Currently, in twenty-nine states and the federal court system, a convicted felon can practice law, but cannot serve on a jury. In these jurisdictions, bar examiners conduct individualized evaluations of all aspiring attorneys, providing bar applicants with a felonious criminal history the opportunity to gain entry into the legal profession. Yet, such jurisdictions also employ categorical, record-based juror eligibility statutes, which permanently prohibit convicted felons from taking part in the adjudicative process. Ignored by courts and scholars, this incongruent framework for assessing the value of prospective legal actors with a criminal past seemingly undermines the proffered rationales for excluding convicted felons from jury service, and civic life generally; thereby delegitimating the law and potentially threatening reintegration initiatives. Lawyers and jurors are equally vital to democratic systems of government. As Alexis De Tocqueville noted, “the prestige accorded to lawyers and their permitted influence in the government are . . . the strongest barriers against the faults of democracy,” while “[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.” Accordingly, to protect the system of justice, all jurisdictions screen potential lawyers and jurors, banishing those who may jeopardize the functionality and integrity of indispensable legal institutions. But the procedures used by a majority of jurisdictions to evaluate a convicted felon's suitability for these two legal roles differ wildly, suggesting that gatekeepers maintain keenly divergent views of convicted felons. Specifically, legislators and courts justify the preclusion of convicted felons from jury service by alleging that all those marked with a felony conviction uniformly “lack probity” and are “inherently biased.” In this way, felon jury exclusion statutes rest solely on the presumption that a felony conviction renders one irreparably flawed, to the extent that lawmakers must “define and protect juries” by categorically locking all convicted felons out of the deliberation room. Yet, a majority of jurisdictions, while permanently banning convicted felons from jury service, do not per se disqualify all bar applicants with a felonious criminal history. Instead, such jurisdictions opt to individually evaluate, and in some cases license, convicted felons who hope to practice law; ostensibly ignoring the supposed permanence of character flaws and biases. Thus, adhering to an inconsistent evaluative framework, a majority of jurisdictions call into question the validity of the professed rationales for record-based juror eligibility statutes.
While per se excluding convicted felons from all meaningful legal roles is a tempting method by which to rectify such inconsistency, social science research demonstrates that the opposite approach is far more prudent. For example, law professor Tom Tyler's empirical work proposes that voluntary compliance surpasses deterrence as a means of social control, and that citizens are more likely to voluntarily comply with the law if they view the law as legitimate. Additionally, because citizens contemplate the fairness of their experiences with the justice system when assessing the legitimacy of legal procedures, authorities can influence one's sense of procedural justice by regulating conduct through thoughtful methods.

Tyler contends that just procedures involve measures of representation, consistency, impartiality, accuracy, correctability, and ethicality. Moreover, just procedures foster fairness, legitimacy, and ultimately voluntary compliance with the law. Yet, “[w]hen authorities are viewed as procedurally unjust, their legitimacy is undermined, leading to support for disobedience and resistance.” Hence, because per se exclusions, like record-based juror eligibility statutes, are inattentive to all of the components of procedural justice, they do not promote the legitimacy of law and potentially encourage recidivistic behavior. Conversely, the tailored assessments that govern a felon's access to the legal profession respect elements of procedural justice, legitimizing the law and likely facilitating law abiding conduct.

Though scholars have criticized felon jury exclusion statutes by highlighting their inherent flaws, this article takes a different approach. This article considers felon jury exclusion statutes contextually, arguing that by unconditionally banning felon-jurors, while individually evaluating felon-lawyers, a majority of jurisdictions undermine their own rationales for expelling millions of Americans from the adjudicative process. Moreover, informed by Tyler's theoretical framework, this article asserts that to achieve procedural justice, jurisdictions must perform case-by-case assessments of all convicted felons who seek to fulfill their civic duty as jurors, because uncompromising and inconsistent policies, in part, delegitimize the law and hinder reentry efforts.

Part II details the practice of felon jury exclusion, outlining the scope, application, and rationalization of record-based juror eligibility statutes. Part III examines the purposes and approaches for regulating a convicted felon's access to the legal profession. Part IV challenges the presumption that convicted felons threaten the probity of the jury by exposing the inconsistent conceptualizations of character at work in a majority of jurisdictions. Part IV critically assesses the inherent bias rationale for felon jury exclusion, questioning its validity by exploring the requisite duties of the lawyer and the juror. Part V acknowledges likely criticisms of challenging felon jury exclusion statutes contextually. Part VI reviews Tyler's theoretical framework, concluding that standardized individual assessments are normatively superior to inconsistent procedures that include blanket exclusions, as such uniform assessments elicit respect for the legal system and foster successful reintegration.

II. The Felonious Juror

In the United States, the “felon” label has become increasingly salient. For those to whom the criminal justice system affixes this permanent mark, there are a host of lasting consequences. Specifically, certain restrictive legal constructs curtail the civic freedoms of a convicted felon. Moreover, “collateral sanctions” or “discretionary disqualifications” are “often unknown to the offenders to whom they apply.” Included in this “national crazy- quilt of disqualifications and restoration procedures” are legislative provisions that categorically limit or eliminate a convicted felon's chance to serve on a jury.

A. The Mechanics of Felon Jury Exclusion
To serve on a jury, a citizen must preliminarily meet statutorily enumerated juror eligibility requirements. Generally, all juror eligibility statutes require that prospective jurors: 1) are United States citizens; 2) are at least eighteen years of age; 3) live in the state and country in which they are summoned; 4) and possess a working knowledge of the English language. Thus, for most citizens, establishing their eligibility to take part in the jury process is a relatively straightforward task, rarely resulting in dismissal. But for convicted felons, an additional record-based juror eligibility criterion often curtails, to some degree, their opportunity to partake in jury service.

For example, California, a state that permanently expels convicted felons from the jury process, requires that a potential juror complete a “juror affidavit questionnaire” prior to becoming part of the venire. This questionnaire lists California's juror eligibility requirements and instructs potential jurors to indicate those they do not meet. In relevant part, the juror affidavit questionnaire reads, “I am not qualified to serve as a prospective trial juror because I . . . have been convicted of a felony or malfeasance in office.” Completed and collected by an officer of the court at the outset of the jury selection process, the juror affidavit questionnaire operates to categorically exclude all those with a felonious criminal history, foreclosing the possibility that a convicted felon might possess the requisite characteristics of a fit juror.

**1385 B. Jurisdictional Approaches to Felon Jury Exclusion**

Felon jury exclusion provisions roughly divide into two types: those that absolutely remove a convicted felon's chances of ever serving as a juror (lifetime ban), and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (others). Thirty-one states and the federal court system make convicted felons permanently ineligible to take part in the adjudicative process (lifetime bans). Yet, apart from these lifetime bans, felon jury exclusion provisions vary significantly.

“Ten states . . . exclude felons during the time that they are under sentence, under the supervision of the criminal justice system, or in prison;” three states “allow parties to challenge felons for cause for life at the discretion of the court;” five states “provide hybrids of various severity, either providing different rules for different situations, or using a rule combining penal status and some term of years;” and two states place no restrictions on felon jury service. Hence, while divergent statutory schemes comprise a “patchwork” of standards, an overwhelming majority of jurisdictions banish felonious jurors for life.

**C. Justifying Felon Jury Exclusion**

Jurisdictions rationalize the exclusion of convicted felons from jury service by asserting that convicted felons “threaten the probity of the jury” and are “inherently biased against the government.” Hence, by preventing convicted felons from serving as jurors, jurisdictions allegedly “protect juries rather than . . . punish or degrade felons.” Yet, courts have clearly articulated the purported logic of only the inherent bias rationale for felon jury exclusion statutes. “[C]ourts have been less clear as to whether the threat that felons pose to jury probity stems from their degraded status or from their actual characteristics.”

As law professor Brian Kalt points out, two possibilities perhaps explain the probity rationale for felon jury exclusion statutes. First, a jurisdiction might presume that all convicted felons lack probity because they possess “poor character or innate untrustworthiness,” traits that could compromise the jury process. Second, a jurisdiction may suppose that the “badges of shame” or “degraded status” of all convicted felons “undermine[s] the integrity of the institution.” Yet, in either case
“[t]he precise mechanism by which felons threaten jury probity is unclear,” leaving scholars to speculate about the causal connection between a felony conviction and a supposed lack of probity.

The inherent bias rationale for felon jury exclusion statutes holds that all convicted felons harbor biases that makes them “adversarial to the government.” Such bias apparently spawns a sympathy for criminal defendants, thereby making those with a felonious criminal history “less willing, if not unwilling altogether, to subject another person to the horrors of punishment [they] have endured.” In this way, a felony conviction purportedly destroys the capacity for impartiality, rendering one unsuitable for jury service.

*1387 Though somewhat distinct, the justifications for felon jury exclusion possess a crucial similarity. Both the probity rationale and the inherent bias rationale rest on the assumption that all convicted felons possess traits that make them permanently unfit for jury service. While some scholars question the logic of this assumption, proponents of felon jury exclusion statutes argue that such measures are necessary to protect juries, the justice system, and even crime victims. Moreover, the Supreme Court has upheld felon jury exclusion statutes, proclaiming “jurisdictions are ‘free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character.’” Yet, an examination of the process by which a convicted felon can enter the legal profession, even in those jurisdictions that ban felonious jurors for life, reveals the flaws in the presumptions on which felon jury exclusion statutes rest.

III. The Felonious Lawyer

After successfully completing a grueling period of schooling, a prospective attorney faces two obstacles to professional licensure. A bar applicant must not only pass a comprehensive exam testing legal knowledge, but must also successfully navigate a moral character and fitness determination designed to establish that “graduating law students . . . meet high standards of moral character.” Though for many applicants this assessment amounts to a time-consuming formality, for convicted felons, a character evaluation can represent an insurmountable obstacle.

A. Jurisdictional Approaches to Felonious Bar Applicants

The moral character and fitness process begins with the requirement that bar applicants complete a lengthy questionnaire which asks a series of significantly probing questions. Contained in this application are “four major areas of inquiry, including an applicant's history of in-patient psychiatric hospitalization and out-patient mental health treatment, substance abuse and treatment, educational misconduct, and criminal conduct.” For an applicant with a felony criminal conviction, bar examiners will almost always seek out additional information about the offense.

Once an applicant has provided the requested information to the relevant jurisdiction, the process for determining fitness of character depends on the favored jurisdictional approach. In some jurisdictions, a felony conviction per se disqualifies an applicant from admission to the bar. Yet, in others, a felony conviction merely amounts to a presumptive disqualification, creating a “rebuttable presumption that an applicant with a record of prior unlawful conduct lacks the requisite character to practice law.”

1. Per se Disqualifications
Those jurisdictions that per se disqualify felonious bar applicants from the legal profession do so either permanently or temporarily. While ten jurisdictions impose some form of per se disqualification on bar applicants with a felony criminal history, only half of such jurisdictions per se disqualify convicted felons from the practice of law permanently. The remaining half per se disqualify felonious applicants for an automatically-terminating period of time, usually a set-period of years after expiration of the imposed sentence.

The severity of the per se disqualification notwithstanding, such an approach reflects the “‘traditional view that ‘certain illegal acts . . . evidence attitudes toward the law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession's reputation and reduce the character requirement to a meaningless pretense.’” Hence, like lifetime felon jury exclusion statutes, the per se disqualification model suggests that those with a felonious criminal history are forever blemished, and, as some scholars suggest, “destroys an individual's professional hopes and possibly deprives the bar and society of committed, rehabilitated lawyers.”

2. Presumptive Disqualifications

Forty-five states and the federal court system do not per se disqualify (permanently) a convicted felon from practicing law. Instead, in these jurisdictions a felony conviction merely amounts to a presumptive disqualification rebuttable by a felonious bar applicant at a moral character and fitness determination. During the determination, “evidence of complete rehabilitation is almost always required before a bar applicant with a record of prior unlawful conduct will be admitted.” Though demonstrating a change in one's character is a rather ambiguous task, “[f]or bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society.”

Specifically, states that employ the presumptive disqualification framework look for evidence of rehabilitation using either a “guided approach” or an “unguided approach.” Under the guided approach, jurisdictions use “specific guidelines and requirements for judging an applicant's moral character,” while the unguided approach involves considering “admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners.” Although scholars note that each approach has inherent drawbacks, the benefit of this rubric is that applicants “receive a case-by-case determination after consideration of the ‘totality of the record.’” Thus, the presumptive disqualification approach is “more accepting of individuals who have, in the past, been convicted of a felony.”

B. Rationalizing Moral Character and Fitness Determinations

The national governing body of legal practitioners in the United States, the American Bar Association (ABA), asserts that “[t]he primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice.” Though bar examinations test professional competence, the ABA theorizes that “[t]he lawyer licensing process is incomplete if only testing for minimal competence is undertaken,” because “[t]he public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law.” Thus, the ABA recommends that in each jurisdiction “[t]he bar examining authority should determine whether the present character and fitness of an applicant qualifies the applicant for admission,” and whether an applicant is “one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them.”
*1392 Echoing the sentiments of the ABA, the Supreme Court has also noted the importance of protecting the public and our system of justice by allowing “the profession itself [to] determine who should enter it.”*98 Emphasizing the crucial role of practicing attorneys, Justice Frankfurter noted:

It is a fair characterization of the lawyer's responsibility in our society that he stands “as a shield,” . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as “moral character.”*99

Concerned that an attorney without the requisite moral make-up might engage in “potential abuses, such as misrepresentation, misappropriation of funds, or betrayal of confidences,”*100 the legal profession and courts defend the use of character evaluations by stressing the need to protect the system of justice “from those who might subvert it through subornation of perjury, misrepresentation, bribery, or the like.”*101 Moreover, they allege that with such assessments “a state bar can maintain control and hopefully avoid the problems that unfit attorneys may cause.”*102

Additionally, courts and bar examiners justify a heightened level of scrutiny for felonious bar applicants by noting that “‘good’ moral character means the absence of proven ‘misconduct.’”*103 As the ABA highlights, “[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission.”*104 In this way, much like felon jury exclusion statutes, supposition about those with a felony criminal record plagues the moral character and fitness process. Yet, in a majority of jurisdictions, the moral character and fitness process allows for the possibility that certain *1393 convicted felons are suitable to fill essential legal roles—belying the presumption that all those with a felonious criminal history are permanently unfit to take part in the pursuit of justice.*105

IV. Undermining the Probity Rationale

As discussed, jurisdictions primarily justify felon jury exclusion statutes by arguing that convicted felons “threaten the probity of the jury.”*106 And, while the manner in which those with a felonious criminal history threaten a jury’s probity is ambiguous, the rationale makes clear that a majority of jurisdictions presume that all felonious jurors possess unalterably bad character.*107 Yet, in twenty-nine states and the federal court system, that presumption exists alongside flexible moral character and fitness standards that acknowledge a more malleable conceptualization of character,*108 casting doubt on the veracity of the probity rationale for excluding convicted felons from jury service.

A. Two Views of Character

Discussions of one's character and its role in human behavior educe a host of varied viewpoints. Philosophers and ethicists often contend that “character will have regular behavioral manifestations: the person of good character will do well, even under substantial pressure to moral failure, while the person of bad character is someone on whom it would be foolish to rely.”*110 In this way, character supposedly serves as a critical tool for predicting behavior, as it “decides the moral texture of life.”*111 Yet, other scholars argue that experimental social psychology challenges the *1394 traditional view of character. Specifically, situationist psychology research offers an alternative framework with which to explain conduct, suggesting that one's environment perhaps has a greater impact on one’s actions than do inherent personality traits.*112
1. Traditional Views

Law professor Anders Kaye notes that conventional character theories “assume that we have a certain sort of character, comprised of enduring, global character traits—traits that are not just consistent across time, but also across situations, and that manifest not just sporadically, but reliably.” This static conceptualization of character harkens back to the Aristotelian formulation of human nature which places “[a]n emphasis on robust traits and behavioral consistency,” and speculates that “[k]nowing something about a person's character is supposed to render their behavior intelligible and help observers determine what behaviors to expect.”

The conventional view of character also holds that “every person chooses to develop good and bad character through autonomous actions,” and “[o]nce a person [chooses] their character . . . he or she [is] not free to simply undo the choice.” Moreover, traditional character theorists posit that often one socially unacceptable act is adequate evidence that one possesses a normatively undesirable trait. In this way, bad character “require [s] very little in the way of behavioral consistency.” Thus, “one doesn't have to reliably falter, but only sporadically falter,” to win the traditionalist’s pejorative distinction of possessing bad character.

John Doris describes this view of character as “globalism.” He contends that under the globalist theory of character, “[i]f a person possesses a trait, that person will engage in trait-relevant behaviors in trait-relevant eliciting conditions with marked above chance probability.” Specifically, globalism dictates that traits are: 1) consistent, 2) stable, and 3) evaluatively integrative. For example, if one possesses the trait of dishonesty, that person will consistently act in a dishonest fashion in a host of varied situations. Moreover, in such situations, a dishonest person is also more likely to exhibit other traits of equal reprehensibility.

2. Situationist Psychology

Some scholars argue that conventional conceptualizations of character do not accurately reflect human nature. Along these lines, Doris contends that “philosophical explanations referencing character traits are generally inferior to those adduced from experimental social psychology” because “[t]hey presuppose the existence of character structures that actual people do not very often possess.” Simply, modern research indicates that behavior may primarily derive from the situations that confront an actor, rather than an actor's “dispositional structure.”

A series of experiments, now famous in social psychological literature, strengthen the claim that one's behaviors are largely a product of one's environment. By manipulating situational factors, researchers have been able to induce striking behaviors, demonstrating that “situational influences can easily cause us to act in ways that we would not approve.” Kaye terms this phenomenon the “puppet problem,” noting that quantifiable data shows that our acts are intimately connected to our surroundings.

The situationist conceptualization of character challenges conventional views in several respects. Situationism holds that 1) “behavioral variation across a population owes more to situational differences than dispositional differences among persons”; 2) “[p]eople will quite typically behave inconsistently with respect to the attributive standards associated with a trait, and whatever behavioral consistency is displayed may be readily disrupted by situational variation”; and 3)
“evaluatively inconsistent dispositions may ‘cohabitate’ in a single personality.” 135 Returning to our dishonest straw-person, the situationist would argue that one who is dishonest may only act untruthfully in certain situations, but he or she may behave quite honestly if other circumstances present. In this way, the dishonest person has the capability to be both forthright and deceptive.

B. Jurisdictional Situationism: Probity's Detractor

Whether knowingly or unknowingly, jurisdictions that expel convicted felons from the jury process, but allow others to practice law, ostensibly join situationist theorists in acknowledging the weaknesses that plague the traditional views of character. Specifically, such jurisdictions openly accept the central precept of situationism--that perceived personality traits are often a poor predictor of human behavior--and therefore call into question the principal justification that drives their own felon jury exclusion statutes. 136

Felon jury exclusion statutes comport entirely with a conventional conceptualization of character. First, lawmakers use felony convictions as indices of flawed character, suggesting that a felony conviction “springs from or manifests the actor's character, it comes from what makes him ‘him.’” 137 Second, by unconditionally banning convicted felons from the venire without considering the *1397 possibility that a felonious juror may be fit to serve on a jury, a majority of jurisdictions suggest that flawed character is static, irremediable, and predictive of future behavior. 138 Hence, felon jury exclusion statutes adhere to a traditional, rigid conceptualization of character.

Contrarily, the presumptive disqualification approach for assessing the moral character and fitness of felonious bar applicants departs from conventional conceptualizations of character in important ways. Though such an approach still attributes bad character to those with a felonious criminal record, 139 it also acknowledges a convicted felon's ability to act in ways that reflect good character by allowing those applicants with a felony criminal history to rebut the presumption that they boast only undesirable personality traits. 140 Thus, the presumptive disqualification approach seemingly borrows from situationist theory, challenging the tenets of the conventional view of character, and affirming that along with potential character flaws, convicted felons likely also possess commendable traits which are observable in select situations.

For those who endorse a traditional view of character, the presumptive disqualification approach to moral character and fitness determinations overlooks the alleged true nature of convicted felons. Conventionalists might argue that selectively admitting felonious bar applicants jeopardizes the legal profession and the system of justice by ignoring the ingrained character flaws that exist among all convicted felons. 141 They might also commend jurisdictions that systematically banish convicted felons from the deliberation room, claiming that such measures appropriately ally with traditionalist conceptions of character, and are necessary to protect society from the perpetually bad.

But such contentions are void of evidentiary support. Instead, defenders of customary character analysis often cite “common sense” 142 as a means by which to hold fast to their position and *1398 reject contradictory research. 143 Moreover, as Kaye notes, fundamental attribution error, 144 confirmation bias, 145 and misperceptions of consistency 146 likely all play a part in reinforcing the traditionalist viewpoint that “we and those around us bear robust, global character traits.” 147

Alternatively, situationism, which indicates that traditionalist claims are empirically untenable, “derives from a substantial and diverse body of experimental work.” 148 The presumptive disqualification approach to felonious bar applicants furthers the validated situationist assertion that conventional views of character do not accurately portray human nature. 149 Further, the
presumptive disqualification approach concedes the flaws of the character theory underlying the probity rationale for felon jury exclusion. Thus, by using inconsistent processes for evaluating a convicted felon's suitability for legal roles, a majority of jurisdictions bolster the contention that felon jury exclusion statutes have little to do with character and are simply constructs of unwarranted conjecture and speculation.

V. Questioning Inherent Bias

Legislators and courts also justify felon jury exclusion statutes by asserting that convicted felons uniformly harbor an “inherent[ ] bias[] against the government.” The “inherent bias rationale[]” presumes that a felonious juror, if allowed to serve, would unfairly prejudice the jury in favor of a criminal defendant because of prior negative experiences with the criminal justice system.

Yet, as scholars note, precluding all convicted felons from the adjudicative process likely does little to protect the impartiality of the tribunal, betrays the modern view of the jury as “a body truly representative of the community,” and is illogical in civil litigation between private parties. Still, proponents of these ineffective and overinclusive measures overlook their inherent shortcomings, arguing that “[t]he exclusion of ex-felons from jury service . . . promotes the legitimate state goal of assuring impartiality of the verdict.”

But perhaps the strongest indictment of the inherent bias rationale comes from the legal profession. By simultaneously licensing felonious lawyers while banishing felonious jurors, a majority of jurisdictions suggest that the practice of law does not require neutrality or, in the alternative, that convicted felons have the capacity to act without bias. Yet, lawyers are primarily “officers of the court” and, like jurors, have obligations to society that often require detached analysis and dispassionate assessment. Moreover, jurisdictions that exclude convicted felons from jury service make clear that convicted felons cannot act without bias holding “that felons are generally less trustworthy and responsible than others, and that they just cannot be counted on to be ‘fair.’”

Nonetheless, a majority of jurisdictions--while precluding convicted felons from serving on a jury because of an apparent lack of objectivity--allow convicted felons to practice law, a profession that demands impartiality. Thus, a majority of jurisdictions recognize a convicted felon's ability to remain neutral, undermining their own justification for exiling felonious jurors.

A. The Impartial Lawyer

Today, attorneys are no longer “the only enlightened class not distrusted by the people.” As Justice O'Connor notes, “[f]ew Americans can even recall that our society once sincerely trusted and respected its lawyers.” Rather, society largely views lawyers as combative adversaries, teeming with greed and lacking integrity.

Yet, “[t]wo antagonistic models describe the role of lawyers in our legal system.” While the attorney's role as “loyal and zealous client protector” is “more familiar to the public,” the attorney also functions as an officer of the court, frequently requiring that he or she act without bias “in a quasi-judicial or quasi-official capacity” when confronting the difficult ethical dilemmas the legal profession presents.
For example, the ABA's Model Rules of Professional Conduct ("the Model Rules") dictate that "a lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Moreover, the Model Rules also require that "[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether *1401 or not the facts are adverse." In such situations, because a lawyer's duty as an officer of the court possibly mandates the "subordination of the interests of the client and the lawyer to those of the judicial system and the public," he or she faces an ethical quandary. To adhere to the Model Rules, a lawyer must put financial welfare and client concerns aside in order to make an impartial determination of what is professionally ethical.

Other instances may also require that a lawyer ignore vested interests. Consider a scenario in which a criminal defendant admits guilt to an attorney of record, forcing the attorney to weigh responsibilities to the client against "the pursuit of truth and justice." As Michael Asimow and Richard Weisberg contend, in such circumstances, a lawyer might act as a "weak adversarialist[]," "less concerned with . . . zealous advocacy, protection of client confidences, and procedural justice, and more concerned with the pursuit of substantive justice." Authorized by the Model Rules, this position allows an attorney to "do less than the lawyer's adversarial best," and to a degree, subvert responsibilities to the client in favor of obligations to the justice system. Again, this difficult decision forces a lawyer to engage in unbiased deliberation.

Admittedly, some scholars portray an attorney's bifurcated duties *1402 as simply two forms of advocacy. Arthur Gross Schaefer and Leland Swenson suggest that the practice of law requires a lawyer to act as an advocate "for the few" and "for the many." They posit that when acting as an advocate for the few, attorneys "act solely in the interest of the individual client or firm they represent[,]" and when acting as an advocate for the many, attorneys "act as officers of the court, promoting the interests of the legal profession, the legal system, and society as a whole." Though this model holds that lawyers consistently act as interested representatives when "satisfy[ing] professional duties to their clients and the legal system," this model also implicitly considers the frequent need for attorneys to act impartially, acknowledging that "[l]awyers are required to behave in ways that are sometimes inconsistent with their beliefs on a daily basis." Clearly, the duties of the lawyer require that they regularly act as neutral referees, calling on professional and personal experience in an effort to fulfill an "obligation to aid the administration of justice." For an attorney, competing occupational obligations require objective analyses informed by the tenets of justice and personal conviction. Thus, like the adjudicative process, the practice of law involves a measure of impartiality.

B. Can Convicted Felons Act Without Bias?

Criticizing the alleged pro-defendant, inherent bias rationale for felon jury exclusion, scholars contend that "[s]uch a notion of universal, unidirectional bias is not particularly plausible." Further, courts suggest that while some convicted felons might harbor resentments towards the justice system that condemned them to prison, others "may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated." A convicted felon may also "desire *1403 to show others--and himself--that he is now a good citizen . . . lead[ing] him to display an excess of rectitude, both in his deliberations and in his vote." Additionally, there exist a number of cases in which a felonious juror has rendered a guilty verdict--validating the contention that a convicted felon can overcome a strong bias against the prosecution.
Yet, jurisdictions that justify felon jury exclusion statutes by pointing consistently to the inherent bias rationale all but ignore the possibility that a convicted felon can deliberate objectively, holding that “[a]t some point, a juror's past experience must lead to a presumption of bias because of the juror's inherent knowledge from experience,” and that such a bias always cuts in favor of a criminal defendant. As the California Supreme Court has stated:

The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state--a conviction of felony and punishment therefor--might well harbor a continuing resentment against “the system” that punished him and an equally unhthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils. Because these antisocial feelings would often be consciously or subconsciously concealed, the Legislature could further conclude that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in jury selection proceedings.

Nevertheless, a majority of jurisdictions selectively adhere to the inherent bias rationale by expelling felonious jurors while admitting felonious lawyers to the bar. Such a framework outwardly concludes, in part, that many “jurors can overcome their biases, making fair and objective judgments despite their predispositions.” In this way, the majority approach to assessing the suitability of convicted felons for legal roles weakens the inherent bias rationale to the point of superfluity, suggesting that inherent bias is but a myth engineered to mask less acceptable purposes for exiling convicted felons from the adjudicative process.

*1404 VI. Acknowledging Criticisms

Undoubtedly, proponents of felon jury exclusion statutes will contest the assertion that allowing convicted felons to enter the legal profession undercuts the justifications for felon jury exclusion statutes. Assuredly, criticisms will center on the idea that the jury is a sacrosanct legal institution that requires increased protection from those who may threaten its integrity. Critics might also argue that the jury system has no feasible means by which to perform character screenings as rigorous as those performed by bar examiners in presumptive disqualification jurisdictions. And finally challengers could contend that, unlike the legal profession, the jury system cannot monitor convicted felons that gain access to the jury box; there are no rules of professional conduct governing deliberations. Yet while these oppositions to the contextual challenge of felon jury exclusion have superficial appeal, none is strong enough to justify the consequences of the civic expulsion of an exceedingly large swath of our population.

A. Twelve Good Men and True: An Outdated Calculus

For decades, a fear of crime and criminals has permeated American society. As David Garland notes, “[w]hat was once regarded as a localized, situational anxiety . . . has come to be regarded as a major social problem and a characteristic of contemporary culture.” Today, “a fearful, angry public” drives legislative efforts to protect the populous from “unruly youth, dangerous predators, and incorrigible career criminals.” In short, “[t]he emotional temperature of policy-making has shifted from cool to hot,” and it is fear that has served as a catalyst for a departure from more progressive ideologies.

Promulgated to protect the citizenry from those who may threaten the functionality and integrity of the adjudicative process, felon jury exclusion statutes are attempts to allay fears of those who bear the mark of a felony conviction. But such fears reflect an characterization of a jury system that no longer exists. Today, a jury trial is a rare occurrence and, when
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utilized, often embraces juror bias as a means of enhancing deliberations. Moreover, the principle asset of the modern jury is not its accuracy as a judicial institution, but rather its capacity for educating participants on the workings of democracy. Catering to fears of felonious jurors, proponents of excluding felons from juries cling to obsolete visions of the jury as merely a decision making body composed entirely of those who bring no preconceived notions to the deliberation process, largely ignoring the educative aspects of serving as a juror.

1. The Jury as a Judicial Institution: Working Hard or Hardly Working?

Some commentators opine that “the greatest value of the jury is its ability to decide cases correctly.”\textsuperscript{200} Infusing democratic ideals into the judiciary,\textsuperscript{201} the jury provides “insight into the character of American justice.”\textsuperscript{202} But “the American jury system is dying out”\textsuperscript{203} as “jury trials today are marginalized in both significance and frequency.”\textsuperscript{204}

Currently, a jury trial is an uncommon occurrence in the United States. “From 1989 to 1999, the number of civil jury trials declined by twenty-six percent, and the number of criminal trials dropped by twenty-one percent.”\textsuperscript{205} As one federal trial judge explains, “[t]oday, our federal criminal justice system is all about plea bargaining. Trials--and thus, juries--are largely extraneous. An accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what *1406 was once a constitutional right.”\textsuperscript{206} Moreover, civil trials succumb to arbitration and summary judgment at an alarming rate.\textsuperscript{207}

In addition to being an infrequent tool for administering justice, the jury trial is widely criticized as an inaccurate method by which to achieve a proper verdict.\textsuperscript{208} Though “[t]here has remained a broad conviction among Americans that the jury system is a positive and necessary force in the quest for justice,”\textsuperscript{209} the effectiveness of the jury as a vindicator of rights is often the subject of intense scrutiny.\textsuperscript{210} Critics of the jury system advance two main substantive contentions: “that the jury is incompetent”\textsuperscript{211} and “that the jury is prejudiced.”\textsuperscript{213}

a. Incompetent Jurors

Arguments highlighting the incompetence of juries point out that “the jury, composed, after all, of amateurs, is a decision-making body prone to error.”\textsuperscript{214} Judge Jerome Frank opined that “juries apply law that they don't understand to facts that they can't get straight.”\textsuperscript{215} Because “jurors do not explain the basis of their *1407 decision,”\textsuperscript{216} it is often difficult to ascertain whether a jury truly understands a case at bar.\textsuperscript{217} Moreover, many times complex litigation ensures that jurors find it increasingly difficult to understand the law at issue,\textsuperscript{218} let alone how the law applies to the given facts of a case.\textsuperscript{219} Thus, the modern jury system is perhaps void of “practical value in promoting justice.”\textsuperscript{220}

b. Prejudiced Jurors

Critics of the jury system also note that jurors too often make decisions by relying on feelings rather than assessing evidence, arguing that jurors “are gullible creatures, too often driven by emotion and too easily motivated by prejudice, anger and pity.”\textsuperscript{221} These critics contend that the model jury is “an impartial tribunal, one that is not predisposed to favor a particular outcome,”\textsuperscript{222} requiring that a juror act solely as “impartial adjudicator[]”\textsuperscript{223} arriving to court a “tabula rasa.”\textsuperscript{224} Accordingly, this traditional view of the jury system demands, perhaps unrealistically,\textsuperscript{225} that jurors “base their verdicts on an accurate appraisal of the
evidence presented in court while disregarding all facts, information, and personal sources of knowledge not formally admitted into evidence.”

*1408* But the Supreme Court has refined the requisite characteristics of an impartial tribunal holding that “only ‘representative’ juries are ‘impartial’ juries.”

This more enlightened view of the adjudicative process demands that jurors possess “qualities of human nature and varieties of human experience,” thereby acknowledging that “[d]eliberations are considered impartial . . . when group differences are not eliminated but rather invited, embraced, and fairly represented.”

Therefore, though still charged with the task of impartially weighing evidence, the juror no longer must “appear in court with a blank slate, neutral and untainted by life experiences.”

The Court’s modern vision of the jury values thorough deliberation achieved through partiality. As Jeffrey Abramson explains, “[t]o eliminate potential jurors on the grounds that they will bring the biases of their group into the jury room is . . . to misunderstand the democratic task of the jury, which is nothing else than to represent accurately the diversity of views held in a heterogeneous society.” Hence, “[i]f the jury is balanced to accomplish this representative task, then as a whole it will be impartial, even though no one juror is.”

Thus, it is rare that a felonious juror, or any juror, will have an opportunity to deliberate and decide a litigated matter. Moreover, questions abound as to whether the jury system is the optimal means by which to enforce law. A good many jurors may be incompetent and, in keeping with modern conceptualizations of the jury, more than a few will harbor biases. Accordingly, while stopping well short of conceding that the jury system is an ineffective method of administering justice, one can conservatively dismiss the notion that the jury is the type of sacrosanct institution many felon jury exclusion proponents claim necessitates the outright eviction of those who have perhaps committed but one legal indiscretion.

2. The Jury as an Educative Force: Overlooking an Invaluable Asset

De Tocqueville argued that “[t]o regard the jury simply as a judicial institution would be taking a very narrow view of the matter.” Accordingly, he asserted that jury service “instill[s] some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”

Yet proponents of felon jury exclusion statutes, while painstakingly chronicling the exalted judicial function of the jury, often overlook the most-valuable aspect of the adjudicative process—the jury's pension for teaching the citizenry through active participation in democracy.

Echoing De Tocqueville, Justice Breyer articulated the contemporary concept of active liberty. Active liberty “refers to a sharing of a nation’s sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people.”

One of the core principles of active liberty, Justice Breyer notes, is the idea that “the people themselves should participate in government” and that “[p]articipation is most forceful when it is direct.”

And as some scholars contend, “[t]he most stunning and successful experiment in direct popular sovereignty in all history is the American jury.”

Nonetheless, those who favor record-based juror eligibility requirements seldom note the educative aspect of the adjudicative process when measuring the sanctity of the jury. They rarely consider that “[j]uries teach each individual not to shirk responsibility for his own acts” and “invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government.” Instead, champions of felon jury exclusion statutes
allege that the modern jury, because of its revered status, requires protections that are, in some instances, exceedingly severe. Yet given the uncertainty about the functionality of the adjudicative process and the uniform benefits of juror participation, it is clear that the jury necessitates no more protection from convicted felons than does the “great calling.”

B. Voir Dire vs. Moral Character and Fitness Determinations

A second criticism of contextually attacking the justifications for felon jury exclusion statutes will likely highlight the thoroughness of moral character and fitness evaluations and the superficiality of voir dire. At a minimum, critics may allege that voir dire, because of its inherent restraints, cannot equal the assessments of felonious bar applicants made by bar examiners. But such an argument assumes that the flaws of voir dire are markedly more severe than those present in the moral character and fitness process, making current jury selection procedures unsuitable for screening felonious jurors. A closer look at both processes reveals that this assumption lacks support.

1. Voir Dire: Is It That Bad?

The law recognizes voir dire as the only tool for ascertaining the capability and impartiality of potential jurors. For virtually all citizens, voir dire “is a routine part of every trial,” and for attorneys and judges “an opportunity to learn about [jurors’] existing prejudices.” Voir dire can take minutes to months and can involve anything from detailed questions to superficial interrogatories. In some instances, lawyers ask the questions, while in others, only the judge examines the prospective jurors. Thus, voir dire is relatively fluid, often changing to suit the circumstances of the case at bar.

But many critics contend that voir dire is an inadequate procedure for selecting impartial jurors. Kassin and Wrightsman assert that to find objective jurors, both judges and lawyers “must use their opportunity to question jurors for the purposes intended,” and “they must know what they are doing.” Yet attorneys and the court seldom adhere to these two conditions. Lawyers, who have a vested interest in seating jurors who will favor their client's position, rarely use voir dire to empanel a neutral jury. Rather, as one lawyer remarks, “I don’t want an impartial jury. I want one that’s going to find in my client’s favor.” Moreover, both judges and attorneys most often rely on intuition and stereotypes to whittle down the venire. Thus, critics of voir dire are correct, to a degree, when asserting that “the problem with the jury system is basically a problem of bad jurors.”

Proposals for amending the jury selection process range from the abolition of juries to a more succinct form of voir dire, designed to ensure efficiency and to partially eliminate an attorney's ability to engineer the tribunal. Yet as some scholars contend, such reforms are destined for failure. Any process crafted to forecast human behavior, including impartiality, must account for situational differences and individual characteristics. As Ellsworth and Reifman point out, “[a]n understanding of the situation is a much better predictor of a person’s behavior than an understanding of the person. Jury researchers have searched in vain for individual differences—race, gender, class, attitudes, or personality—that reliably predict a person’s verdict and have almost always come up empty handed.” Therefore, while voir dire may not be the optimal method for selecting an entirely neutral tribunal, the existing jury system, even with its constraints, is as good as any feasible alternative.

2. Moral Character and Fitness Determinations: Are They That Good?
Many question whether the bar’s present system of moral screening is effective. Further, many also question whether the purpose of evaluating an applicant’s character actually stems from a desire to preserve and advance the legal profession rather than a need to protect the public and our justice system.

In 1985, Deborah Rhode published an assessment of the moral character and fitness processes in the United States. Based on two years of collected data, Rhode found that moral character and fitness screening procedures nationwide were fraught with drawbacks that potentially hindered their professed goals. Though bar examining authorities expressed great confidence in their systems of evaluation, none had empirically evaluated their procedures for determining the fitness of potential attorneys.

In her research, Rhode discovered that “the most commonly cited problem in the certification process is the inadequacy of time, resources, staff, and sources of information to conduct meaningful character inquiries.” The investigative efforts of some states amount to “a check on residency or a phone call to someone who knows or knows of the applicant” while only “half the states routinely check police records and contact at least some previous employers.” Moreover, though “[a]lmost all jurisdictions demand personal references of varying number . . . [m]ost examiners found employers or personal references were ‘only rarely’ or ‘virtually never’ of assistance.”

In addition, Rhode’s study uncovered that seldom were bar applicants denied admission based on a perceived lack of character. For example, “[i]n the forty-one states that could supply 1982 information, bar examiners declined to certify the character of approximately .2% of all eligible applicants, an estimated fifty-odd individuals.” Rhode hypothesizes that such a rate likely stems from the timing of the moral character and fitness determination, which occurs after a law student has invested exorbitant amounts of money and time into a legal career--perhaps fostering bar examiners’ “reluctan[ce] to withhold certification.”

Yet even with unlimited resources and a concerted willingness to seek out and deny all those with questionable character, bar examiners would likely meet with limited success. As Rhode notes, “[d]ecisionmakers are frequently drawing inferences about how individuals will cope with the pressures and temptations of uncertain future practice contexts based on one or two prior acts committed under vastly different circumstances.” Understandably then, adequately protecting the public from the immoral lawyer by attempting to predict a lifetime of occupational behavior is an almost impossible task.

Thus, assuming that convicted felons somehow threaten legal institutions, the level of protection afforded the legal profession and the jury by their respective screening mechanisms is virtually identical, even when the potential participant is a convicted felon. Though the moral character and fitness determination is not the most effective method for evaluating the fitness of aspiring attorneys, and though the jury selection process often results in error, these flaws stem from the tasks each process must complete.

Bar examiners hope to predict a future lawyer’s conduct by merely conducting, at most, a background check and an interview. Similarly, attorneys and judges seek to find jurors who will act impartially, by conducting a period of question and answer. But such expectations of bar examiners and legal authorities are unrealistic. Human beings are complex and react to the situations they confront; personality dispositions do not alone drive behavior. Thus, to condemn an argument against felon jury exclusion statutes on the grounds that voir dire is a less accurate filtering mechanism than the moral character and fitness determination is to mistakenly assume that any cursory process can alone predict a person's actions.
C. The Rules of Professional Conduct: Do They Matter?

A final criticism of contextually attacking the rationales for felon jury exclusion statutes will assuredly rest on the existence and enforcement of the lawyer's rules for professional conduct. While the legal profession can keep an eye on its members in the hope that it might “eliminat[e] the diseased dogs before they inflict their first bite,” the jury system has no such mechanism for control. The rules of professional conduct allows for the contention that licensing felonious lawyers is inherently less risky than seating a felonious juror. But while such an argument presumes that the lawyer’s code of conduct is born of noble intentions and effective at regulating attorney conduct, a critical look at the rules of profession conduct tell a different story.

Richard Abel argues that rules of professional conduct can only work if: (1) they clearly state desired behaviors and (2) differ from everyday edicts of morality and law. Yet the legal profession’s rules of ethics are not clear and “simply restate the most commonplace morality.” Moreover, the consequences for violating professional rules of conduct are varied and virtually inconsequential. As Abel notes, study after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.

In addition, some scholars contend that these ethical rules merely exist to safeguard “lawyers’ economic monopoly over law-related services.” In this way, ethical rules do not legitimize the profession, but instead serve to “control the markets in which they sell their labor.” For example, Terence Halliday argues that professional regulation helps a profession maintain ultimate control over the marketplace by fostering alignment with government. Specifically, a quid pro quo makes it “unlikely that professions will serve the state without any consideration of cost to themselves,” and that “for the state to profit from professional resources it must sometimes recognize, sometimes guard against, and sometimes appropriate the interests of professions--indeed, press them beyond monopoly.” Accordingly, what results is “an implicit concordat between states and established professions: in exchange for the state’s implicit guarantee that the traditional monopoly of the profession will be largely preserved.”

Therefore, while the postulated purposes for the legal profession's rules of conduct involve rhetoric centering on protecting the public and our system of justice, perhaps such noble aspirations are not the only reasons for monitoring lawyers. Though possessing a somewhat conspiratorial quality, deserving of consideration are those theories that cite the preservation and advancement of the legal occupation as justification for rules of professional conduct. Such theories may help explain the continued recognition of commandments that are vastly ineffective.

The rules of professional conduct are an ambiguous guide to behaving as would anyone in a position of trust. Additionally, the rules provide very little disincentive for straying from the path of good conduct. Coupled with perhaps disingenuous origins, the ineffectiveness of the legal profession's conduct code makes arguments based on its capacity to protect unsupportable. Like the moral character and fitness screening, the rules of professional conduct do little to insulate society from attorneys who might engage in unethical behavior. Thus, defending against attacks on felon jury exclusion statutes by spotlighting these ethical mandates is to erroneously ignore the practical defects of all such regulations.
VII. Reintegration and the Legitimacy of the Law

Some reentry scholars question whether prohibiting convicted felons from serving on juries significantly impacts reintegration, even defending felon jury exclusion statutes by differentiating them from other categorical exclusions. Yet other scholars note that the exclusion of convicted felons from jury service is a part of a larger framework of banishment that unfairly marginalizes those with a felonious criminal history and undermines reintegration by delegitimizing the law in the eyes of convicted felons. Specifically, preclusions affecting convicted felons “influence[] both [their] view of the legitimacy of group authority and ultimately [their] obedience to group norms.”

Moreover, when such preclusions are procedurally unjust, convicted felons are less likely to view the law as legitimate and, in turn, less likely to voluntarily comply with its mandates.

A. Does Felon Jury Exclusion Really Matter?

Admittedly, few citizens enjoy jury service. Rather, most people view jury service as “a waste of [their] time and taxpayer monies, a burden to be avoided if at all possible, and if not, to be dispensed with as quickly and with as little effort as possible.” Not surprisingly then, many scholars contend that “more immediate factors such as employment and education make more of a difference in rehabilitation and recidivism,” even condoning those legal restrictions that bar convicted felons from juries.

For instance, in his article Invisible Punishment: An Instrument of Social Exclusion, Jeremy Travis offers several methods by which “to constrain the impulse to punish those who violate our laws by diminishing their rights and privileges.” One of Travis’ recommendations is “individualized justice.” This principle is rather straightforward: authorities should tailor collateral sanctions so that they serve a purpose but are not so overinclusive as to make them an additional punishment that creates barriers to readjustment.

Yet, in condemning overinclusive, restrictive legal constructs Travis offers a rather counterintuitive example of a collateral sanction that “may appropriately be automatic.” He notes that “barring convicted felons from jury eligibility automatically may well be reasonable to protect the integrity of criminal trials.” He goes on to argue that “the vast majority of collateral sanctions cannot be justified this way . . . these sanctions should be imposed in ways that tailor the punishment to the circumstances.”

Though for many jury service is an unenviable task, for convicted felons record-based juror eligibility criteria represent yet another form of stigmatization and marginalization. To allege that felon jury exclusion is only a minor consequence of a criminal conviction is to accommodate a privileged perspective. As one reformer explains, “[o]ne barrier may not be that big a deal . . . . You can't get housing . . . you can't get ID and no one will hire you. Cumulatively, that sends a signal: You're not wanted.” Thus, for those who bear the mark of a felony conviction, exclusion from jury service clearly matters on several levels.

B. The Importance of Procedural Fairness

To foster compliance with the law, authorities regularly rely on measures of social control. For example, criminal sanctions “seek[] to deter rule breaking by threatening to punish wrongdoing.” Yet empirical evidence suggests that deterrence has only a marginal impact on a citizen’s willingness to obey the law. Nevertheless, lawmakers expend an inordinate amount
of *1419* resources attempting to deter illegal behavior, often ignoring potential alternative schemes by which to facilitate compliance.  

Professor Tom Tyler suggests a normatively superior method for cultivating legal obedience. He contends that “the legal system benefits when people voluntarily defer to regulations to some degree and follow them, even when they do not anticipate being caught and punished if they do not.” Thus, authorities can promote law-abiding behavior by moving away from the forced acquiescence characteristic of deterrence and toward a “value-based model” focused on eliciting “voluntary acceptance and cooperation.”

This “self-regulation” approach suggests that “internal motivational forces . . . lead people to undertake voluntary actions,” and that “values shape rule-following.” Accordingly, Tyler theorizes that when citizens view the law as legitimate, they are more likely to follow its directives and that legal procedures impact the perceived legitimacy of the law. Specifically, Tyler asserts that the legitimacy of the law is contingent on: (1) a citizen's “prior views about law and government” and (2) “the use of fair procedures during the experience itself.” Therefore, self-regulation can only succeed if authorities take steps to legitimize the law by employing legal policies that citizens view as procedurally fair, while continuously evaluating these policies to ensure that they continue to portray the law as legitimate.

In the context of recidivism, research specifically addressing procedural justice indicates that citizens who have committed criminal offenses and who have had prior negative experiences with the law are more likely to voluntarily comply with the law if they perceive the law to be legitimate. For example, Gill McIvor assessed the effectiveness of Scottish Drug Courts and found that the “interactions that took place in court between offenders and sentences encouraged increased compliance and supported offenders in their efforts to address their drug use and associated offending.” In another setting, researchers studying the perpetrators of domestic violence discovered that “the manner in which an arrestee is handled plays an important role in reducing the likelihood of recidivating behavior.” Additionally, analyses of graduated sanctions in the probation and parole setting show that “[a] perception of unfairness may increase noncompliance” with supervision conditions. Thus, evidence suggests that the fairness of procedures impacts even a criminal offender's behavior.

**B. Creating Fair Legal Procedures**

Several factors influence citizens’ views of the law. Tyler and others have “identified six components of procedural justice: (1) representation, (2) consistency, (3) impartiality, (4) accuracy, (5) correctability, and (6) ethicality.” Moreover, data indicates that “persons attribute legitimacy to legal authorities and voluntarily follow rules out of a sense of duty and obligation when legal authorities treat them fairly.” Concomitantly examining felon jury exclusion statutes and moral character and fitness determinations reveals the procedural justness of an individualized approach to felonious bar applicants. But such an examination also shows how unconditional, record-based juror eligibility statutes and inconsistent schemes for evaluating a convicted felon's suitability for legal roles undermine the fairness and legitimacy of the law.

1. **Representation**

Citizens perceive the law as fair when it provides them “a forum in which they can tell their story.” As Tyler points out, “people want to have an opportunity to state their case to legal authorities.” Thus, it should come as no surprise that categorical exclusions--like those that preclude convicted felons from jury service--often spark feelings of helplessness and
futility. Conversely, by allowing convicted felons to address their past--as do those jurisdictions that adhere to the presumptive disqualification approach to moral character and fitness determinations--authorities cultivate fairness. In this regard, while felon jury exclusion statutes undermine the representation element of procedural justice, individualized evaluations of felonious bar applicants help to develop the fairness of legal procedures.

2. Consistency

As Paternoster and others note, “consistency in decisionmaking refers to similarity of treatment” and one can assess similarity of treatment across persons or over time. In addition, a person can also evaluate the similarity of treatment across situations or contexts. When doing such an analysis, one would likely view the law as consistent in its decisionmaking when it employs analogous procedures in the same or similar situations or contexts. In the case of a convicted felon's access to legal roles, the inconsistency that characterizes the majority approach clearly fosters a sense that the law is unfair and procedurally unjust, thus undermining the law's legitimacy and the likelihood for voluntary compliance by convicted felons.

*1422 3. Impartiality

For citizens who come into contact with legal or quasi-legal processes, “[t]ransparency and openness foster the belief that decisionmaking procedures are neutral.” As Tyler points out, “people react to signs that the authorities with whom they are dealing are neutral . . . making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases.” Along these lines, most jurisdictions publish their moral character and fitness standards. Moreover, the ABA produces an annual report outlining most jurisdictions' bar application process for those with a felonious criminal history. By contrast, felon jury exclusion statutes are “invisible punishments” justified entirely by speculation and conjecture. Thus, for convicted felons, the presumptive disqualification approach to the moral character and fitness process promotes a far greater sense of the law's neutrality and fairness than hidden record-based juror eligibility standards that make blanket assumptions about those with a felonious criminal history.

4. Accuracy

People generally view the law as fair when decisions are accurate. The accuracy of a decision largely depends on authorities' employing procedures that “publicly bring[ ] the problem to light” and are “based on factual information”. In short, procedures that provide citizens with a sense that authorities “make competent, high-quality decisions . . . are more likely to be viewed as fair.” Individualized moral character and fitness determinations of felonious bar applicants almost always involve a hearing and the consideration of evidence provided by the prospective attorney. Such procedures likely foster the applicant's perception that the proceedings are fair. Conversely, felon jury exclusion statutes fail to give one a sense that they accurately exclude incompetent jurors. For instance, often courts fail to overturn verdicts rendered by juries that include statutorily ineligible felon-jurors, creating an ambiguity about the accuracy of felon jury exclusion statutes.

5. Correctability

When procedures provide a mechanism for higher review, those subjected to such procedures will more readily view the process as fair. A convicted felon cannot appeal his or her dismissal from a jury that results from a record-based juror eligibility statute. Rather, felon jury exclusion measures are definite and unchallengeable. Yet moral character and fitness determinations are almost always appealable. Most often those applicants denied admission to the bar because of a prior felony conviction have the option of reapplying after a specified period of time or challenging the decision of bar authorities
through that jurisdiction's appellate system. In this way, bar admission processes promote the perception that they are fair and just while felon jury exclusion statutes undermine the correctability element of procedural justice.

6. Ethicality

Along with an opportunity to state their claims to a neutral tribunal, citizens want to feel that authorities respect their rights. Courteous treatment is an indicator of such respect. As Tyler explains, “people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected . . . [p]eople react favorably to the perception that the authorities are benevolent and caring and are sincerely trying to do what is best for the public.” Yet, as previously outlined, the procedures by which a majority of jurisdictions expel convicted felons from the jury process are callous and embarrassing. Alternatively, by providing a bar applicant with a felony criminal record the opportunity to explain their past indiscretions--either orally or in writing--jurisdictions that license felonious lawyers preserve an offender's dignity, nurturing the perception that legal procedures are fair and legitimate.

Moreover, when authorities “explain or justify their actions in ways that show an awareness of people's needs,” citizens will view the law as legitimate. Understandably then, when authorities impose inconsistent regulations without justification citizens are more likely to deem the law unfair. In a majority of jurisdictions, bar regulations seemingly conclude that felons are malleable beings, while permanent record-based juror eligibility statutes allege that one with a felonious criminal history is a static deviant. Therefore, the majority approach for regulating a convicted felon's access to the legal profession and the jury box undermines the protectionist justifications for excluding felons from jury service--forcing convicted felons to question the true intentions of the authorities that expel them from the deliberation room, the fairness of felon jury exclusion statutes, and the law generally.

By considering reentry a holistic concept, one avoids the inclination to examine collateral sanctions and discretionary disabilities from an instrumental viewpoint. Instead, as Tyler argues, one must view compliance with the law, and in turn reintegration, normatively stressing “what people regard as just and moral as opposed to what is in their self-interest.” In this light, it is relatively easy to see how policies grounded in blanket assumptions and faulty stereotypes, which do not provide those they impact the opportunity to rebut legal presumptions, help to create, rather than curb, the problem of recidivism. In addition, equally as damaging to reintegration are the inconsistent procedures for regulating access to legal roles, which detract from the law's legitimacy by simultaneously promoting procedural justice and outright injustice.

VIII. Conclusion

By examining the majority approach to evaluating prospective attorneys and potential jurors, the logical flaws in the justifications for felon jury exclusion statutes are evident. Twenty-nine states and the federal court system provide convicted felons the opportunity to demonstrate rehabilitation, but uniformly presume all convicted felons permanently unsuitable for jury service. Thus, the majority approach for screening would-be legal actors is both inconsistent and illogical, prompting an unbiased observer to question the true purposes for felon jury exclusion statutes.

Such a system, though defended by supposition and conjecture, cannot withstand criticisms from its own ranks. While this article highlights the substantive challenges of predicting behavior through standard screening processes, it also notes the superfluity of attempting to protect the public from convicted felons. Those with a felonious criminal history pose no greater risk to the legal profession or the jury than do countless other citizens who may be unfit for legal service. Nevertheless, fear has served as a catalyst for restrictive, overinclusive legal constructs aimed at convicted felons.
Though this article may at time appear to endorse the categorical exclusion of convicted felons from the legal profession, its reliance on Tom Tyler's research indicates otherwise. By conducting an individual assessment of each convicted felon who wishes to productively engage the legal system, jurisdictions adhere to the principals of procedural justice, coloring the law fair and legitimate. Legitimacy leads to voluntary compliance with legal mandates and thus, can potentially curb recidivism.

Perhaps the only plausible attack on criticisms of felon jury exclusion statutes is philosophical, rooted in “theories of social contractarianism and civic republicanism.”

There are some who claim that felonious jurors lose the right to participate in government when they depart from the law's mandates, suggesting that the commission of crime is a conscious choice that represents a rejection of societal values. But criminal responsibility may encompass far more than an individual's intrinsic composition. As noted, experimental research shows that circumstances play a large role in a person's behavior. Nevertheless, those who forward the such arguments for felon jury exclusion statutes consider only personal choice when calculating what an offender deserves or does not deserve, ignoring more modern theories of criminality.

I am a licensed attorney and a convicted felon. Thus, I can represent a client in the most grievous of circumstances, but I cannot decide even a minor civil dispute. Though I committed a crime years ago and swore to uphold the United States Constitution when I entered the legal profession, I will never be worthy to serve as an empanelled juror. This incongruity is troubling and seemingly unexplainable. Thus, my hope is that this Article furthers a burgeoning dialogue that addresses the illogicality of precluding millions of Americans from performing an essential civic duty.

*1427 Appendix 1: A Convicted Felon's Access to the Legal Profession

As noted, almost all jurisdictions in the United States evaluate the character of a felonious bar applicant on an individualized basis using the presumptive disqualification approach. In those states, applicants with a felony criminal history have an opportunity to rebut the presumption that they lack the requisite character to practice law (the presumptive disqualification approach). Yet, a few select jurisdictions do not assess the moral character of each bar applicant with a felony criminal history. Instead, such states per se disqualify convicted felons from attaining professional licensure as an attorney (the per se approach).

The following list categorizes all United States jurisdictions by the manner in which they evaluate the character of a bar applicant with a felony criminal history. As shown, those jurisdictions that per se disqualify felonious bar applicants do so 1) for a period of years; 2) for the period of the imposed sentence; 3) for life, if the felony criminal history would have led to disbarment in that jurisdiction; 4) for life, if the felony criminal history included certain demarcated offenses; and 5) for life, unless the applicant's civil liberties are restored.

Note that for the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.

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<th>State</th>
<th>Moral Character &amp; Fitness Determination Approach</th>
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<td>Alabama</td>
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<td>District of Columbia</td>
<td>Presumptive Disqualification³⁵⁴</td>
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<td>Florida</td>
<td>Per se Disqualification unless civil rights are restored (non-automatic); then a felony conviction amounts to a Presumptive Disqualification³⁵⁵</td>
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<td>Presumptive Disqualification³⁵⁶</td>
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<td>Hawaii</td>
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<td>Per se Disqualification for life for those felony convictions that would otherwise result in disbarment³⁵⁸</td>
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<tr>
<td>Minnesota</td>
<td>Presumptive Disqualification³⁶⁹</td>
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<tr>
<td>Mississippi</td>
<td>Per se Disqualification for life for all felonies except manslaughter and violations of the Internal Revenue Code³⁷⁰</td>
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<tr>
<td>Missouri</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)³⁷¹</td>
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<td>Montana</td>
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<td>Ohio</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)³⁸¹</td>
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<td>Oklahoma</td>
<td>Presumptive Disqualification³⁸²</td>
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<tr>
<td>Oregon</td>
<td>Per se Disqualification for life for those felony convictions that would otherwise result in disbarment³⁸³</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Presumptive Disqualification³⁸⁴</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Presumptive Disqualification³⁸⁵</td>
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</tbody>
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**State** | Moral Character & Fitness Determination Approach | Duration of Felon Jury Exclusion
---|---|---
Alabama | Presumptive Disqualification |Lifetime Ban
Alaska | Presumptive Disqualification |During Supervision
Arizona | Presumptive Disqualification |During Supervision (first offenders)
Arkansas | Presumptive Disqualification |Lifetime Ban
California | Presumptive Disqualification |Lifetime Ban
Colorado | Presumptive Disqualification |Lifetime Ban (grand juries) No Exclusion (petit juries)
Connecticut | Presumptive Disqualification |During Incarceration or Seven Years from Conviction (whichever is longer)
Delaware | Presumptive Disqualification |Lifetime Ban
District of Columbia | Presumptive Disqualification |During Supervision Plus Ten Years
Florida | Per se Disqualification (unless civil rights are restored - non-automatic) |Lifetime Ban
Georgia | Presumptive Disqualification |Lifetime Ban
Hawaii | Presumptive Disqualification |During Supervision
Idaho | Per se Disqualification (if felony conviction would otherwise result in disbarment) |Challengeable for Cause (for life)
Illinois | Presumptive Disqualification |Challengeable for Cause (for life)
Indiana | Presumptive Disqualification |During Sentence
Iowa | Presumptive Disqualification |During Supervision or Ten Years from Conviction (whichever is longer)
Kansas | Presumptive Disqualification |---

*1436 Appendix 2: Comparison: A Convicted Felon's Access to the Legal Profession and A Convicted Felon's Access to a Jury*

For each jurisdiction in the United States, the following list illustrates 1) the approach taken by bar examiners faced with an applicant who is a convicted felon, and 2) “the duration of felon jury exclusion.” Highlighted are those jurisdictions that allow convicted felons to practice law (those that employ the presumptive disqualification approach or the temporary Per se Disqualification approach), but prohibit convicted felons from ever serving on juries (lifetime ban).
<table>
<thead>
<tr>
<th>State</th>
<th>Disqualification Type</th>
<th>Exclusion Period</th>
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<tbody>
<tr>
<td>Kentucky</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<tr>
<td>Louisiana</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
</tr>
<tr>
<td>Maine</td>
<td>Presumptive Disqualification</td>
<td>No Exclusion</td>
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<td>Maryland</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Presumptive Disqualification</td>
<td>During Incarceration or Seven Years from Conviction (whichever is longer) Removable for Cause (for life)</td>
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<tr>
<td>Michigan</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<td>Minnesota</td>
<td>Presumptive Disqualification</td>
<td>During Sentence</td>
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<tr>
<td>Mississippi</td>
<td>Per se Disqualification (for all felonies except manslaughter and violations of the Internal Revenue Code)</td>
<td>Lifetime Ban</td>
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<tr>
<td>Missouri</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)</td>
<td>Lifetime Ban</td>
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<td>Montana</td>
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<td>New Jersey</td>
<td>Presumptive Disqualification (upon completion of sentence)</td>
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<td>New Mexico</td>
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<td>North Dakota</td>
<td>Disqualification</td>
<td>Lifetime Ban</td>
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<td>Ohio</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)</td>
<td>Lifetime Ban</td>
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<tr>
<td>Oklahoma</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<tr>
<td>Oregon</td>
<td>Per se Disqualification (if felony conviction would otherwise result in disbarment)</td>
<td>During Incarceration Plus Fifteen Years (criminal and grand juries) During Incarceration (civil juries)</td>
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<tr>
<td>Pennsylvania</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<td>South Carolina</td>
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<td>Tennessee</td>
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<td>Lifetime Ban</td>
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<tr>
<td>Texas</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence or conviction is reversed or pardoned)</td>
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<td>Utah</td>
<td>Presumptive Disqualification (upon completion of sentence)</td>
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<td>Lifetime Ban</td>
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<td>Washington</td>
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<td>During Supervision (if committed after July 1984) Lifetime Ban (if committed before July 1984)</td>
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<td>Wisconsin</td>
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<td>During Sentence</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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</tbody>
</table>
Footnotes

a1 Practitioner & Ph.D. student, University of California at Irvine; LL.M., Georgetown University Law Center; J.D., Thomas Jefferson School of Law; M.S., Wagner College; B.A., Gettysburg College. Mr. Binnall is an attorney and a convicted felon who spent over four years in a maximum security prison for a DUI homicide that claimed the life of his best friend--his experiences inform this article.

1 See Appendix 2 (highlighting those jurisdictions that permanently exclude convicted felons from jury service but do not per se exclude convicted felons from the legal profession).

2 See infra Part III.A.2; see also Appendix 1.


4 Scholarship on the exclusion of felons from jury service has remained entirely exclusive from that on the licensing of bar applicants with a felonious criminal record.


6 Id. at 276.

7 See infra Parts II.C, III.B (discussing the justifications for the moral character and fitness determination and jury exclusion statutes).

8 See Appendix 2 (noting that all jurisdictions evaluate the moral character and fitness of bar applicants and statutorily filter-out ineligible jurors).


10 Kalt, supra note 9, at 74.

11 See, e.g., Washington v. State, 75 Ala. 582, 585 (1884) (“The presumption is, that one rendered infamous by conviction of felony ... is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.”).

12 Kalt, supra note 9, at 74.


14 See infra Part III.A.2; see also Appendix 2.

15 See Maureen M. Carr, The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards, 8 Geo. J. Legal Ethics 367, 383-84 (1995) (“The current majority approach of presumptive disqualification attempts to strike a balance among several competing concerns ... allowing a fully rehabilitated individual the opportunity to serve the community in the capacity of his or her choice.”).


17 Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DePaul L. Rev. 661, 661 (2007) (“The findings of this research suggest that Americans generally accept the principles underlying the rule of law and defer to legal authorities when they believe that the authorities are acting in accord with those principles.”).

Tom R. Tyler, Why People Obey the Law 277 (2006) (“[A]uthorities should govern based upon the consent of those that they govern, consent that develops from the experience of fairness when dealing with authorities. This fairness leads to legitimacy, a key precursor of consent and voluntary acceptance.”).


Paternoster et al., supra note 20, at 166 (noting “compliance may depend as much or more on the procedural fairness of sanction delivery as it does on the characteristics of the sanction imposed”).


See, e.g., Kalt, supra note 9, at 69.

Id. at 169-71 app. 2 (suggesting that the practice of felon jury exclusion impacts approximately sixteen million Americans, but noting that “[p]recisely quantifying the reach of felon exclusion is difficult”).

See, e.g., Ted Chiricos, Kelle Barrick & William Bales, The Labeling of Convicted Felons and its Consequences for Recidivism, 45 Criminology 547, 547-49 (2007); see also Stephanie Bontrager, William Bales & Ted Chiricos, Race, Ethnicity, Threat, and the Labeling of Convicted Felons, 43 Criminology 589, 589 (2005) (finding that despite Florida law allowing judges to withhold adjudication of guilt for persons who have been found guilty of a felony, blacks and hispanics are less likely to have adjudication withheld and thereby more likely to be labeled felons).

See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 1 (2003); see also Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 83 (2005); Alec C. Ewald & Marnie Smith, Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench, 29 Just. Sys. J. 145, 145 (2008) (reporting a study in which judges were asked to assess the usefulness and impact of collateral sanctions); Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. Rev. 623, 634-35 (2006) (explaining that collateral consequences result not from the explicit punishment, but rather from the fact that an individual has been convicted).

See, e.g., Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 3 (2006) (discussing statutory restrictions on a convicted felon's ability to vote); see also ABA Section of Criminal Justice et al., ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004); Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (2006); Kalt, supra note 9, at 65-189 (reviewing the practice of statutorily excluding convicted felons from jury service); Steinacker, supra note 13, at 801-28 (examining those legal measures that burden a felon's right to hold public office).

ABA Section of Criminal Justice et al., supra note 27, at 1 (defining a collateral sanction as “a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence”).
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29. Id. (defining a discretionary disqualification as “a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction”).

30. Petersilia, supra note 26, at 106.

31. Id. (quoting Margaret Colgate Love & Susan M. Kuzma, Department of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey 1 (1996)).


33. Id. ("All persons are eligible and qualified to be prospective trial jurors except ... persons who have been convicted of a malfeasance in office or a felony.") (emphasis added); see also Appendix 2.


35. Id.

36. The author is a convicted felon living in California; he observed the procedures outlined when the Superior Court of San Diego summoned him to jury service.

37. Kalt, supra note 9, at 150 (listing jurisdictions as “life” if they “bar felons unless civil rights have been restored, but have broad restoration provisions”); see also Appendix 2.

38. Kalt, supra note 9, at 150 (noting that “most jurisdictions bar felons from juries for life, but many do not”); see also Appendix 2.

39. Kalt, supra note 9, at 150-58; see also Love, supra note 27 (cataloguing the approaches taken by each state with respect to felon jury service).

40. Kalt, supra note 9, at 150-58.

41. Id. at 158 (noting that the ten states that employ this approach are: Alaska, Idaho, Indiana, Minnesota, North Carolina, North Dakota, Rhode Island, South Dakota, Washington, and Wisconsin); see also Appendix 2.

42. Kalt, supra note 9, at 158 (noting that the three states that employ this approach are: Illinois, Iowa, and Massachusetts); see also Appendix 2.

43. Kalt, supra note 9, at 158 (noting that the five states that employ this approach are: Arizona, Connecticut, District of Columbia, Kansas, and Oregon); see also Appendix 2.

44. Kalt, supra note 9, at 158 (noting that only Colorado and Maine “do not exclude felons as felons from juries at all”); see also Appendix 2.

45. Kalt, supra note 9, at 150 (explaining that this “patchwork” encompasses “standards of different durations, applied to different crimes, and to different kinds of juries”); see also Appendix 2.

46. Kalt, supra note 9, at 104.

47. Id. at 105.

48. Id. at 74.


50. Kalt, supra note 9, at 74.
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51 Id. at 102.
52 Id.
53 Id. at 104.
54 Id. (Professor Kalt labels this the “taint” argument).
55 Id. at 102.
56 Id. at 105.
57 Id. (“The core of the inherent bias argument is that felons remain adversarial to the government, and will sympathize unduly with any criminal defendant.”).
58 Id.
59 See, e.g., Michigan Senate Fiscal Agency, Bill Analysis: Jury Compensation and Qualification: S.B. 1448 & 1452 and H.B. 4551-4553 Enrolled Analysis (2003) [hereinafter Michigan Senate Fiscal Agency], available at http://legislature.mi.gov/documents/2001-2002/billanalysis/Senate/pdf/2001-SFA-1448-E.pdf (stating “[a] person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant”); see also People v. Miller, 759 N.W.2d 850, 873 n.49 (Kelly, J., dissenting) (arguing that felons have some prejudice given that “[o]ne convicted of the same crime charged against a defendant would, at a minimum, be thoroughly familiar with the nature of the crime(s) charged. The convict would know how such crimes are committed, the emotions and feelings associated with the guilt accompanying the criminal act(s), and criminal procedure in general.”).
60 See Kalt, supra note 9; see also Binnall, supra note 16.
61 Michigan Senate Fiscal Agency, supra note 59 (stating that seating a felonious juror “is blatantly unfair to the prosecution and the crime victim”).
63 See Marcus Ratcliff, The Good Character Requirement: A Proposal for a Uniform National Standard, 36 Tulsa L.J. 487, 487 (2000) (characterizing the moral character and fitness determination as “the unknown requirement for admission to the bar” and noting that “[w]hile it is true that most entering law students know that at some point in the future they will be required to prove their knowledge on the bar exam, many of these students do not realize that they will also have to prove the fitness of their character before being admitted to the practice of law”).
64 See Nat’l Conference of Bar Exam’rs & Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirement, ix-x, 3-5 (Erica Moeser & Margaret Fuller Corneille eds., 2009) [hereinafter Nat’l Conference of Bar Exam’rs].
66 See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 516 (1985) (pointing out that there is a “low incidence of applications denied on character grounds”); see also infra Part V.B.2.
67 See Scott DeVito, Justice and the Felonious Attorney, 48 Santa Clara L. Rev. 155, 158 (2008) (“Applicants with criminal acts in their past often face a heightened burden of proof of good moral character.”); see also Arnold, supra note 65, at 63 (stating “for students
with records of prior unlawful conduct the application process can become particularly troublesome. Applicants with incidents of unlawful conduct in their past can find the road toward bar admission confusing and unpredictable.”).

68 See, e.g., Comm. of Bar Exam'r's, Office of Admissions, State Bar of Cal., Application for Determination of Moral Character, available at http://calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/adm_app_moral-character_1003.pdf; see also Donald H. Stone, The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study, 15 N. Ill. U. L. Rev. 331, 331 (1995) (presenting the results of a 1995 survey of all but two states conducted “in order to determine the type of questions asked for the purpose of screening out persons who bar committees believed were not morally fit or mentally stable to practice law in their state”).

69 Stone, supra note 68, at 332 (noting that bar examiners often solicit an applicant's “armed forces discharge, marital status, [and] financial condition”).

70 See, e.g., id. at 342 (noting that when an applicant has a felony on their criminal record, a bar examiner normally “seeks details of an applicant's criminal behavior, including: a. a description of the charge; b. the date the charge was made; c. the name, address, and telephone number of each person or entity initiating or bringing the charge; d. the name, address, and telephone number of each attorney you retained to assist you in defending the charge; e. the reason why the charges were brought against you; f. the final disposition of the charge; and, g. copies of the disposition order of the tribunal sufficient to describe the substantive resolution of the proceeding”) (citing Idaho State Bar, Application for the Idaho Bar Examination and Admission to the Idaho State Bar P 19 (2010), available at http:isb.idaho.gov/pdf/admissions/web_be_application.pdf).

71 Carr, supra note 15, at 378 (noting “almost all of the states and the District of Columbia adopted rules guiding bar admission committees in their determination to allow or deny an applicant with a prior felony conviction the opportunity to practice law”).

72 Id. at 374 (describing the per se disqualification approach as “the historical approach, whereby individuals with prior criminal records are permanently disqualified from applying for admission to state bars”).

73 Arnold, supra note 65, at 378 (citing Carr, supra note 15, at 380).

74 See Carr, supra note 15, at 381-83; see also Appendix 1.

75 See Appendix 1. The ten jurisdictions that per se disqualify convicted felons from the bar either permanently or temporarily are: Florida, Idaho, Indiana, Mississippi, Missouri, New Jersey, Ohio, Oregon, Texas, and Utah.

76 Id. The five jurisdictions that effectively per se exclude convicted felons from the bar permanently are: Florida (requires the restoration of civil rights which is non-automatic), Indiana (permanently excluding those convicted of a felony for life), Idaho and Oregon (permanently excluding those convicted of a felony that would otherwise result in disbarment), and Mississippi (permanently excluding those convicted of any felony besides manslaughter and violations of the Internal Revenue Code).

77 Id. The five jurisdictions that per se exclude convicted felons from the bar temporarily are: Missouri, Ohio, and Texas (until five years after completion of sentence), New Jersey and Utah (until completion of sentence).


79 Carr, supra note 15, at 381 (describing this view by stating “some crimes, if unpardoned, remain always as a blot on the applicant's character and prevent admission to the bar”).

80 Id. at 374.

81 See Appendix 1. For the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.
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Arnold, supra note 65, at 87; see also Nat’l Conference of Bar Exam’rs, supra note 64, at viii (“The bar examining authority may appropriately place on the applicant the burden of producing information.”).

See In re King, 136 P.3d 878, 889 (Ariz. 2006) (“[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.”) (quoting In re Matthews, 462 A.2d 165, 176 (N.J. 1983)); see also Graniere & McHugh, supra note 78, at 231 (stating “where serious or criminal misconduct is involved, positive inferences about the applicant’s moral character are difficult to draw, and negative character inferences are stronger and more reasonable”) (quoting George L. Blum, Annotation, Criminal Record as Affecting Applicant’s Moral Character for Purposes of Admission to the Bar, 3 A.L.R. 6th 49, 49 (2005)).

In re Cason, 294 S.E. 2d 520, 522 (Ga. 1982).

Graniere & McHugh, supra note 78, at 236.

Id. at 239.

Id. at 223; see also Nat’l Conference of Bar Exam’rs, supra note 64, at ix (listing the suggested factors to be used in assessing rehabilitation).

Graniere & McHugh, supra note 78, at 223.

See Arnold, supra note 65, at 73, 75 (noting critiques of the per se disqualification and the presumptive disqualification frameworks, and stating respectively “[t]he presumption made by the ABA and state bars that prior unlawful conduct by a bar applicant is predictive of future unlawful conduct or misbehavior as a lawyer has been criticized and remains unproven” and “[t]he flexibility for which the presumptive disqualification approach receives support is accompanied by a level of vagueness, which can undermine some of its benefits and leave applicants with a record of unlawful conduct vulnerable to unclear standards and unpredictable outcomes”).

Carr, supra note 15, at 388 (citing written response of Alan Ogden, Executive Director, State of Colorado Supreme Court Board of Law Examiners (Jan. 4, 1994)).

Carr, supra note 15, at 383.

Nat’l Conference of Bar Exam’rs, supra note 64, at vii.

Id.

Id.

Id. at viii-ix.

Id. at viii.


Id. at 247.

Rhode, supra note 66, at 508.

Id. at 509 (citing James E. Alderman, Screening for Character and Fitness, B. Examiner, Feb. 1982, at 23, 24; Ruel C. Walker, Texas’ Tests of Character Come Too Late, 3 Tex. B. J. 177 (1940)).

Ratcliff, supra note 63, at 492.
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104 Nat'l Conference of Bar Exam'nrs, supra note 64, at viii.

105 Carr, supra note 15, at 378 (noting that the presumptive disqualification approach show that jurisdictions are “willing to engage in more flexible character screening processes when making decisions about individuals with prior felony convictions”).

106 Kalt, supra note 9, at 74 n.28 (listing those cases in which courts upheld felon jury exclusion based on the probity rationale); see also supra Part II.C.

107 Id. at 104 (noting that the probity rationale centers on the idea that “felons are bad,” and that they either threaten a jury's probity or its “appearance of probity” because of their flawed character).

108 Id. at 102 (describing this view: “[i]f someone is not responsible enough to follow the law, how can they [sic] be responsible enough to decide guilt or innocence?”) (citing State of Oregon Special Election Voters' Pamphlet, Ballot Measure 75, Arguments in Favor (1999)); see also Rector v. State, 659 S.W.2d 163, 173 (Ark. 1983) (stating “exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws”).

109 See Appendix 2.


111 Id.

112 Id. at 2 (summarizing the situationist position and stating “behavior is --contra the old saw about character and destiny--extraordinarily sensitive to variation in circumstance”).


114 Doris, supra note 110, at 18.

115 Id. at 5 (commenting “talk of character is a ‘thick’ discourse, intermingling evaluative and descriptive elements”) (citing Bernard Williams, Ethics and the Limits of Philosophy 128-31, 140-45 (1985)).


117 Yankah, supra note 116, at 1028.

118 Doris, supra note 110, at 20.

119 Id. at 20.

120 Id. at 22-23 (defining globalism as a theory that “construe[s] personality as more or less coherent and integrated with reliable, relatively situation-resistant, behavioral implications”).

121 Id. at 23.

122 Id. (discussing consistency and stating “[c]haracter and personality traits are reliably manifested in trait-relevant behavior across a diversity of trait-relevant eliciting conditions that may vary widely in their conduciveness to the manifestation of the trait in question”).

123 Id.
Id. (discussing evaluative integration and stating “[i]n a given character or personality the occurrence of a trait with a particular evaluative valence is probabilistically related to the occurrence of other traits with similar evaluative valences”).

125
Id. at 1 (“This conception of character is both venerable and appealing, but it is also deeply problematic.”).

126
Id. at 6.

127
Id.

128
Id. at 26 (further arguing that conventional conceptualizations of character do not fully explain “the striking variability of behavior with situational variation”).

129
See Kaye, supra note 113, at 618-39 (discussing several experiments where researchers elicited alarming behaviors from unexpected human sources).

130
Id. at 639.

131
Id. (“Because we are so vulnerable to situational influences, our characters cannot be as consistent as we generally imagine they are.”).

132
Id. (“The story of my act shifts from being a story about me to being a story about my surroundings, so that my acts belong, in some significant way, to forces beyond myself.”).

133
Doris, supra note 110, at 24.

134
Id.

135
Id.

136
Id. (noting that the “central theoretical commitments” of situationism “amount to a qualified rejection of globalism”).

137
Kaye, supra note 113, at 646.

138
Doris, supra note 110, at 1 (commenting that such a view holds that “character is destiny”).

139
See supra Part III.A.2. (noting that a felony conviction presumptively disqualifies a felonious bar applicant).

140
Id.

141
Kalt, supra note 9, at 73 n.28 (citing People ex rel. Hannon v. Ryan, 312 N.Y.S.2d 706, 712 (App. Div. 1970) (stating “it would be a strange system, indeed, which permitted those who had been convicted of anti-social and dissolute conduct to serve on its juries”)).

142
Doris, supra note 110, at 12 (“’Common sense’ is a keenly felt constraint in psychology, and this has served to put [ ] situationist psychology ... at a certain rhetorical disadvantage, inasmuch as it threatens time-honored notions of personality and character.”).

143
Id. (noting “it is alleged that everyday convictions about personality constrain psychological theorizing”).

144
See Kaye, supra note 113, at 637 (“It has been well-established that we are strongly inclined to explain human acts in terms of character traits or dispositions, even when we have only observed a single act, and even when there are strong reasons to believe that situation had a profound influence on the actor.”) (citing Lee Ross & Richard E. Nisbett, The Person and the Situation 4 (1991)).

145
Kaye, supra note 113, at 637-38 (stating that confirmation bias forces us to “reject information that conflicts with our working models of people, and retain information that supports our working models, such that once we have decided a person is a certain ‘kind’ of person, it is very unlikely that we will question the characterization”) (citing Ross & Nisbett, supra note 144, at 139-44).

146
Id. at 638 (“[W]e are likely to accurately perceive others as acting consistently--but for reasons having nothing to do with any characterological consistency on their part.”).
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147  Id.
148  Doris, supra note 110, at 13 (highlighting that situationist research includes “many naturalistic field studies, dating back to the 1920s”).
149  Id. (noting that if situationism “is empirically supportable, it should be empirically falsifiable” and opining that “given the extent of empirical support,” there is “good reason for believing that falsification is not forthcoming”).
150  Kalt, supra note 9, at 105.
151  Id. at 85.
152  See supra Part II.C.
153  Kalt, supra note 9, at 105 (“[M]any groups have generally strong biases in criminal cases ... in the case of crime victims, the justice system does not presume that they are all incapable of being objective in all trials.”).
154  Smith v. Texas, 311 U.S. 128, 130 (1940); see also Kalt, supra note 9, at 107 (“To the extent that inherent bias among felon jurors leads to legitimate skepticism, the automatic exclusion of felons is less acceptable and smacks of viewpoint discrimination.”).
155  Kalt, supra note 9, at 105 (pointing out that “the inherent bias argument does not explain why felons should be excluded from civil juries in cases where the government is not a party,” and also noting that only Oregon distinguishes between a civil and criminal trial in its felon jury exclusion statute).
156  Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion).
159  See Appendix 2.
160  De Tocqueville, supra note 5, at 269.
161  Sandra Day O'Connor, Address at the University of Oregon Dedication of the William W. Knight Law Center: Professionalism, in 78 Or. L. Rev. 385, 386 (1999).
162  Rennard Strickland & Frank T. Read, The Lawyer Myth: A Defense of the American Legal Profession 3-4 (2008) (“A recent study showed that in the minds of the American public, the term ‘lawyer’ was almost synonymous with ‘courtroom advocate.’”).
163  Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 3-4 (2000) (“Of all the traits that the public dislikes in attorneys, greed is at the top of the list .... About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees.”).
164  Id. at 4 (“The public's other principal complaint about attorneys' character involves integrity .... Only a fifth of those surveyed by the American Bar Association ... felt that lawyers could be described as ‘honest and ethical.’”).
165  Gaetke, supra note 157, at 40.
167  Gaetke, supra note 157, at 40 (noting further that this role is also “more comfortable to lawyers”).
168  O'Connor, supra note 161, at 387 (“A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court.”).
Gaetke, supra note 157, at 48.


Id. at R. 3.3(d).

Gaetke, supra note 157, at 48.

Daniel Northrop, Note, The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention that the Attorney Draft a Document to be Released to Third Parties: Public Policy Calls for at least the Strictest Application of the Attorney-Client Privilege, 78 Fordham L. Rev. 1481, 1484 (2009) ("[U]ncritical acceptance and support of the attorney-client privilege has allowed for the expansion of the privilege and the denial of competing societal and legal concerns .... [and] a reanalysis of the attorney-client privilege would best serve the interests of justice.").

Michael Asimow & Richard Weisberg, When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature, 18 S. Cal. Interdisc. L.J. 229, 236 (2009) ("[W]eak adversarialism ... foregrounds values such as the truth-finding function of trials, the obligation of candor toward the tribunal, and the need to protect the reputation of truthful witnesses and the interests of other third parties who may be damaged by the litigation.").

Id. at 236.

Id. at 237 n.33 (noting that “discretionary provisions allow lawyers wiggle room to act in good faith when they confront difficult and dangerous ethical and moral quandaries”) (citing Bruce A. Green, Criminal Defense Lawyering at the Edge: A Look Back, 36 Hofstra L. Rev. 353, 391-92 (2007)).

Asimow & Weisberg, supra note 174, at 236.

See id. at 235 (describing the contrasting approach of “strong adversarialism (sometimes referred to as ‘neutral partisanship’)” which “emphasizes the objective of zealous representation and protection of client confidences ... foreground[ing] the client's interests above all other values”).


Id. at 466.

Id.

Id.

Id.

Id. at 474.

Id. at 466.

Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925).

Kalt, supra note 9, at 106.


Id.

See, e.g., Boney, 977 F.2d. 624; Anderson v. Commonwealth, 107 S.W.3d 193 (Ky. 2003); People v. Miller, 759 N.W.2d 850 (Mich. 2008).
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191  Miller, 759 N.W.2d at 874.
193  See Appendix 2.
196  Id.
197  Id.
198  Id. at 11.
199  United States v. Boney, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting) (“That a felon has been unwilling to conform his conduct raises doubts about his capacity to honor the juror's oath, and to comply with the trial judge's instructions.”).
201  William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 74 (2006) (“The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government.”).
202  Id.; see also William L. Dwyer, In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy 153 (2002) (discussing the popularity of the jury trial in America, and noting that nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States).
203  United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002) (noting specifically that the number of jury trials is declining “more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts--but dying nonetheless”).
204  Young, supra note 201, at 74.
205  Id.
206  Id. at 76.
207  Id. at 77-78 (stating “[t]he Supreme Court ... has interpreted the Federal Arbitration Act to supplant juries with arbitrators whenever possible” and “strong scholarly analyses suggest that trial judges overuse summary judgment to take triable cases away from juries”).
208  Kassin & Wrightsman, supra note 194, at 4 (noting that “juries are viewed simultaneously as partial and impartial, brilliant and stupid, active and passive, compliant and rebellious, conscientious and expedient”).
210  Harry Kalven Jr. & Hans Zeisel, The American Jury 4 (1966) (stating that the jury “from its inception...has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism”); see also Kassin & Wrightsman, supra note 194, at 3 (commenting that “scholarly debate over juries can be traced about as far back in history as juries themselves”).
211  Some scholars and citizens also contend that the costs associated with the jury system outweigh its usefulness. See, e.g., Kassin & Wrightsman, supra note 194, at 3 (“Critics maintain that the system is a very costly anachronism, consuming human resources and government expenditures in massive doses, that it is burdensome to those called into service, and that it is largely responsible for congestion and delay in the civil courts.”).
213 Id.
214 Kassin & Wrightsman, supra note 194, at 3; see also Phoebe C. Ellsworth & Alan Reifman, Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions, 6 Psychol. Pub. Pol’y & L. 788, 792 (2000) (“A major theme of popular criticism is that competent, responsible people rarely serve on juries; instead, American juries are made up of incompetent people-- the uneducated, the jobless, the people who pay so little attention to the news that they have never heard of litigants who are major public figures.”).
215 Hans & Vidmar, supra note 212, at 19 (citing Judge Jerome Frank).
216 Id. at 115.
217 See id. (continuing “all [jurors] are required to do is indicate whether the verdict is for or against the plaintiff (or in criminal cases whether the defendant is guilty or not guilty”).
218 See, e.g., Kassin & Wrightsman, supra note 194, at 3-4 (“It is said that the average person is not smart enough or educated enough to understand, much less decide, technically complex civil cases such as antitrust suits.”); see also Hans & Vidmar, supra note 212, at 121 (discussing the average juror’s ability to understand jury instructions and commenting “[n]ot surprisingly, given the convoluted language and special legal terms, jurors’ comprehension is often very low”).
219 See Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 60 (2d Cir. 1948) (“But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.”).
221 Kassin & Wrightsman, supra note 194, at 4.
222 Id. at 6.
225 See Jeffrey Abramson, We the Jury: The Jury System and the Ideal of Democracy 100 (1994) (“This is a demanding notion of impartiality, requiring jurors to be independent not only from the dictates of others but also from their own opinions and biases.”).
226 Kassin & Wrightsman, supra note 194, at 7-8.
227 Abramson, supra note 225, at 100 (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).
229 Abramson, supra note 225, at 101 (continuing “[t]he jury will achieve the ‘overall’ or ‘diffused’ impartiality that comes from balancing the biases of its members against each other”).
230 Mortimer S. Kadish & Sanford H. Kadish, Discretion to Disobey 66 (1973) (noting that the ideal juror “find[s] the facts on the basis of the evidence presented and ... return[s] a general verdict by applying those facts to the law as given by the judge”).
231 Kassin & Wrightsman, supra note 194, at 6.
232 Peters, 407 U.S. at 503-504 (highlighting that “exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented”).
233 Abramson, supra note 225, at 101.

234 Id.; see also Hans & Vidmar, supra note 212, at 51 (noting “not only for fact-finding but also for legitimation, a representative jury is desirable”).

235 De Tocqueville, supra note 5, at 272.

236 Id. at 274.

237 Kassin & Wrightsman, supra note 194, at 4 (commenting “[w]ith juries arousing so much ambivalence and controversy, it should come as no surprise to learn that the legal system is often thoroughly confused about how they act and, in turn, how they should be treated”).


239 Id.

240 Id.

241 Young, supra note 201, at 69.

242 De Tocqueville, supra note 5, at 274.

243 Id.

244 In re Applicants for License, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

245 See Paula L. Hannaford-Agor & G. Thomas Munsterman, Ethical Reciprocity: The Obligations of Citizens and Courts to Promote Participation in Jury Service, in Jury Ethics: Jury Conduct and Jury Dynamics 21, 25 (John Kleinig & James P. Levine eds., 2006) (describing voir dire as “the jury selection phase” where “the focus shifts abruptly from general presumptions about individuals’ ethical capacity to intense attention on the individual and his or her ability to be fair and impartial in the context of a specific trial”).

246 Hans & Vidmar, supra note 212, at 67.

247 Id.

248 See id. (noting that voir dire “may be as brief as 20 minutes or as long as 8 hours for an average trial” and that “in the Hillside Strangler trial in Los Angeles,...the voir dire and jury selection took 49 court days”).

249 See id. (commenting “[q]uestions may be wide-ranging or more specifically related to the case”).

250 See id. (“During voir dire, the trial judge and/or the attorneys ask questions of prospective jurors.”).

251 See Ellsworth & Reifman, supra note 214, at 792-93 (“The high-publicity spectacle trials typically involve greatly expanded voir dire, partly because they are high-publicity.”).

252 See Julie E. Howe, An Ethical Framework for Jury Selection: Enhancing Voir Dire Conditions, in Jury Ethics: Jury Conduct and Jury Dynamics 35, 37 (John Kleinig & James P. Levine eds., 2006) (“Improvements in voir dire conditions have been studied and proposed by the legal community including judges, attorneys, trial consultants, and social psychologists.”).

253 Kassin & Wrightsman, supra note 194, at 49.

254 Id.

255 See Ellsworth & Reifman, supra note 214, at 793 (hypothesizing that “‘[b]ad jurors’ are seated on juries because they are the ones the attorneys and the jury consultants are looking for”).
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258 Ellsworth & Reifman, supra note 214, at 792.

259 See id. at 792-94.

260 See id. at 794-96.

261 Id. at 795.

262 See Swisher, supra note 65, at 1072 (commenting that, with regard to moral character and fitness determinations, “[t]he time has come-- belatedly--to forgive and forget this troubling mark on the legal profession's good moral character”); see also Arnold, supra note 65, at 67 (noting “[u]ndeniably, the legal profession ranks low on the public's list of professions that maintains high levels of honesty and integrity”).

263 Swisher, supra note 65, at 1069 (questioning whether the use of “good moral character” has been “perverted, devalued, and misappropriated for the bar's reputation and self-image”).

264 See Rhode, supra note 66.

265 Id. at 503 (describing her methodology noting that her research included “compiled data from bar examining authorities, reported judicial cases, and accredited law schools” from “1982 and 1983”).

266 Id. at 555 (“Most bar examiners involved in the certification process express confidence in its general effectiveness. About 60%...of respondents engaged in initial character screening in all fifty states identified no problems in the current system. Over half...of the chairmen at the highest review level in selected jurisdictions found the process effective; a quarter were unsure, but only fourteen percent believed that it was ineffective.”).

267 Id. at 556 (“Despite most bar examiners' confidence in their predictive capacities, there have been no attempts, however primitive, to assess the effectiveness of certification procedures. Not only is there an absence of controlled research, no state bar has examined the records of disciplined or disbarred attorneys to determine what, if anything, in their records as applicants might have foreshadowed later problems. Nor have any studies attempted to examine the careers of candidates denied admission for evidence of subsequent moral lapses. Finally, and perhaps most disturbingly, the courts and examiners involved in certification have failed to confront the large volume of social science research that questions both the consistency and predictability of moral behavior.” (footnote omitted)).

268 Id. at 512 (footnote omitted).

269 Id. at 513.

270 Rhode, supra note 66, at 513.

271 Id. at 513-14.

272 Id. at 516 (continuing “[t]he only other empirical data available suggest that this percentage has remained relatively constant over the last quarter century” (footnote omitted)).

273 Id.
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274 Id. at 560.

275 Id. at 509 (quoting Donald T. Weckstein, Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident, 40 B. Examinier 17, 23 (1971)).

276 Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, in Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader 18, 19-20 (Susan D. Carle ed., 2005) (stating “[i]n order for rules to mold behavior, they must set forth the boundaries of that behavior with clarity” and “[r]ules of professional conduct are likely to make a significant contribution to directing behavior only if they differ from prevailing law and morality”).

277 Id. at 20 (noting “the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless”).

278 Id. (pointing out that the legal profession's rules of professional conduct require adherence to basic principles such as “do your work promptly, stay in communication with your client, do not represent adverse interests, [and] hold client property in trust” (footnotes omitted)).

279 Id.


281 See Abel, supra note 276, at 22 (critically noting that “rules of legal ethics are an attempt by elite lawyers to convince themselves that they have resolved their ethical dilemmas...there is little evidence that anyone pays attention to ethical rules beyond the small proportion of lawyers who draft, discuss, and enact them, or those who request ethical opinions” and that “most lay people know little more than that such rules exist, and those who are aware of the rules are probably skeptical about their contents”).

282 Id. at 21 (“All occupations in a capitalist system seek to control the markets in which they sell their labor. Some occupations organize unions. Others form associations that attempt to secure state support for their control over entry to the market. In other words, they aspire to control the supply of services by controlling the production of and by producers of those services. The justification for control, typically, is that the services require a high level of technical skill and that only those who already possess such skill can determine whether others have acquired it.”).

283 Lawyers' Ethics, supra note 280, at 14 (“Halliday's theory is that the legal profession's collective organization allows it to bring its special expertise to the service of state power.”).


285 Id.

286 Id.

287 Raymond Paternoster et al., supra note 20, at 165 (commenting “[a] key proposition of this group-value model of procedural justice is that adhering to fair procedures will cement persons' ties to the social order because it treats them with dignity and worth and certifies their full and valued membership in the group”).


289 Kalt, supra note 9, at 133.


291 Id. at 35.

292 Id.
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293    Id.
294    Id.
295    See James M. Binnall, EG1900 ... The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile, 44 Willamette L. Rev. 667, 680-688 (2008).
297    See Tyler, supra note 22, at 308 (stating “[i]rrespective of the type of case involved, the traditional means of obtaining compliance is via social control”).
298    Id.
299    See id. at 309 (commenting “it is not surprising that studies which empirically test the deterrence model typically find either that deterrent effects cannot be reliably detected or that, when they are detected, their magnitude is small”).
300    See id. at 309 (noting “[t]he high costs of deterrence arise because authorities have to create and maintain a credible threat of punishment for wrongdoing”).
301    See id. at 310 (proposing that the methods used to evaluate a deterrence framework foster its continued existence because such methods “approach this issue by defining the issue as whether or not deterrence ‘works,’” failing to “consider how strongly deterrence works” and “compare the effectiveness of deterrence to alternative models and approaches”).
302    Id. at 312.
303    Tyler, supra note 22, at 311.
304    Id. (contending “[if] the goal is simply to achieve compliance with the law, a value-based model is as or more effective than the deterrence model”).
305    Id. at 311.
306    Id. at 313.
307    Id. at 326.
308    See generally Tyler, supra note 17.
309    Tyler, Casper, & Fisher, supra note 18, at 643, 645 (stating “[t]o the extent that a regime can promote the development of widespread affective attachment, a cushion of support develops that enables the state to impose substantial burdens on citizens without losing their allegiance”).
310    Id. (noting “the government can influence the impact of negative outcomes on allegiance by delivering those outcomes through procedures that citizens will view as fair”).
311    Tyler, supra note 22, at 334 (commenting “it is important to institutionalize mechanisms for evaluating legal authorities in terms of their legitimacy as well as the consistency of their policies and practices with the principles of procedural justice”).
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314 Id. at 187.


316 Paternoster et al., supra note 20, at 167.

317 Tyler, supra note 17, at 664 (continuing by noting that citizens “want to have a ‘voice’ in the decisionmaking process”).

318 Id.

319 Paternoster et al., supra note 20, at 167 (emphasis omitted).

320 Id. (stating that people assess consistency “across persons” by “compare[ing] the treatment they receive with the treatment given other people”).

321 Id. at 167-68 (stating that people assess consistency “across time” by “compare[ing] their current treatment with both their past experiences and how they expect to be treated”).

322 Tyler, supra note 17, at 664.

323 Id.

324 See Appendix 1.

325 See Nat'l Conference of Bar Exam'rs, supra note 64, at 6-9.

326 Travis, supra note 290, at 16; see also Travis, supra note 26, at 64-65 (continuing “[i]n short, this universe of criminal sanctions has been hidden from public view, ignored in our national debate on punishment policy, and generally excluded from research on the life course of ex-offenders or the costs and benefits of the criminal sanction”).

327 Paternoster et al., supra note 20, at 168.

328 Id.

329 Id.

330 See Rhode, supra note 66, at 506 (noting “all judicial denials of admissions must meet minimum due process standards of notice and an opportunity to be heard”).


332 Paternoster et al., supra note 20, at 168 (stating “[t]o be perceived as procedurally fair, authorities must supply some mechanism by which decisions thought to be unfair or incorrect can be made right”).

333 Though no administrative mechanisms allow an excluded felon-juror to challenge record-based juror eligibility requirements, some have unsuccessfully explored constitutional challenges to felon jury exclusion statutes. See generally Binnall, supra note 16 (describing constitutional challenges to felon jury exclusion statutes).

334 See Rhode, supra note 66, at 506-07 n.69.
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Id. at 507 (noting, for example, that “[s]ome state courts defer to the bar's assessments absent an ‘abuse of discretion, arbitrary action, fraud, corruption or oppression’” while “[o]ther jurisdictions will determine applicants' qualifications de novo or resolve reasonable doubts in their favor”).

Paternoster et al., supra note 20, at 168 (stating “[r]espectful treatment by legal authorities is seen to be directly related to perceptions that authorities are moral, legitimate, and are deserving of compliance”).

Tyler, supra note 17, at 664.

See supra Part II.A. (detailing California's procedures for dismissing felonious jurors).

Tyler, supra note 17, at 664.

Tyler, supra note 19, at 4 (noting that “people who make instrumental decisions about complying with various laws will have their degree of compliance dictated by their estimate of the likelihood that they will be punished if they do not comply”).

See id. at 3-4 (commenting that “[t]his normative commitment can involve personal morality or legitimacy” and “[n]ormative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior”).

Id. at 3.

Kalt, supra note 9, at 121.

See, e.g., Washington v. State, 75 Ala. 582 (1884).

The “imposed sentence” refers to any period of incarceration or supervised release (parole or probation).

Ala. State Bar, Rules Governing Admission to the Alabama State Bar R. V (2009), available at http://www.alabar.org/admissions/files/AdmissionRulesRegbooksept2009.pdf (making no mention of felony convictions, but stating “[t]he burden is on the applicant to establish to the reasonable satisfaction of a majority of the said committee that the applicant possesses such character and qualifications as to justify the applicant's admission to the Bar and qualify the applicant to perform the duties of an attorney and counselor at law”).

Alaska Court Sys., 2009-2010 Alaska Bar Rules pt. I, R. 2, § 1(d)(1), available at http://www.state.ak.us/courts/bar.htm (noting that “[c]onduct manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission” and listing a series of factors to be considered including “a criminal conviction except minor traffic violations”).

Comm. on Examinations of the Supreme Court of Ariz., Rules for Admission of Applicants to the Practice of Law in Arizona R. 36(b)(2)(A) (2005), available at http://www.supreme.state.az.us/admis/pdf/Rules for Admission as of 12-1-05 rev 1006 with ph.pdf (“There shall be a presumption, rebuttable by clear and convincing evidence presented at an informal or formal hearing, that an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony shall be denied admission.”).

Ark. Judiciary, Rules Governing Bar Admission R. XIII (2004), available at http://courts.state.ar.us/rules/bar_admission/index.cfm (making no mention of felony convictions, but stating “[t]he practice of law is a privilege,” and “[a]dmission to practice is based upon the grade made on the examination if one is taken, moral qualifications, and mental and emotional stability”).

State Bar of Cal., Rules of the State Bar of California tit. 4, div. 1., R. 4.40(A)-(B) (2008), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf (stating that “[a]n applicant must be of good moral character as determined by the Committee,” and that “[t]he applicant has the burden of establishing that he or she is of good moral character” defined as “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process”).

in which “[t]he applicant has been convicted of a felony or a crime of moral turpitude, or any crime involving a breach of fiduciary
duty, or accepted a deferred judgment which is pending as to such a charge in any jurisdiction”).

www.jud.state.ct.us/CBEC/regs.htm#VI (noting that a felony conviction “creates a presumption of and may result, in the absence
evidence to the contrary, in a finding of lack of good moral character and/or fitness to practice law”).

courts.state.de.us/forms/download.aspx?id=28388 (Delaware requires that all applicants obtain a “preceptor” who must certify that
the applicant “is a person of good moral character and reputation,” and must “have sufficient personal knowledge of the applicant's
background, or make a reasonable investigation into the applicant's background from independent sources other than the applicant
or the applicant's family”).

dccourts/docs/DCCA_Rules.pdf (“No applicant shall be certified for admission by the Committee until the applicant demonstrates
good moral character and general fitness to practice law.”); see In re Manville, 538 A.2d 1128, 1133 n.4 (D.C. 1988) (en banc); In
re Polin, 596 A.2d 50, 53 n.4 (D.C. 1991) (each listing factors courts will consider when assessing whether a bar applicant with a
felonious criminal history has demonstrated sufficient rehabilitation to enter the legal profession).

www.floridabarexam.org/public/main.nsf/rules.html (stating that “[a] person who has been convicted of a felony is not eligible to
apply until the person's civil rights have been restored,” which is not an automatic occurrence in Florida, instead it requires an
application).

www.gabaradmissions.org/pdf/admissionrules.pdf (making no mention of a felony conviction, but noting “[i]f, during the
investigation of an applicant, information is obtained which raises a question as to the applicant's character or fitness to practice
law, the Board may require the applicant to appear, together with his or her counsel if he or she so desires, before the Board or any
designated member for an informal conference concerning such information”).

Supreme Court of the State of Haw., Rules of the Supreme Court of the State of Hawai'i R. 1.3(c)-(e) (2006), available at http://
www.state.hi.us/jud/crules/scrules.htm#Rule_1.3 (making no mention of felony convictions, but stating “[a] lawyer should be one
whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to
them,” and that “[a] record manifesting deficiency in ... respect for the law shall be grounds for denying an application”).

rules/ibcr.pdf (“Conviction of a serious crime,” defined to include “any felony,” “shall constitute criteria for disqualification of an
applicant.”).

Bd. of Admissions to the Bar and the Comm. on Character and Fitness of the Supreme Court of Ill., Rules of Procedure R. 6.4(a)
unlawful conduct “should be treated as cause for further detailed inquiry before the Committee decides whether the law student
registrant or applicant possesses the requisite character and fitness to practice law”).

www.in.gov/judiciary/rules/ad_dis/ad_dis.pdf (“Anyone who has been convicted of a felony prima facie shall be deemed lacking the
requisite of good moral character.”).

Iowa Legislature, Court Rules ch. 31, R. 31.9(1) (2008), available at http://www.legis.state.ia.us/DOCS/ACO/CR/
LINC/03-26-2010.chapter.31.pdf (making no mention of felony convictions, but simply stating that “[t]he Iowa board of law
examiners shall make an investigation of the moral character and fitness of any applicant and may procure the services of any bar
association, agency, organization, or individual qualified to make a moral character or fitness report”).
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363 Ky. Bar Ass’n, Rules of the Supreme Court of Kentucky R. 2.011 (2008), available at http://www.kyoba.org/rules/scr2.011.pdf (making no mention of felony convictions, but stating “[t]he applicant shall have the burden of proving that he or she is possessed of good moral character” and that “‘good moral character’ includes qualities of honesty, fairness, responsibility, knowledge of the laws of the state and the nation and respect for the rights of others and for the judicial process”).

364 La. Supreme Court Comm. on Bar Admissions, Admission Rules R. XVII, § 5(E)(21) (2008), available at http://www.lascba.org/admission_rules.asp (“Conviction or a plea of guilty or ‘no contest’ to any misdemeanor or felony, including juvenile proceedings” “should be considered to be a basis for investigation and inquiry before recommending admission.”).

365 Me. Bd. of Bar Exam’rs, Maine Bar Admission Rules R. 9(a) (2009), available at http://www.mainebarexaminers.org/PDFFiles/MBAR0109.pdf (making no mention of felony convictions, but stating “[e]ach applicant shall produce to the Board satisfactory evidence of good moral character,” and “[t]he attributes of character that are relevant to this determination are those pertinent to the trust placed in lawyers by the public and clients as well as to the requirement that lawyers in this state comply with the Maine Bar Rules”.

366 Court of Appeals of Md., Rules Governing Admission to the Bar of Maryland R. 5(a) (2009), available at http://www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf (making no mention of felony convictions, but noting that “[t]he applicant bears the burden of proving ... good moral character and fitness for the practice of law,” and “[f]ailure or refusal to answer fully and candidly any question set forth in the application or any relevant question asked by a member of the Character Committee, the Board, or the Court is sufficient cause for a finding that the applicant has not met this burden”).

367 Mass. Supreme Judicial Court Bd. of Bar Exam’rs, Rules of the Board of Bar Examiners R. V.1, V.2.2 (2008), available at http://www.mass.gov/bbe/barrules.pdf (stating that “[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of a candidate may constitute a basis for denial of a recommendation for admission,” and “[f]actors such as incarceration, probation, restrictions of parole still in effect, current unsatisfied judgments or unfulfilled sentences, while not determinative, generally are considered to indicate that the rehabilitation process has not been completed.” Additionally, “[t]he candidate shall have the burden to establish by clear and convincing evidence his or her current good character and fitness”).

368 Mich. Bd. of Law Exam’rs, Rules, Statutes and Policy Statements R. 1(B)-1 (2009), available at http://courts.michigan.gov/supremecourt/BdofLawExaminers/BLE Rules, Statutes, and Policy Statements.pdf (making no mention of felony convictions, but defining “good moral character” as the “propensity on the part of the person to serve the public in a fair, honest, and open manner,” and commenting that “[t]he Board [of Law Examiners] considers ‘fair’ to mean legitimately sought, done, given, etc., for example, proper under the rules; courteous; civil; in a fair manner”).

369 Minn. State Bd. of Law Exam’rs, Character and Fitness for Admission to the Bar: A Guide to the Character and Fitness Standards and Investigation of Applicants to the Bar in Minnesota question 8 (2007), available at http://www.ble.state.mn.us/character_and_fitness.html (“There is no type of misconduct that will automatically render an applicant ineligible for admission to the Minnesota Bar. The Board makes a current assessment of character and fitness for each applicant. If an applicant has a history of serious misconduct, an applicant may still be eligible for admission. The applicant must show evidence of rehabilitation and current good character.”).

370 Miss. Bd. of Bar Admissions, Rules Governing Admission to the Mississippi Bar R. VIII, § 6 (1991), available at http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_admission_msbabar.pdf (“Every person who has been or shall hereafter be convicted of a felony, in a court of this or any state or a court of the United States, manslaughter or a violation of the Internal Revenue Code excepted, shall be incapable of obtaining a license to practice law.”).

371 Mo. Supreme Court Rules, Rules Governing the Missouri Bar and the Judiciary R. 8.04(a) (2003), available at http://www.courts.mo.gov/page.jsp? id=46 (follow “Rules Governing the Missouri Bar and the Judiciary--Rules 1-18”) (“Any person, whether sentence is imposed or not, who has pleaded guilty or nolo contendere to or been found guilty of any felony of the United
States, this state, any other state or any United States territory is not eligible to apply for admission to the bar of this state until five years after the date of successful completion of any sentence or period of probation as a result of the conviction, plea, or finding of guilt.

State Bar of Mont., Rules of Procedure of the Commission on Character and Fitness of the Supreme Court of Montana § 4(h) (1998), available at http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6 (“An applicant found guilty of a felony is conclusively presumed not to have present good moral character and fitness. The presumption ceases upon completion of the sentence and/or period of probation.”).

Neb. Judicial Branch, Nebraska Supreme Court Rules § 3-103(C) (2008), available at http://www.supremecourt.ne.gov/rules/pdf/Ch3Art1.pdf (stating that “[a] record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission,” and listing, as one of these essential eligibility requirements, “[t]he ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct”).

Supreme Court of Nev., Nevada Supreme Court Rules R. 51(1)(d) (2009), available at http://www.leg.state.nv.us/CourtRules/SCR.html (making no mention of felony convictions, but stating that “[a]n applicant for a license to practice as an attorney and counselor at law in this state shall ... [d]emonstrate that the applicant is of good moral character and is willing and able to abide by the high ethical standards required of attorneys and counselors at law”).

Supreme Court of the State of N.H., Rules of the Supreme Court of the State of New Hampshire R. 42(5)(a), (j) (2010), available at http://www.courts.state.nh.us/rules/scr/scr-42.htm (making no mention of felony convictions, but stating that “[i]f the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation.” Further, “[t]he committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters”).

N.J. Comm. on Character, Regulations Governing the Committee on Character § 202:8(a) (2002), available at http://www.njbarexams.org/commchar/char.htm (“A candidate who is on probation or parole from a sentence for a criminal offense shall not be eligible for consideration by the Committee until the probation or parole has been successfully completed.”).

N.M. Bd. of Bar Exam'r's, Rules Governing Admission to the Bar R. 15-103(C)(3)(a) (2008), available at http://www.nmexam.org/rules/rules103.htm (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated as cause for further inquiry before the Board determines whether the applicant possesses the character and fitness to practice law”).

N.Y. State Bd. of Law Exam'r's, Rules of the Court/Board of Law Examiners § 520.12(a), (c) (2000), available at http://www.nybarexam.org/Rules/Rules.htm (making no mention of felony convictions, but noting only that “[e]very applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness requisite for an attorney and counselor-at-law,” and that “[t]he Appellate Division in each department may adopt for its department such additional procedures for ascertaining the moral character and general fitness of applicants as it may deem proper”).

Bd. of Law Exam'r's of the State of N.C., North Carolina Board of Law Examiners Character and Fitness Guidelines (2001), available at http://www.ncble.org (follow “Character & Fitness” hyperlink) (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated as cause for further inquiry before the Board decides whether the applicant possesses the requisite character and fitness to practice law”).

N.D. Supreme Court, North Dakota Admission to Practice Rules R. 2(B)(1)(c)(1) (2009), available at http://www.ndcourts.com/rules/Admission/frameset.htm (making no mention of felony convictions, but stating that “[w]hen an applicant's record of conduct includes inappropriate behavior ... the [State Board of Law Examiners] will make further inquiry before deciding whether the applicant..."
possesses the good moral character and fitness to practice law required for a positive recommendation,” and noting that inappropriate behavior includes “unlawful conduct”).

381 Supreme Court of Ohio & Ohio Judicial Sys., Supreme Court Rules for the Government of the Bar R. I § 11(D)(5)(a)(i)-(iii) (2009), available at http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1 (“If an applicant has been convicted of a felony under the laws of this state, the laws of the United States, or the laws of another state or territory of the United States, or adjudicated a delinquent child for conduct that, if committed by an adult, would be such a felony, the applicant shall undergo a review by the Board of Commissioners on Character and Fitness in accordance with Section 12 of this rule, and the applicant may be approved for admission only if all of the following apply: (i) More than five years have passed since the applicant was released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained; (ii) The rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon; (iii) The applicant is not disqualified by law from holding an office of public trust.”); see also Supreme Court of Ohio & Ohio Judicial Sys., Summary of Character and Fitness Process in Ohio, Special Provisions for Applicants with Felony Records (2010), available at http://www.supremecourt.ohio.gov/Boards/characterFit/CFProcess.pdf (“There is no per se bar to admission for applicants with felony records. However, an applicant who has a felony record must prove full and complete rehabilitation and satisfy special temporal and substantive conditions. The applicant is also subject to additional scrutiny, including a mandatory review by the Board, even if a local Admissions Committee has recommended an unqualified approval of the applicant. Applicants who have been convicted of the most serious kinds of felonies-- aggravated murder, murder, attempted murder, or rape--must undergo yet another review by, and receive approval from, the Supreme Court itself.”).

382 Okla. Supreme Court, Rules Governing Admission to the Practice of Law in the State of Oklahoma R. I, § 1 (2009), available at http://www.okbbe.com/docs/rules_governing_admission.pdf (making no mention of felony convictions, but stating “[t]o be admitted to the practice of law in the State of Oklahoma, the applicant ... shall have good moral character, due respect for the law, and fitness to practice law”).

383 Or. State Bd. of Bar Exam’rs & Or. Supreme Court, Rules for Admission of Attorneys R. 3.10 (2009), available at http://www.osbar.org/_ docs/rulesregs/admissions.pdf (“An applicant shall not be eligible for admission to the Bar after having been convicted of a crime, the commission of which would have led to disbarment in all the circumstances present, had the person been an Oregon attorney at the time of conviction.”).

384 Pa. Bd. of Law Exam’rs, Pennsylvania Bar Admission Rules R. 203(b)(2) (1999), available at http://www.pabarexam.org/bar_admission_rules/203.htm (making no mention of felony convictions, but stating “[t]he general requirements for admission to the bar of this Commonwealth are ... absence of prior conduct by the applicant which in the opinion of the Board [of Law Examiners] indicates character and general qualifications (other than scholastic) incompatible with the standards expected to be observed by members of the bar of this Commonwealth”).

385 Judiciary of Rhode Island, Committee on Character and Fitness, http://www.courts.state.ri.us/supreme/bar/characterfitness.htm (last visited Apr. 1, 2010) (“Established by the Supreme Court in 1988, the Committee on Character and Fitness determines the moral fitness of Rhode Island Bar applicants by scrutinizing their finances, legal training, and criminal records, if any. Additionally, applicants must participate in a personal interview. If further review is warranted following the interview, applicants may be referred to the full committee for a hearing. A recommendation is then made to the Supreme Court as to whether or not an applicant should be admitted to the bar or even be allowed to take the bar examination. The Supreme Court may either grant the applicant's request or require the applicant to show cause why the court should grant the request.”).

386 S.C. Judicial Dep't, South Carolina Appellate Court Rules R. 402(c)(2), (4) (2010), available at http:// www.judicial.state.sc.us/ courtReg/displayRule.cfm?ruleID=402.0&subRuleID=& ruleType=APP (making no mention of felony convictions, but noting that “[n]o person shall be admitted to the practice of law in South Carolina unless the person ... is of good moral character,” and “has been found qualified by a panel of the Committee on Character and Fitness”).

Determinations in South Dakota, “[u]nlawful conduct, including cases in which the record of arrest or conviction was expunged, with the exception of juvenile arrests and dispositions unless they pertain to a serious felony” “may be cause for further inquiry”).

Tenn. Bd. of Law Exam'rs, Tennessee Supreme Court Rules R. 7, art. 6, § 6.01(a) (1992), available at http://www.state.tn.us/lawexaminers/docs/rul7.pdf (“An applicant shall not be admitted if in the judgment of the Board there is reasonable doubt as to that applicant's honesty, respect for the rights of others, and adherence to and obedience to the Constitution and laws of the State and Nation as to justify the conclusion that such applicant is not likely to adhere to the duties and standards of conduct imposed on attorneys in this State. Any conduct which would constitute grounds for discipline if engaged in by an attorney in this State shall be considered by the Board in making its evaluation of the character of an applicant.”).  

Tex. Bd. of Law Exam'rs, Rules Governing Admission to the Bar of Texas R. IV(d)(2) (2002), available at http://www.ble.state.tx.us/Rules/NewRules/ruleiv.htm (“An individual guilty of a felony under this rule is conclusively deemed not to have present good moral character and fitness and shall not be permitted to file a Declaration of Intention to Study Law or an Application for a period of five years after the completion of the sentence and/or period of probation.”).  

Utah Office of Bar Admissions, Rules Governing Admission to the Bar R. 14-708(f)(3) (2006), available at http://www.utcourts.gov/resources/rules/ucja/ch14/07%20Admissions/USB14-708.html (“A rebuttable presumption exists against admission of an applicant convicted of a felony offense. For purposes of this rule, a conviction includes entry of a nolo contendre [sic] (no contest) plea. An applicant who has been convicted of a felony offense is not eligible to apply for admission until after the date of completion of any sentence, term of probation or term of parole or supervised release, whichever occurred last. Upon an applicant's eligibility, a formal hearing as set forth in this article before members of the Character and Fitness Committee will be held. Factors to be considered by the Committee include, but are not limited to, the nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of a sentence imposed and demonstration of clearly proven rehabilitation.”).  

Vt. Bd. of Bar Exam'rs, Rules of Admission to the Bar of the Vermont Supreme Court § 11(b)(1) (2010), available at http://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules8-18-08.pdf (making no mention of felony convictions, but stating that “[t]he purpose of requiring an applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Rules of Professional Conduct. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the state's legitimate interests in protecting prospective clients and the system of justice.”).  

Va. Bd. of Bar Exam'rs, Character & Fitness Questions: Can a Convicted Felon take the Virginia Bar Exam?, http://www.vbbe.state.va.us/faq/faqcfall.html (“Conviction of a felony is not an absolute bar to taking the Virginia bar exam, but it is a factor which will be considered in determining whether a person can prove by clear and convincing evidence that he/she possesses the requisite good character and fitness to qualify for admission to the Virginia bar. The Board's Character and Fitness Committee of the Board considers the nature of the crime, how long ago it was committed, the punishment, and positive contributions to society since the conviction. A pardon or a restoration of the person's civil rights is certainly a positive factor.”); see also Va. Bd. of Bar Exam'rs, Rules of the Virginia Board of Bar Examiners § III(2)(A) (1993), available at http://www.vbbe.state.va.us/pdf/VBBERules.pdf (making no mention of felony convictions, but noting that “commission or conviction of a crime” “may be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).  

Wash. Courts, Washington State Court Rules: Admission to Practice Rules R. 24.2(a)(1) (2006), available at http://www.courts.wa.gov/ (follow Court Rules, Rules of General Application, Admission to Practice Rules, 24.2 Factors Considered when Determining Character and Fitness) (making no mention of felony convictions, but stating that “unlawful conduct” “shall be considered by the Admissions staff and Bar Counsel when determining whether an applicant shall be referred to the Character and Fitness Board for a determination of the applicant's character and/or fitness to practice law”).  

Supreme Court of Appeals of W. Va., Rules for Admission to the Practice of Law in West Virginia R. 5.0, available at http://www.state.wv.us/wvsca/Bd%20of%20Law/lawprac.htm#Rule 5.0. Requirement of good moral character of applicant (“An applicant
who has previously been convicted of a felony or other serious crime carries a heavy burden of persuading the court that he or she presently possesses good moral character sufficient to be invited into the legal community.”) (citing In re Dortch, 486 S.E.2d 311, 320 (W. Va. 1997)).

Wis. Supreme Court, Wisconsin Supreme Court Rules: Rules of the Board of Bar Examiners § BA 6.02(a) (2009), available at http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=36673 (making no mention of felony convictions, but stating “unlawful conduct” “should be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).

Wy. Judicial Branch, Rules and Procedures Governing Admission to the Practice of Law § IV, R. 401(b)(1) (2010), available at http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=PracticeOfLawAdmission.xml (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated by the Board as cause for non-recommendation or for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).

See Appendix 1. The information in this column appears in more detail in Appendix 1.

Kalt, supra note 9, at 150-57 nn. 376-426. This entire column, and almost all of the terminology that is used to indicate the duration of felon jury exclusion, were taken directly from Brian C. Kalt's article, The Exclusion of Felons from Jury Service (supra note 9). Specifically, I transposed Kalt's “Appendix 1.A: Felon Exclusion Statutes” into this chart to make the necessary comparisons.

To make the topical jurisdictional data comparable, I maintained a crucial aspect of Kalt's methodology. Certain jurisdictions require the restoration of civil rights prior to allowing a convicted felon to rebut a presumption of flawed character during the moral character and fitness determination process. If the restoration of civil rights is not automatic in such jurisdictions, I listed them as per se disqualifying convicted felons from the practice of law permanently. Likewise, if a jurisdiction requires the restoration of a felon's civil rights as a prerequisite for jury service, but does not restore them automatically, Kalt listed them as banning felons from jury service for life.

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NEW MEXICO’S SUCCESS WITH NON-ENGLISH SPEAKING JURORS

Edward L. Chávez*

Since its territorial days New Mexico has encouraged participation of non-English speakers, particularly Spanish-speaking citizens, in its jury system. The New Mexico Constitution adopted in 1911, guarantees all citizens the right to participate on juries.

This article describes New Mexico’s use of court interpreters to successfully incorporate non-English speakers into juries. Included are discussions of New Mexico’s history and background in this practice, practical applications, problems, solutions, and associated costs.

Based on New Mexico’s successful use of non-English speakers on juries, participation of non-English speaking jurors is encouraged for the rest of the United States. New Mexico’s jury instructions for the pre-deliberation oath to be administered to court interpreters and guidance to the jury are included for reference, along with New Mexico’s Non-English Speaking Juror Guidelines prepared by the Administrative Office of the Courts.

Introduction

In America, a jury verdict in a trial that adheres to all constitutional requirements represents one of the most important contributions the judiciary makes to our democracy because justice is a community project. In jury rooms throughout the country, the community directly participates in the community project called “justice.” The American jury system empowers citizens to announce the standard of care they will demand in their communities,¹ the medical care they expect from their doc-

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itors; the level of responsibility they expect from each other; and the safety they expect from manufacturers who sell products in the community. These citizens decide the guilt or innocence of an accused, and are given the awesome power to decide whether a defendant who is found guilty of capital murder is to be sentenced to death.

Because of these powers and responsibilities, juries must truly reflect the diversity of our communities. Whether they are rich, poor, educated, uneducated, professionals, or laborers, citizens over the age of 18, can and must participate in the American civil and criminal justice system. Citizens have a community responsibility to further our free society by promoting safety and security in our country, but they also have a concomitant responsibility to free an accused when the evidence presented at trial does not support a guilty verdict beyond a reasonable doubt. All adult citizens should participate, because above all, justice requires an unapologetic and undaunted courage to exercise one’s moral genius. All people, no matter their station in life or their ability to speak and understand the English language have that moral genius.

New Mexico, like any other state in the United States, has a population of non-English speaking citizens. Non-English speaking citizens are people who cannot speak or understand the English language, speak only or primarily a language other than English, or who have a dominant language other than English, which could inhibit their understanding of legal proceedings. This article argues that non-English speaking citizens should not be systematically excluded from jury service. In New Mexico, we provide interpreters for non-English speaking jurors to allow them to fulfill their civic responsibility and participate in the community project called “justice.”

Further, this article examines the history and background of why New Mexico allows those who are not fluent in English to serve on juries; the practical problems and solutions for assuring effective jury participation by non-English speakers; and, the cost associated with New Mexico’s efforts. For those jurisdictions that may be interested in permitting non-English speaking citizens to serve on juries, New Mexico’s Non-English Speaking Juror Guidelines and relevant jury instructions adopted by the New Mexico Supreme Court are included here.8

History of Non-English Speaking Jurors in New Mexico

Territory of New Mexico v. Romine is the first reported opinion to address the subject of non-English speaking jurors.9 Romine appealed his conviction of first-degree murder because the jurors who convicted him did not understand English. The defendant argued that he had a right to a jury that spoke and understood English. He also argued that juries must be given written instructions, and that since the jury instructions, which were written in English, had to be translated into Spanish for the jury by an interpreter, this jury did not have the required written instructions. The court rejected these arguments by noting that for over 20 years juries in New Mexico had embraced both Spanish- and English-speaking members. At that time the preponderance of Spanish-speaking citizens in New Mexico was very large, “and in certain counties the English speaking citizens possessing the qualifications of jurors, [could] be counted by tens instead of hundreds.”10 The territorial court explained the fairness of allowing non-English speaking jurors to decide the defendant’s guilt or innocence as follows:

The practice under the territorial law has been uniform for a long series of years, and works as little injustice to any parties, whatever their language, as any system that could well be devised under the prevailing conditions. In all counties where the jury contains members representing each language, or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus,

8. See infra app. A.
9. 2 N.M. (Gild., E.W.S. ed.) 114 (1881).
10. Id. at 123.
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every one interested is as fully as possible informed of every pro-
ceeding, and no injustice is done.\footnote{11. \textit{Id.} at 123-124.}

Although the structure of the interpretation services pro-
vided during this trial is not known, the common law practice
of allowing non-English speaking citizens to serve on grand
and petit juries became a state constitutional right when the
New Mexico Constitution was adopted on January 21, 1911.
Article VII, Section 3 provides that “[t]he right of any citizen
of the state to . . . sit upon juries, shall never be restricted,
abridged or impaired on account of . . . inability to speak,
read or write the English or Spanish languages[.]”\footnote{12. N.M.
\textit{CONSTITUTION} art. VII, § 3.} The right to sit upon a jury was included with the right to vote and to hold
public office.\footnote{13. \textit{Id.}} That the rights to vote, hold office, and serve on
a jury were considered extremely important is evidenced by the
constitutional requirement that Article VII, Section 3 can only
be amended if “in an election at which at least three-fourths of
the electors voting in the whole state, and at least two-thirds of
those voting in each county of the state, shall vote for such
amendment.”\footnote{14. \textit{Id}.} In contrast, other constitutional amendments
only require a simple majority of those voting.\footnote{15. See \textit{Id}. art. XIX, § 1.}

Although Article VII, Section 3 is intended to grant all citi-
zens the right to sit upon a jury, the right is not absolute.\footnote{16. State v.
Rico, 52 P.3d 942, 945 (N.M. 2002).} The rights of the prospective juror who does not speak English must
be balanced against other constitutional rights, such as the de-
fendant’s right to a speedy trial as guaranteed by the Sixth
Amendment to the United States Constitution. Practical consid-
erations may also be taken into account by the trial judge. For
example, the availability of interpreters and inadequate funding
for interpreters may permit the exclusion of a non-English
speaking citizen from jury duty, but never will mere inconve-
nience allow such exclusion.\footnote{17. \textit{Id.}} The responsibility of New Mex-
ico courts is to:

\[\text{M}ake\ \text{every\ reasonable\ effort\ to\ protect\ a\ juror’s\ rights\ under\ Article\ VII,\ Section\ 3\ . . . \ and\ to\ accommodate\ a\ juror’s\ need\ for\ the\ assistance\ of\ an\ interpreter\ because\ he\ or\ she\ is\ not\ otherwise}\]

\textit{Id.} at 123-124.
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able to participate in court proceedings due to the ‘inability to speak, read or write the English or Spanish languages.’

What constitutes a reasonable effort depends on several factors, including:

[T]he steps actually taken to protect the juror’s rights, the rarity of the juror’s native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties.

Ultimately, if a court interpreter is not available to provide interpretation services for a juror who is eligible to serve but for the fact that he or she doesn’t speak English, the judge has the discretion to either postpone the trial until a court interpreter is available or to excuse the juror subject to recall. As provided in New Mexico’s Non-English Speaking Juror Guidelines, adopted on November 15, 2000, a judge does not have the discretion to excuse a non-English speaking juror simply because he or she cannot read, write, speak, or understand the English language. Reasonable efforts have included providing a Spanish-speaking interpreter who is also fluent in American Sign Language to assist a juror who is both deaf and Spanish-speaking.

A non-English speaking juror can request excusal from jury service from the presiding judge because he or she is not comfortable using the services of an interpreter in the same way that any other juror can make such a request if he or she would not be comfortable serving as a juror. For example, where a prospective juror is hearing impaired and wears hearing aids, but also needs an interpreter in American Sign Language, there have been several excusals based on incompatibility between the court interpreter’s equipment and the non-English speaking juror’s hearing aid.

Because the legal system is by nature adversarial, interpreters are subject to challenges like anyone else. There have occasionally been complaints about the use of court interpreters for non-English speaking jurors. As detailed later in this article,

18. Id. at 943.
19. Id. at 945.
20. Id. at 946.
21. See infra app. A § II(F).
New Mexico uses a specific jury instruction to explain the interpreter’s role, including the facts that the interpreter must be educated, schooled, and certified in his or her languages of expertise. The interpreter is required to swear during the oath that he or she will only provide translation services to the non-English speaking juror and will not otherwise participate in the trial or jury deliberations. These facts alone eliminate most insecurities and complaints.

Cost of Reasonable Accommodations
New Mexico has a rich, deeply rooted history as a multi-lingual, multi-cultural border state. A review of court records for the last three years reveals that court interpreters in New Mexico have been used to assist jurors in the following languages: Apache, Arabic, American Sign Language, Cantonese, Chinese, Farsi, French, German, Gujarati, Hindi, Italian, Japanese, Keres (Native American), Korean, Laotian, Navajo, Spanish, Tagalog, Russian, and Vietnamese. Spanish is the most common language requiring interpreters, representing about 57 percent of non-English speaking jurors. Vietnamese is in second place, representing approximately 20 percent of the demand for court interpreter services.

Despite the many languages that require the services of court interpreters, for the most part, only a small percentage of the juror pool requires such services. For example, the Second Judicial District Court, located in Albuquerque, the largest district court in New Mexico, only required court interpreter services for 30 out of 4,533 qualified jurors from July 1, 2007 through April 1, 2008. This represents 0.662 percent of the juror population in this judicial district. However, in the Third Judicial District Court in Las Cruces, which is in close proximity to Mexico, the number of non-English speaking jurors has risen dramatically. This phenomenon shows no signs of dissipating. For the months of January, February, and March 2008, 114 non-English speaking jurors appeared for voir dire in the Third Judicial District Court. During those three months, eleven trials went all the way to jury verdict with non-English speaking jurors fully participating.
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The preferred procedure is to have certified court interpreters assist non-English speaking jurors during all phases of the trial.23 A certified court interpreter is a person who has met the certification requirements of the New Mexico Administrative Office of the Courts and who has “a sufficient range of formal and informal language skills in English and another language so that he is readily able to interpret, translate and communicate simultaneously and consecutively in either direction between a non-English speaking person and other parties[].”24 The interpreter both interprets spoken words and translates written words.

New Mexico currently has 269 interpreters who interpret nine different languages. New Mexico’s 269 interpreters are mostly in private practice and are not court staff. There are only five or six actual court staff interpreters, and they are for the most part located in Albuquerque and Santa Fe. One position in Albuquerque is split by two interpreters (job-sharing). New Mexico is a member of a consortium through the National Center for State Courts that works to resolve issues involving language interpreters, including expanding the number of available interpreters and what languages can be interpreted. There are currently 40 states involved in the consortium, and the number of participating states continues to increase. New Mexico recruits, trains, and tests its interpreters and administers the interpreter’s exam, which is the same nationwide for consistency.

Payment of the court interpreter is the largest expense, since most interpreters provide their own equipment.25 At present, spoken language certified court interpreters are paid $46.00 per hour and certified sign language interpreters are paid $60.00 per hour. Looking at the 30 non-English speaking jurors needed in Albuquerque for nine months in 2007 and 2008, the total expense for interpreter services was $8,176.50, or an average of $273.00 per juror. The total expense breaks down as follows: 42 hours to interpret during juror orientation at a

cost of $1,932.00, and 98.25 hours for jury selection at a cost of $4,519.50. Three non-English speaking jurors out of the 30 called for jury service were selected to serve during trials. The interpretation services were for 49.5 hours at a cost of $2,277.00. Two of the trials were simple drug possession cases and the third trial was a civil trial lasting only 17 hours.

Best Practices

Anecdotal reports suggest that non-English speaking jurors have had a positive experience while serving on New Mexico juries. Sandra Caldwell, an interpreter in Las Cruces, New Mexico, has been the primary source for the anecdotal evidence. However, trial judges with whom I have spoken have invariably told me that English-speaking jurors who have served with non-English speaking jurors also report positive experiences. In fact, some people have commented to Sandra Caldwell that it is rather anti-climatic to observe a trial with non-English speaking jurors because it is actually not very different from a jury trial with all English-speaking jurors. A positive experience is only possible if court staff consistently implement important procedures and are respectful of all jurors.

The most significant requirement is that all court personnel, including the trial judge, trial court administrative assistant, jury staff, bailiff, interpreter coordinator, and interpreters receive adequate training and work as a team in assisting non-English speaking jurors. Intensive training takes place at the outset of employment for judges and other staff. Jury staff must be trained to identify and track non-English speaking jurors from the outset and notify all appropriate parties when a non-English speaking juror is called to serve. Therefore, it is extremely important that prospective jurors be asked in the Juror Qualification Form whether they read, write, speak, and understand the English language. If the answer is no, they must be asked which language they speak, read, write, and understand. The Jury Summons in New Mexico also contains, in bold, shadowed, conspicuous print, the following notification: “New Mexico does not exclude non-English speaking jurors from service. If you need an interpreter, one will be provided to you at no cost. If you need this service, please contact jury staff at
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(phone number).” The court staff uses this information to coordinate with an interpreter and notify other court staff that a non-English speaking citizen has been called to jury duty.

It is essential that court staff also be trained to examine juror qualification forms as soon as they are received to identify those citizens who might require the services of an interpreter. Courts must track non-English speaking jurors early in the jury selection process to allow sufficient time to schedule interpreter services. Last-minute attempts to secure interpreter services may be difficult, especially when an interpreter is necessary for both litigants and one or more jurors. It must be kept in mind that when an interpreter is needed for an accused, the accused is entitled to communicate privately with his or her attorney. The same interpreter cannot interpret for both the accused and a juror to avoid the risk that privileged communication will be inadvertently revealed to the non-English speaking juror. This is only one reason why multiple interpreters should be in place when interpretation services are needed for both the defendant and a juror or witness.26

Once the judge and the court staff have received intensive training, the system operates as smoothly as it does when there are no non-English speaking jurors. However, public education is also critical. The Court Services Division of the Administrative Office of the Courts has made a jury orientation video shown to all people summoned for jury duty. This video includes a segment on interpreters for non-English speaking jurors in the jury pool and is closed-captioned in Spanish. During orientation, everyone who has received a jury summons, which can mean up to 1,500 people at a time, comes to the court to learn about the rights, procedures, and obligations of jury duty. From questionnaires sent to prospective jurors, court staff receives information regarding potential excusals due to language issues. During orientation, court staff makes an announcement advising prospective jurors that if anyone is more comfortable speaking in a language other than English, interpreters can be made available. All prospective jurors are citizens, so to some

26. But see State v. Nguyen, 144 N.M. 197, 185 P.3d 368 (N.M. Ct. App. 2008) (holding that absent a showing of prejudice, a defendant is not deprived of a fair trial when a court interpreter is used for both the defendant and a juror).
extent they are functional in the English language. Information about interpreters is primarily made available when prospective jurors come in for orientation, but also comes from the prospective jurors themselves. People who serve as non-English speaking jurors play a role in getting information out to the community at large.

Aside from occasional local coverage about specific cases there has not been much coverage in the popular press about the use of non-English speaking jurors. An article in *USA Today* appeared on February 4, 2000 after the Supreme Court upheld Article VII, Section 3 of New Mexico’s Constitution guaranteeing all citizens the right to sit upon a jury to “never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages[.]” There was also an NPR interview that aired during its *Weekend Edition Sunday* program on February 27, 2000 on this subject.

Public education has been the exclusive responsibility of the judiciary.

**Logistics**

The type of equipment used for interpretation services is key to minimizing disruption during the trial and to preserving the confidentiality of jury deliberations. Wireless audio equipment with headphones is preferable during the trial itself. This permits the juror to sit in the jury box while the interpreter is in a different area of the courtroom where his or her presence will be the least disruptive. The interpreter does not need to be in close proximity to the juror, except for sight translation of exhibits. However, because this equipment transmits sound via radio waves, it should not be used in the jury deliberation room due to the risk that someone might intercept the discussion. During deliberations a wired system offers the security needed, but it requires that the interpreter and non-English speaking juror sit close to one another. The length of wire on the equip-


ment dictates the distance at which the interpreter and the juror must position themselves. Despite close proximity, the interpreter should not sit at the table with the jurors to avoid appearing to be a thirteenth juror.

Although debatable, in my opinion, the same interpreter should be used for both trial and jury deliberations. While it might appear prudent to have different interpreters for each phase of the proceedings because of concerns about the interpreter appearing to be a thirteenth juror, to be effective and accurate, it is often critical that the interpreter have detailed knowledge about the facts of the case. A simple example is when a juror makes a statement during deliberations such as “the cousin testified . . . .” If the interpreter does not know the cousin’s gender, at least in Spanish, the interpretation cannot be accurate. This information can be significant if more than one cousin testifies.

To adhere to ethical behavior and maintain the interpreter’s professional role, interpreters must follow certain protocols with other jurors. The interpreter must only communicate with the jury in his or her role as interpreter, otherwise remaining as invisible as possible and declining to speak directly with other jurors, except to explain a technical problem with equipment.29

Jury Instructions

The Non-English Speaking Juror Guidelines30 suggest that prior to jury deliberations, the trial judge should, on the record and in the presence of the jury, instruct the interpreter not to interfere or participate in any way during jury deliberations.31 In addition, the guidelines recommend that after jury deliberations, but before the verdict is announced, the trial judge should question the interpreter on the record about whether the interpreter abided by the oath given not to participate in the deliberations.32 The guidelines also allow a party to request that the

30. See infra app. A.
31. Id. § III(C)(5).
32. Id. § III(C)(6).
jurors be questioned regarding whether the interpreter improperly participated in the deliberations. In State v. Pacheco, the New Mexico Supreme Court set forth the mandatory steps to follow when an interpreter assists a non-English speaking juror. The court stated:

First, prior to excusing the jury for deliberations, the trial court must administer an oath, on the record in the presence of the jury, instructing the interpreter not to participate in the jury’s deliberations. See NES Guidelines, § III(C)(5). We also require that the interpreter be identified on the record by name, that the interpreter state whether he or she is certified, and that the interpreter indicate whether he or she understands the instructions. In addition to instructing the interpreter, the trial court must also give an instruction to the jury about the interpreter’s role during deliberations. . . .

After deliberations, but before the verdict is announced, the trial court is required to ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations. The interpreter’s response must be made part of the record. Furthermore, at the request of any party, the trial court must allow jurors to be questioned to the same effect. Finally, the trial judge must also instruct the interpreter not to reveal any part of the jury deliberations until after the case is closed.

In addition to the oath given to an interpreter at the beginning of the proceedings, the court offered a pre-deliberation oath for the interpreter and a pre-deliberation instruction to the jury.

Pre-Deliberation Oath to Interpreter

Do you solemnly swear or affirm that you will not interfere with the jury’s deliberations in any way by expressing any ideas, opinions, or observations that you may have during deliberations, and that you will strictly limit your role during deliberations to interpreting?

The court directed that the instruction be read before deliberations whenever a non-English speaking juror is serving on the jury.

33. Id.; State v. Pacheco, 155 P.3d 745 (N.M. 2007).
34. See infra app. A § III(C)(6); Pacheco at 754.
35. Pacheco at 755.
Pre-Deliberation Instruction to Jury

Ladies and gentlemen, we have at least one non-English speaking juror who is participating in this case. The New Mexico Constitution permits all citizens to serve on a jury whether or not English is their first language. You should include this juror(s) in all deliberations and discussions on the case. To help you communicate, the juror(s) will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1) The interpreter’s only function in the jury room is to interpret between English and [the non-English speaking juror(s) native language].

2) The interpreter is not allowed to answer questions, express opinions, have direct conversations with other jurors or participate in your deliberations.

3) The interpreter is only allowed to speak directly to a member of the jury to ensure that the interpreter’s equipment is functioning properly or to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.

4) No gesture, expression, sound or movement made by the interpreter in the jury room should influence your opinion or indicate how you should vote.

5) If you can speak both English and [the language of the non-English speaker], we ask that you speak only in English in the jury room so the rest of the jury is not excluded from any conversation.

6) Leave all interpretations to the official court interpreter [who is trained and certified by the court]. The interpreter should be the only one to interpret conversations inside the jury room and testimony in the courtroom.

7) Any deviation from these rules should be immediately reported by submitting a note identifying the problem to the judge or court personnel.36

Conclusion

Every day in courtrooms throughout the United States, juries are made up of a mix of citizens, those with a professional degree serving with those who do not have a high school diploma; those who are comfortable speaking in groups with those who are shy, reserved, or even inarticulate. So, why should a citizen who has limited English proficiency be automatically excluded from fulfilling a critical civic responsibility? Is it less efficient to allow non-English speaking citizens to par-

36. Id. at 755.
participate in the jury system? Yes. Does it require more effort from judges and staff? Yes. Does it require more rules and jury instructions? Yes. The question remains whether less efficiency, more effort, and more instructions justify the systematic exclusion of non-English speaking citizens from our jury system. New Mexico has answered the question “no.” The problems caused by allowing non-English speaking citizens to participate in a jury system are not insurmountable and the cost is not prohibitive. New Mexico’s experience with non-English speaking jurors has been pleasantly effective. Not only should our non-English speaking citizens enjoy the privileges of citizenship, they should share in the responsibilities. Patriotism requires service to one’s community, and like voting, jury service is an important civic responsibility.
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APPENDIX A
Non-English Speaking Juror Guidelines
Supreme Court of New Mexico
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Administrative Office of the Courts
Non-English Speaking Juror Guidelines37

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37. The Guidelines printed here are taken directly from Pacheco, Appendix C, 141 N.M. at 351-56, 155 P.3d at 756-61. The most current version of the guidelines can be found at http://www.nmcourts.gov/newface/court- interp/guidelinesandpolicies_for_non-english_speaking_jurors.pdf/.
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I. INTRODUCTION

These guidelines are intended to assist in the efforts of the New Mexico Judiciary to incorporate non-English speaking (NES) citizens into New Mexico’s jury system. Because each local court has unique needs and limitations, these guidelines may not be applicable in all courts. Accordingly, these guidelines should not be considered mandatory directives that must be followed in all cases. However, all courts are encouraged to implement the standards set forth below to the fullest extent possible.

II. NON-ENGLISH SPEAKING JUROR ASSISTANCE SERVICES

A. Scope

   Article VII, Section 3, of the New Mexico Constitution provides that “[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or
Spanish languages.” To comply with this constitutional mandate, all courts should strive to incorporate all New Mexico citizens into our jury system regardless of the language spoken by a prospective NES juror. Because most potential NES jurors speak Spanish as their primary language, these guidelines seek to implement statewide standards for accommodating prospective jurors who speak Spanish. However, where financially and logistically possible, all courts are encouraged to implement these guidelines for other languages.

B. Court Interpreters

Upon request by an NES citizen called for jury duty, all courts should appoint a court interpreter to assist the NES juror or prospective juror. In the absence of a specific request for a court interpreter, all courts should independently determine whether a juror or prospective juror is in need of a court interpreter. To make this determination, a court may consider conducting a limited interview of the juror or prospective juror to assess whether the juror or prospective juror is capable of understanding the proceedings in English.

C. Jury Summons

The New Mexico jury summons form should include a statement in Spanish notifying citizens called for jury duty that assistance is available for those who cannot understand English. The Spanish notice should also provide a telephone number that prospective NES jurors may call for further assistance. The Administrative Office of the Courts (AOC) is responsible for producing jury summonses for local courts that will include an appropriate Spanish notice. The AOC will coordinate with local courts to ensure that an adequate number of trained court personnel are available to respond to calls for assistance from prospective NES jurors.

D. Juror Questionnaire

The AOC is responsible for preparing a Spanish version of the juror questionnaire used by local courts. The AOC is also responsible for distributing copies of the Spanish version of the juror questionnaire to all local courts. All local courts should provide a Spanish version of the juror questionnaire upon re-
E. Juror Orientation Materials

The AOC is responsible for distributing to all local courts copies of the Spanish version of jury orientation materials approved by the Supreme Court. To the extent that local courts may provide English language jury orientation materials to prospective jurors, those courts should also make arrangements to provide oral, Spanish translations when needed. Alternatively, courts are encouraged to produce written translations of juror orientation materials.

F. Jury Selection

All courts should make arrangements to have a court interpreter available for prospective NES jurors during the jury selection process. Upon arriving for jury selection, the court should introduce the court interpreter appointed to assist prospective NES jurors and advise prospective NES jurors that they should alert the interpreter if they have any questions during the process. The transcript of proceedings need not include the foreign language statements of the court interpreter or prospective NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for a prospective NES juror.

Although a court interpreter may provide interpretation services for more than one prospective NES juror at a time, a court interpreter ordinarily should not be used to interpret for both a litigant and a prospective NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for both the litigant and the prospective NES juror. Subject to availability, courts are encouraged to avoid using the same court interpreter for jury selection and trial in the same case.

Prospective NES jurors are subject to peremptory challenges and challenges for cause the same as any other prospec-
tive juror. However, a prospective NES juror may not be challenged or excused simply because that juror is unable to read, write, or speak the English language. Moreover, the trial court should not excuse a prospective NES juror who asks to be excused simply because he or she cannot read, write, or speak the English language. Exercising its discretion in ruling on an objection to the service of any NES citizen, the court should consider all facts and circumstances pertaining to service by this juror, as the court would do in ruling on an objection to service by any citizen. In the event that a court interpreter will not be available to provide interpretation services for a prospective NES juror who would otherwise be selected to serve on the jury, the presiding judge may either postpone the proceedings until a court interpreter is available or excuse the juror from service for that proceeding only, provided that the prospective NES juror is recalled for jury selection for the next scheduled proceeding. If an interpreter cannot be obtained after reasonable effort, the prospective NES juror may be excused permanently.

G. Trial Proceedings

All courts should make arrangements to have a court interpreter available for all NES jurors during all trial proceedings. The transcript of proceedings need not include the foreign language statements of the court interpreter or the NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for an NES juror. Although a court interpreter may provide interpretation services for more than one NES juror, a court interpreter ordinarily may not provide interpretation services for both a litigant and an NES juror or for a witness and an NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for the litigants, witnesses, other court participants, and NES jurors. Subject to availability, courts are encouraged to avoid using the same court interpreter for the trial and for jury deliberations.
H. Jury Deliberations

All courts should make arrangements to have a court interpreter available for all NES jurors during all jury deliberations. One court interpreter may provide interpretation services for more than one NES juror at a time during deliberations. To the extent that documentary exhibits are submitted to the jury for consideration during deliberations, the court interpreter assigned to assist NES jurors may provide an oral translation of the written material. With respect to jury instructions submitted to the jury, courts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions.

III. Court Interpretation Standards for NES Jurors

When providing the court interpretation services to NES jurors and prospective jurors as outlined above, all courts should strive to meet the following standards:

A. Certification and Availability Standards

1. Certified

All courts should use certified court interpreters to assist NES jurors during all jury selection, trial, and deliberation proceedings. Certification is governed by the provisions of the Court Interpreters Act, NMSA 1978, §§ 38-10-1 to -8 (1985), as administered by the AOC. Except as otherwise provided below, an uncertified court interpreter should only be used if the requirements of NMSA 1978, Section 38-10-3(B) (1985), are met. In the event that a court must use an uncertified court interpreter, the court should consider briefly examining the uncertified court interpreter to establish the qualifications of the interpreter.

2. Uncertified

All courts may use uncertified court interpreters to assist NES jurors and prospective jurors in completing the juror questionnaire. uncertified court interpreters may also be used during the jury orientation process.
3. Availability

All courts should maintain a list of locally available certified and uncertified court interpreters and submit an updated copy of that list to the AOC by May 1st of each year. For those courts that do not have an adequate number of locally available certified or uncertified court interpreters available to assist NES jurors and prospective jurors, the local court administrator or chief judge should coordinate with the AOC to compile a list of certified and uncertified court interpreters who are available from other areas. The AOC should also assist local courts in the training of local court personnel to assist NES jurors and prospective jurors with the juror questionnaire, jury orientation, and with questions arising outside the context of formal court proceedings.

B. Written Translation Standards

1. Qualification Materials

The AOC will provide all courts with a written, Spanish translation of the juror qualification form and questionnaire translated by a certified court interpreter.

2. Trial Materials

Written materials that are submitted to the jury for consideration during trial or jury deliberations should be orally translated by a certified court interpreter or translated in writing by a certified court interpreter. If a certified court interpreter is not available, the court may use an uncertified court interpreter to orally translate written materials if the requirements of Section 38-10-3(B) are met.

3. Machine Translation

A number of services are available on the Internet and elsewhere that provide free or low-cost translation of written materials from English into a number of other languages. Because machine translation may not be accurate, courts should not use machine translation for written materials that are to be used in formal court proceedings, such as jury instructions or documentary exhibits. Although courts may consider using machine translation for other informational and local orientation materials submitted to jurors and prospective jurors, all courts
are cautioned against relying exclusively on machine translation without human verification of the accuracy of a machine translation.

C. Use and Performance Standards

Because of the demanding and sensitive nature of the services provided by court interpreters appointed to assist NES jurors and prospective jurors, all courts are encouraged to use and instruct court interpreters in accordance with the following standards.

1. Hours of Service

All courts should strive to limit the amount of time that a court interpreter interprets for an NES juror or prospective juror to avoid court interpreter fatigue. Ideally, two court interpreters should be used as a team to provide interpretation services, and each interpreter should avoid interpreting for more than 30-45 minutes without a rest period. Because this may not be logistically feasible in all circumstances, every court should remain sensitive to the risk of court interpreter fatigue. Whenever a court interpreter suspects that the quality of interpretation may become compromised because of fatigue, the interpreter should advise the trial court judge of the need for a period of rest.

2. Oath of Interpreter

Before a court interpreter begins to provide interpretation services for an NES juror or prospective juror during jury selection or trial, the trial judge should administer an oath to the court interpreter in accordance with NMSA 1978, Section 38-10-8 (1985).

3. Pre-Interpretation Interview

Prior to providing interpretation services for an NES juror or prospective juror, with the knowledge and permission of the court, the court interpreter should briefly interview the NES juror or prospective juror to enhance the effectiveness of the interpretation by becoming familiar with the speech patterns and linguistic traits of the NES juror or prospective juror.
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4. Courtroom Explanation of the Role of the Interpreter

Prior to the commencement of proceedings, the trial court judge should explain the role of the court interpreter to those present in the courtroom by explaining that the interpreter was appointed by the court to assist jurors or prospective jurors who do not understand English. The judge should also explain to the jury that the interpreter is only allowed to interpret and that the jurors may not ask the interpreter for advice or other assistance. The judge should also explain that, for those English speaking jurors who may understand the non-English language spoken by the court interpreter, the jurors should disregard what they hear the interpreter say and rely solely on the evidence presented in English.

5. Pre-Deliberation Instructions

Prior to excusing the jury for deliberations, the trial judge should, on the record in the presence of the jury, instruct the court interpreter who will be providing interpretation services for an NES juror that the interpreter should not interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations but should be strictly limited to interpreting the jury deliberations. The trial judge should also ask the court interpreter to affirmatively state on the record that the interpreter understands the trial judge’s instructions.

6. Post-Deliberation Instructions

Following jury deliberations but before the jury’s verdict is announced, the trial judge should ask the court interpreter on the record whether the interpreter abided by his or her oath to act strictly as an interpreter and not to participate in the deliberations. The interpreter’s identity and answers should be made a part of the record. At the request of a party to the litigation, the jurors may also be questioned to the same effect. The trial judge should also instruct the court interpreter not to reveal any aspect of the jury deliberations after the case is closed.

7. Equipment

With the assistance of the AOC, all courts should make arrangements to provide equipment for use by a court interpreter
who will be providing interpretation services for NES jurors. The AOC will develop standards and seek funding to acquire adequate equipment for use by court interpreters throughout the state who will be providing interpretation services for NES jurors and prospective jurors. The equipment should allow interpreters to provide interpretation services for multiple persons with minimum disruption of the court proceedings.

To the extent that the AOC and local courts are unable to provide court interpreters with interpretation equipment, all court personnel should assist court interpreters with the logistical arrangements for providing interpretation services whenever possible. Accordingly, prior to jury selection or trial proceedings, court personnel should identify the number of NES jurors or prospective jurors scheduled to appear in court. This information should be provided to the appointed court interpreter so that the interpreter can make arrangements for the appropriate equipment and seating arrangements. The interpreter should obtain the prior approval of the trial court if special equipment and seating arrangements are needed. The bailiff should inform counsel if any seating changes have been made to accommodate NES jurors or prospective jurors.

IV. COURT INTERPRETATION COSTS

A. Jury and Witness Fee Fund

All costs associated with administering these guidelines and providing services for NES jurors and prospective jurors should be paid from the Jury and Witness Fee Fund. To the extent that such costs are initially incurred at the local court level, local courts may seek reimbursement from the Jury and Witness Fee Fund.

B. Interpreters in Civil Cases

The costs for a court interpreter to provide interpretation services to an NES juror or prospective juror in civil cases should be paid by the court through the Jury and Witness Fee Fund.
C. Interpreter Compensation

Court interpreters appointed to provide interpretation services for NES jurors or prospective jurors should be paid at a fixed rate in accordance with the approved fee schedule established by the AOC. However, all courts are free to employ a certified interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

V. COURT INTERPRETER RECRUITMENT AND TRAINING

A. Administration

The AOC is responsible for the recruitment and training of court interpreters to provide interpretation services for NES jurors and prospective jurors. Consistent with the New Mexico Judicial Branch Personnel Rules, local court personnel are encouraged to train for and become certified as court interpreters.

B. Special Training

The AOC, in consultation with the Court Interpreters Advisory Committee, see NMSA 1978, § 38-10-4 (1985), will develop supplemental training standards for court interpreters who will provide interpretation services for NES jurors and prospective jurors. These standards should be incorporated into the general certification process for all new court interpreters.

EFFECTIVE DATE:
Guidelines are effective November 15, 2000

__________________
John M. Greacen
Director, Administrative Office of the Courts

__________________
Date
Embedded Experts on Real Juries: A Delicate Balance

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EMBEDDED EXPERTS ON REAL JURIES:
A DELICATE BALANCE†

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ABSTRACT

“Experts” appear in the modern American courtroom on the jury as well as in the witness box, posing a dilemma for the legal system by offering a potentially valuable resource and an uncontrolled source of influence. Courts give ambiguous guidance to jurors on how they should handle their expertise in the deliberation room. On the one hand, jurors are told that they should “decide what the facts are from the evidence presented here in court.” By direct implication, then, jurors should not use outside information to evaluate the evidence. Jurors are also told, however, that they should “consider all of the evidence in the light of reason, common sense, and experience.” And indeed, all decision makers, including jurors, are unavoidably influenced by their own backgrounds and experiences as they evaluate evidence and reach decisions.

In this Article we examine the actual and desirable behavior during deliberations of jurors with specialized expertise. We draw on three sources to assess how often citizens with specialized knowledge serve as jurors, how they behave when they do, and how legal

† This research was supported by early research grants from the State Justice Institute (Grant SJI-97-N-247), the National Science Foundation (Grant SBR9818806), and continued funding from the American Bar Foundation and Northwestern University Law School. The videotaping project was made possible by the interest of the Arizona judiciary in examining juries with an eye toward optimizing the jury trial. For more detail on the background of the study, see Diamond et al., infra note 61.

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professionals view the appropriateness of the contributions juror-experts may make. Our sources include: (1) a survey of 167 experienced trial attorneys who reported on their recent trial experience with juror “experts”; (2) the actual deliberations of jurors in fifty civil trials from the Arizona Jury Project, which revealed how real jurors use their expertise in the jury room; and (3) a survey of 128 judges and attorneys who evaluated examples of “expert” juror behavior.

Some scholars suggest that jurors with specialized expertise should be excused for cause. In light of our findings, we conclude that such drastic intervention is unwarranted and would inappropriately undermine the increasing heterogeneity on the jury that the elimination of occupational exemptions has worked to promote. We instead advocate a tempered response to the growing presence of juror expertise in the jury room.
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IV. WHAT (IF ANYTHING) SHOULD BE DONE ABOUT JUROR-EXPERTS?
“[W]hile the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra facts into the jury room.”

—Judge Irving Goldberg

INTRODUCTION

Juries have become increasingly representative over time. No longer are juries the exclusive domain of white male property-owners deemed (by a court official) to be of good character. Although the modern jury is not fully representative of the community, changes in eligibility requirements and methods of summoning jurors have made the modern jury far more heterogeneous than it has ever been. Much of the recent push for juries representing a cross-section of the community has focused on removing racial and gender restrictions, albeit with mixed success, but jury reform efforts have also led to the elimination of most occupational exemptions. If jury service is viewed as a responsibility and opportunity that all able-bodied citizens should share, it is hard to justify excluding citizens from service based on occupation. Consistent with this view, jurors with specialized occupational expertise are now eligible to appear on the jury as well as in the witness box.

and, as the data we present reveal, they are appearing not only in jury venires but also on juries. These jurors create a dilemma for the legal system, offering a potentially valuable resource and an uncontrolled source of influence.

Other changes in the trial intersect with the potential for specialized juror expertise. Evidence in the modern American jury trial increasingly includes scientific, technical, or other specialized knowledge. The trial court plays the role of gatekeeper when a party proposes to have an expert testify, vetting the expert’s credentials and the nature of the testimony being offered. Experts permitted to appear as witnesses answer only legally relevant questions posed in open court and are subject to cross-examination by opposing counsel. Jurors often receive a special instruction on how to evaluate expert testimony. Yet not all nonlegal expertise that enters the jury room may come from the witness stand. Nor may all legal expertise come from the judge. Until recently, most states excluded from jury service individuals in particular occupations (e.g., physicians, lawyers, clergy), but that has changed. In

6. See infra Part II; see, e.g., Alexandra Stevenson, Jury of 7 Women and 5 Men Chosen for Martoma Trial, N.Y. Times Dealbook (Jan. 9, 2014, 4:33 PM), http://dealbook.nytimes.com/2014/01/09/jury-of-7-women-and-5-men-chosen-for-martoma-trial (reporting that the jury selected for the insider-trading trial of a former hedge fund manager included “an insurance underwriter,” a law-school graduate employed by an accounting firm, and “an employment and labor lawyer”).


8. For example, under Federal Rule of Evidence 702, the party offering the expert must show that the expert has “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702. Further, the testimony offered must be “based upon sufficient facts or data,” and must be “the product of reliable principles and methods.” Id. Finally, the expert must have “applied the principles and methods reliably to the facts of the case.” Id.

9. See FED. R. EVID. 402, 611.

10. See, e.g., State Bar Ariz., Revised Arizona Jury Instructions (Civil) 8 (5th Ed. 2013) (hereinafter Arizona Jury Instructions] (“A witness qualified as an expert by education or experience may state opinions on matters in that witness’s field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness’s qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.”).

11. Sobol, supra note 5, at 165 n.38.

12. See AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS 54, 61 (2005), available
recent years, states have reduced their occupational exemptions; over half of all states now have no automatic exemptions.\footnote{Id.; Shauna M. Strickland et al. eds., STATE COURT ORG., http://www.ncsc.org/seo (click “List of Tables”; select “Trial Juries: Exemptions, Terms of Service, and Payment”; select “Exemptions and Terms of Service”). For example, as of July 2006, Indiana eliminated all automatic exemptions. Previously, licensed dentists and veterinarians were excused, as well as members in active service of the armed forces, elected or appointed governmental officials, honorary military staff officers appointed by the governor, members of the board of school commissioners of the city of Indianapolis, and members of police or fire departments. Ind. Pub. L. No. 1-2005 § 216 (2005) (amending IND. CODE § 33-28-4-8).} The result is that venires are more likely to include prospective jurors who have specialized expertise.

According to conventional wisdom, even if jurors with relevant occupational expertise appear in the venire, they are likely to be removed. If the judge does not excuse such jurors, the attorneys will use peremptory challenges during jury selection to remove all jurors whose backgrounds indicate particular expertise relevant to the case. Nurses will be excused from cases involving medical claims; engineers will be removed by peremptory challenge if one of the parties plans to introduce technical engineering testimony; attorneys will inevitably be excused. In fact, this picture turns out to be inaccurate. As we show in two studies reported below, the modern American jury frequently includes jurors with relevant occupational expertise. Moreover, some successful attorneys with extensive trial experience may actually welcome these embedded experts to serve on the juries they select.

Jurors typically receive no guidance on how their own expertise, as opposed to witness expertise, should be handled. On the one hand, jurors are told, “You will decide what the facts are from the evidence presented here in court.”\footnote{ARIZONA JURY INSTRUCTIONS, supra note 10, at 5.} By direct implication, jurors should not use outside information to evaluate the evidence. Jurors are also told, however, that they should “[c]onsider all of the evidence in the light of reason, common sense, and experience.”\footnote{Id. at 7.}
Indeed, all decision makers, including jurors, are unavoidably influenced by their own backgrounds and experiences as they evaluate evidence and reach decisions. Moreover, one valuable characteristic of the jury is the mixture of experiences that its members bring to the task of resolving conflicting and uncertain claims. What is less clear is the role that these embedded “juror-experts” should play in deliberations and how other jurors should consider the purported knowledge of these jurors who come to the trial with specialized expertise. In this Article we explore both the desirable range of behavior by jurors with specialized expertise and the actual behavior of jurors with specialized expertise during jury deliberations. Based on this investigation, we consider the appropriate response of the legal system to juror expertise.

We begin in Part I by reviewing the variety of approaches courts take when they learn that jurors have specialized knowledge that may impact jury deliberations. In Part II we present two studies that reveal how pervasive specialized juror knowledge has become in the modern jury trial and provide evidence tracking the behavior of these juror-experts during deliberations. In Part III we consider what behavior is desirable and attainable when embedded experts are seated on a jury. Finally, in Part IV we suggest an approach to


18. We refer to these jurors as “juror-experts” because of their specialized knowledge relative to others on the jury. The term “expert” is not used to imply that the juror would qualify to testify as an expert.
I. STANDARD LEGAL CONTROLS ON SPECIALIZED JUROR KNOWLEDGE

We begin by examining how courts typically delineate the boundaries of appropriate juror behavior when a juror possesses knowledge based on information gleaned outside the trial. In evaluating court responses, it is important to recognize that courts are reluctant to entertain any challenge to the verdict of a jury based on what has occurred during jury deliberations. The rationales are that deliberations should be free of constraint and insulated from outside pressure and that the stability and finality of verdicts should be protected. Nonetheless, when reliable evidence emerges that jurors have sought information from external sources during the trial—whether from people, newspapers, the Internet, or dictionaries—trial courts generally view that juror behavior as misconduct and may order a new trial. Similarly, if a juror inspects the scene of an accident or the crime at issue in the case, courts agree that the juror has not fulfilled the obligation to draw solely on the evidence presented at trial. Although this behavior reflects juror efforts to understand the evidence and to reach well-informed verdicts, these actions are out of bounds and can be understood as explicit violations of the court’s instructions to the jury. Reflecting this prohibition on gathering extra-trial information, Federal Rule of Evidence 606(b) recognizes evidence of “extraneous prejudicial information [that] was improperly brought to the jury’s attention” as a basis for inquiry into the validity of a verdict. This inquiry is an exception to the usual protection
extended to jury deliberations that limits the use of juror testimony to impeach a jury verdict.  


24. See TEX. R. EVID. 606(b) (permitting a juror to testify only concerning “(1) whether any outside influence was improperly brought to bear upon any juror; or (2) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.”).


26. State v. Aguilar, 818 P.2d 165, 167 (Ariz. Ct. App. 1991); see also State v. Dickens, 926 P.2d 468, 483 (Ariz. 1996) (holding that juror mechanic’s statement that defendant’s truck could not have overheated because there was no evidence that the motor was rusty was not extrinsic information improperly brought into the jury room).
ties that contradicted the testimony of the defense expert on the likelihood that the death was an accident. Other courts have found that a party waived the right to object to a juror’s use of occupation-ally based expertise during deliberations by failing to exercise a peremptory challenge to remove that juror during jury selection.

In contrast, some courts have responded to evidence that a juror employed specialized knowledge by characterizing the behavior as juror misconduct. In light of that determination, the court must then decide whether the behavior was harmless or whether it warrants a new trial. When courts do examine the nature of the expertise employed and its likely impact during deliberations, their analyses reveal the difficulty in balancing the value of the juror’s contribution against its invisibility to the parties and the consequent lack of control that results. Thus, in State v. Scott, during deliberations a Marine juror used his expertise with weaponry and ammunition to question evidence presented at trial. The court determined that his discussion of the lack of penetrating power of reloaded ammunition “extended beyond common knowledge [and] into specialized expertise.” Because the juror’s contribution during deliberations effectively explained the conflict between the experts’ theories in the State’s favor without giving the defendant an opportunity to respond, the court found that it was misconduct that injected specialized extrinsic evidence into deliberations and warranted a new trial.

The ambivalence of courts faced with evidence that jurors have employed their specialized experience during deliberations was most poignantly demonstrated in People v. Maragh. A New York trial court was presented with evidence that two nurses on a jury had

31. Id. at *3.
32. Id.
33. 729 N.E.2d 701 (N.Y. 2000).
influenced the verdict by providing “non-evidentiary assessments regarding the volume of blood loss necessary to cause ventricular defibrillation.”

Expert testimony had disputed the cause of death. The prosecution argued that the defendant had repeatedly punched his girlfriend in the abdomen, causing substantial blood loss that resulted in death. This theory relied on expert testimony that the cause of death was blunt force trauma to the abdomen, with massive internal bleeding. Defense experts testified that the reported blood loss was inadequate to cause death and found that the ventricular fibrillation and congested blood vessels noted in the autopsy report “were consistent with death from an air embolism or other cardiac event” rather than with death from a loss of blood. Post-trial hearings revealed that one of the two nurse-jurors told the other jury members that the volume of blood loss was sufficient to cause ventricular fibrillation resulting in death. The other nurse-juror “performed personal estimations of the blood volume loss and shared them with the rest of the jury.” The jury convicted and the trial court granted a new trial on grounds of juror misconduct.

The Appellate Division reversed, based in part on a finding that the defense had waived any objection because of what it had learned about the nurses during jury selection. A further appeal to New York’s highest court resulted in a reinstatement of the trial court’s order directing a new trial. In a unanimous opinion, the New York Court of Appeals acknowledged that “[g]enerally, a jury verdict may not be impeached by probes into the jury’s deliberative process.” Nonetheless, the court found a showing of improper influence that warranted an exception to the general rule and ordered a new trial based solely on the post-trial hearing indicating that the nurse-jurors had improperly used their professional expertise to insert

34. Id. at 703.
35. Id. at 702.
36. Id.
37. Id. at 702-03.
38. Id. at 703.
39. Id.
40. Id. at 702.
42. Maragh, 729 N.E.2d 701, 701 (N.Y. 2000).
43. Id. at 703.
medical opinions regarding material issues into the deliberation process. The court rejected the notion that voir dire can “immunize juror misconduct at the deliberation stage.” While characterizing the jurors’ behavior as misconduct, the court acknowledged the modern trend toward reducing professional exemptions from jury service and the value of having professional individuals contribute their “wisdom and life experiences to the deliberative process.” The court also admitted that “[i]t would be unrealistic to expect jurors to shed their life experiences in performing this important civic duty just because they are professionals.

Maragh palpably reflects the ambivalence of the legal system about juror expertise, expressed as courts strive to provide guidance and support competent jury performance, while at the same time exercising restraint and avoiding interference with the deliberations of a valued democratic institution. The result is a lack of clarity reflected in the various “rules” courts purport to use in drawing the distinction between legitimate use of specialized knowledge and illegitimate use. The following is a sampling of these “rules”:

(1) Juror background knowledge is permitted up to the point at which it would be considered “specialized knowledge” and hence would require the testimony of an expert witness instead of a lay witness under Rules 701 and 702.

44. Id. at 703-05.
45. Id. at 706.
46. Id. at 705 (citing Judith S. Kaye, A Judge’s Perspective on Jury Reform from the Other Side of the Jury Box, 36 JUDGES’ J., Fall no. 4, 1997, at 21).
47. Id.
48. Compare State v. Briggs, 776 P.2d 1347, 1355-57 (Wash. Ct. App. 1989) (finding juror misconduct when a juror did not disclose his personal experience with speech problems when questioned about the general topic on voir dire and then discussed that experience with other jurors in deliberations), and State v. Scott, 89 Wash. App. 1064, No. 3925-1-4-I, 1998 WL 139013, at *2-3 (Wash. Ct. App. 1998) (finding juror misconduct when a juror who revealed his military training during voir dire did not disclose his specialized knowledge about ammunition because he was not specifically asked about it, and then discussed it with other jurors in deliberations), with Richards v. Overlake Hosp. Med. Ctr., 796 P.2d 737, 743 (Wash. Ct. App. 1990) (finding no juror misconduct when a juror with medical training that was revealed during voir dire used specialized knowledge about the potential cause of a birth defect to interpret evidence admitted at trial). See generally FED. R. EVID. 701; FED. R. EVID. 702.
(2) "Jurors may draw inferences ... where such inferences are within the common experience of the average person" and not where the inferences are outside common knowledge.49
(3) Jurors “may not validly render a verdict on the particular knowledge of individual jurors.”50
(4) "Jurors may rely on their common sense and life’s experience during deliberations. This knowledge may include expertise that a juror may have on a certain subject.”51
(5) If a juror’s assertions merely reflect evidence and arguments presented in the trial, they are less egregious than other juror actions that warrant a new trial.52
(6) If a juror’s legal knowledge is not specific to the factual circumstances presented in the case, that knowledge is not prejudicial extraneous information.53
(7) “Jurors may use their background, including professional and educational experiences, to inform their deliberations so long as they do not introduce legal content or specific factual information learned from outside the record.”54

51. State v. Heitkemper, 538 N.W.2d 561, 563-64 (Wis. Ct. App. 1995) (finding no improper use of extraneous information when pharmacist told other jurors, based on his professional opinion, that the defense witness “was untruthful about the drug she took because the quantities she testifies she took would have knocked her out”).
53. See Leavitt v. Magid, 598 N.W.2d 722, 728 (Neb. 1999) (finding no improper use of extraneous information when an attorney-juror’s discussion of proximate cause was general legal knowledge and not specific to the factual circumstances presented in the case).
These examples of guidelines for determining the legitimate boundaries for the use of juror expertise display a lack of clarity that is reflected in the varied and ambivalent response these appellate courts display when presented with evidence that jurors have used their specialized expertise during deliberations. Moreover, perhaps recognizing the murkiness of the boundaries, courts do not attempt to communicate these guidelines for appropriate behavior to the jurors, who are instead expected to divine the proper dividing line between appropriate and inappropriate behavior based on specialized expertise.55

II. SPECIALIZED JUROR KNOWLEDGE IN THE MODERN JURY TRIAL

Appellate cases can offer only a glimpse at the occurrence and use of specialized juror knowledge on the modern American jury. We learn about such cases only if someone has disclosed what occurred during deliberations and an appeal has ensued. Thus, a survey of appellate cases provides no indication of how often jurors with specialized expertise appear on juries and only indirect information on the role that expertise has actually played during deliberations. To address the first question—how often jurors with specialized expertise appear on juries—we collected data from two sources. The first is a survey of experienced trial attorneys who were asked about the occupational make up of the jury in their most recent jury trial. The second is a unique study of fifty civil jury trials in Tucson, Arizona, where we were able to question jurors on their relevant case-specific expertise. In addition, because we were permitted to videotape the actual jury deliberations, we were able to examine the behavior of the embedded juror-experts in the deliberations in these

55. An exception to the general absence of instruction on how jurors should handle specialized expertise arises in trials involving the use of interpreters. Jurors often receive a specific instruction that they must accept the official interpreter’s translation of non-English testimony even if they disagree with it. See, e.g., DEL. P.J.I. CIV. § 3.8 (2000) (“Languages other than English may be used during this trial. The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.”).
fifty civil trials.\textsuperscript{56} We begin with a description of the survey of experienced trial attorneys conducted at their national conference.

\textit{A. Trial Attorney Survey}

At the annual meeting of a prestigious invitation-only organization of experienced trial attorneys who represent plaintiffs and defendants in civil cases, as well as the government and criminal defendants in criminal cases, one of us (S.D.) was invited to speak about juries. With the permission of the Executive Board of the organization, members of the audience were asked to complete a survey, which included questions about their last jury trial. Approximately half the members of the audience completed the survey, producing a sample of 167 attorney respondents who had tried an average of eighty jury trials each.\textsuperscript{57}

Respondents were asked to think about their last jury trial and to indicate occupations represented on the jury.\textsuperscript{58} Table 1 shows the question and the pattern of responses.

\textsuperscript{56} Pam Mueller’s research assistance on the topic of juror experts and coding of deliberations was invaluable.

\textsuperscript{57} Eligible respondents were attorneys who reported on the composition of the jury in their last trial. The survey asked whether the respondent was an attorney. Twenty-seven respondents were not included in the analyses: two judicial respondents, five non-lawyers, nine respondents who did not indicate whether they were lawyers, ten lawyers who did not answer the questions about their last jury trial, and one additional respondent whose answers were illegible.

\textsuperscript{58} The question was phrased: “Please think back to the jurors on your most recent jury trial. Please indicate whether anyone on the jury, including alternates, was (check all that apply): [followed by the list of occupations that appear in Table 1].”
Table 1. Occupations of Jurors on Your Last Jury Trial
Please think back to the jurors on your most recent jury trial. Please indicate whether anyone on the jury, including alternates, was (check all that apply):

<table>
<thead>
<tr>
<th>N</th>
<th>Percent</th>
<th>Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0.6</td>
<td>physician</td>
</tr>
<tr>
<td>36</td>
<td>21.6</td>
<td>nurse or medical technician</td>
</tr>
<tr>
<td>16</td>
<td>9.6</td>
<td>attorney</td>
</tr>
<tr>
<td>26</td>
<td>15.6</td>
<td>paralegal or legal secretary</td>
</tr>
<tr>
<td>51</td>
<td>30.5</td>
<td>mechanic</td>
</tr>
<tr>
<td>15</td>
<td>9.0</td>
<td>scientist</td>
</tr>
<tr>
<td>51</td>
<td>30.5</td>
<td>therapist or social worker</td>
</tr>
<tr>
<td>46</td>
<td>27.5</td>
<td>accountant</td>
</tr>
<tr>
<td>32</td>
<td>19.2</td>
<td>insurance company employee</td>
</tr>
<tr>
<td>17</td>
<td>10.2</td>
<td>had other occupational expertise, specify _______</td>
</tr>
</tbody>
</table>

Note: Average listed occupations: 342/167 = 2 per case

Although the attorneys reported that they rarely had physicians on their juries, their most recent trials, contrary to expectation, were heavily populated with jurors who had occupational expertise that could have been relevant in at least some types of trial. To test whether jurors with case-relevant occupations were avoided when that potential expertise was applicable to a case, we looked at selection patterns attorneys reported for trials when there was a match between the juror’s occupation and the nature of the case. More specifically, we examined whether the attorneys avoided

59. After asking about the presence of juror-experts in their last jury trial (Table 1), we asked the attorneys: “What was the general nature of the case?” and offered the following choices: “criminal, medical malpractice, products liability, other tort, contract, or other (specify).”
jurers with medical expertise in medical malpractice cases, or more broadly in tort cases, and whether they avoided jurors with engineering or mechanical expertise in products liability cases (Table 2).

Table 2. Selection Patterns for Jurors with Potentially Relevant Expertise

<table>
<thead>
<tr>
<th>Juror Occupation</th>
<th>Case Type</th>
<th>% of Case Type with this Juror Expertise</th>
<th>% of All Other Case Types with this Juror Expertise</th>
<th>p-level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical</td>
<td>Medical Malpractice</td>
<td>31.0% (29)</td>
<td>19.6% (138)</td>
<td>.172</td>
</tr>
<tr>
<td>Medical</td>
<td>Tort</td>
<td>27.8% (90)</td>
<td>14.3% (77)</td>
<td>.035</td>
</tr>
<tr>
<td>Engineering/</td>
<td>Products Liability</td>
<td>72.2% (18)</td>
<td>48.3% (149)</td>
<td>.055</td>
</tr>
<tr>
<td>Mechanical</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Based on data from n = 167 attorneys. Numbers in parentheses refer to the total number of most-recent trials of that case type.

In light of the small number of cases for each of the specialized categories, it is not surprising that two of the three comparisons in Table 2 were not statistically significant at the conventional level of p<.05. What is surprising is that all three comparisons showed patterns that actually tilted in favor of retaining jurors with expertise, contradicting the common wisdom that says such jurors will be swiftly removed. Could it be that these experienced veteran trial attorneys were actually selecting for juror expertise? To the extent that an attorney believes that the weight of the technical evidence favors her client, she may not be inclined to remove a prospective juror whose background suggests expertise. If both attorneys believe that the evidence is in their favor, the juror will remain.60 Whether trial attorneys are actively selecting jurors with

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60. In rejecting a claim on appeal that a juror-mechanic brought improper expertise to deliberations in a products liability case, one appellate court observed that the parties were aware of his background, noting, “The trial court stated: ‘None of the parties struck him and they obviously assumed he would bring something to their overall discussion of the case which is drawn from his own experience and knowledge.’” Christman v. Isuzu, No. 97-2211, 1998 WL 249017, at *7 (Wis. Ct. App. May 19, 1998).
relevant expertise or merely not actively attempting to remove them, this evidence indicates that the appearance of an embedded expert on the jury is neither a fluke nor the product of inexperienced lawyering. Nor is it confined to trials handled by elite attorneys, as the evidence below from the Arizona Jury Project shows.

B. The Arizona Jury Project

1. The Background of the Project

The Arizona Jury Project, in which we observed actual jury deliberations, presented a unique occasion to observe how jurors with occupational expertise behave during jury deliberations. The opportunity to study these jury deliberations arose because an innovative group of judges and attorneys in Arizona, encouraged by the Arizona Supreme Court, took a close look at their jury system. As a result, Arizona decided to make some changes aimed at facilitating jury performance, including a controversial innovation instructing jurors that they were permitted to discuss the case among themselves during breaks in the trial. To evaluate the effect of allowing discussions, the Arizona Supreme Court issued an order permitting a team of researchers to conduct a randomized experiment in which jurors in some cases were instructed that they could discuss the case and jurors in other cases were given the traditional admonition not to discuss the case. The court order also permitted us to videotape the jury discussions and deliberations.

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62. Id. at 3-4.
63. Id. at 4.
64. Id. at 16-17.
65. See id. at 17 n.39. See also id. at 17, for a detailed report on the permissions and security measures the project required, and the results of the evaluation. As part of their obligations of confidentiality under the Supreme Court Order as well as additional assurances to parties and jurors undertaken by the principal investigators, the authors of this Article have changed certain details to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.
2. Selection of Jurors and Cases

The jurors, attorneys, and parties were promised that the tapes would be viewed only by the researchers and only for research purposes.\textsuperscript{66} Jurors were told about the videotaping project when they arrived at court for their jury service.\textsuperscript{67} If they preferred not to participate, they were assigned to cases not involved in the project.\textsuperscript{68} The juror participation rate was over 95 percent.\textsuperscript{69} Attorneys and litigants were less willing to take part in the study.\textsuperscript{70} Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused.\textsuperscript{71} The result was a 22 percent yield among otherwise eligible trials.\textsuperscript{72}

3. Data Collection and the Final Sample

In addition to videotaping the discussions and deliberations, we also videotaped the trials themselves and collected the exhibits, juror questions submitted during trial, jury instructions, and verdict forms.\textsuperscript{73} In addition, the jurors, attorneys, and judge completed questionnaires at the end of the trial.\textsuperscript{74} The fifty cases in the study reflected the usual mix of cases dealt with by state courts: twenty-six motor vehicle cases (52 percent), four medical malpractice cases (8 percent), seventeen other tort cases (34 percent), and three contract cases (6 percent).\textsuperscript{75} The forty-seven tort cases in the sample

\textsuperscript{66.} See id.
\textsuperscript{67.} Id.
\textsuperscript{68.} Id.
\textsuperscript{69.} Although we cannot be certain that the cameras had no effect on their behavior during deliberations, the behavior during deliberations at times included comments that the jurors presumably would not have wanted the judges or attorneys to hear. See id. at 22-23 (providing excerpts of comments by jurors).
\textsuperscript{70.} Id. at 17.
\textsuperscript{71.} Id.
\textsuperscript{72.} Id.
\textsuperscript{73.} Id. at 18.
\textsuperscript{74.} Id.
\textsuperscript{75.} Id. This distribution is similar to the breakdown for civil jury trials for the Pima County Superior Court for the year 2001: 62 percent motor vehicle tort cases, 8 percent medical malpractice cases, 23 percent other tort cases, and 6 percent contract cases. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 2001, NAT’L ARCHIVE OF CRIM. JUST. DATA, available at http://www.icpsr.umich.edu/icpsrweb/
varied from the common rear-end collision with a claim of soft tissue injury to cases involving severe and permanent injury or death.\textsuperscript{76} Awards ranged from $1000 to $2.8 million, with a median award of $25,500.\textsuperscript{77}

4. The Data

a. The Trials

We transcribed the opening and closing arguments in each case from the trial videotape.\textsuperscript{78} We also created a very detailed “road-map” of the trial from the videotaped trial.\textsuperscript{79}

b. Data from the Deliberations

We created verbatim transcripts of all deliberations,\textsuperscript{80} producing 5276 pages of deliberation transcripts for the fifty trials. The deliberations consisted of 78,864 comments by the jurors, each of which was coded on a variety of dimensions. A comment, akin to a turn, was defined as a statement or partial statement that continued until the speaker stopped talking or until another speaker’s statement or partial statement began. If another speaker interrupted, but the original speaker continued talking, the continuation was treated as part of the initial comment.\textsuperscript{81} For example, here Juror 2 is in mid-sentence when Juror 4 interrupts to agree before Juror 2 completes his comment:

\begin{quote}
Juror 2: Negligence and cause of death ... [are] also in the fact of what you don’t do—
Juror 4: I, I agree.
Juror 2: to prevent it.
\end{quote}

\footnotesize
\textsuperscript{76} Diamond et al., supra note 61, at 18-19.
\textsuperscript{77} Id. at 19.
\textsuperscript{78} Id. at 19.
\textsuperscript{79} Id.
\textsuperscript{80} The project originally created quasi-transcripts of the deliberations for initial analyses. Id. at 19-20. We later produced verbatim transcripts to obtain a complete representation of what jurors said during deliberations.
\textsuperscript{81} Id. at 61 n.90.
In this instance, Juror 2 was credited with one comment and Juror 4 was credited with one comment.

c. Post-trial Questionnaires

At the end of the trial, each juror and judge completed a questionnaire about the trial and their reactions to it.82 One of the questions jurors answered on the questionnaire was whether there was anything in their background that had given them particular knowledge or expertise in serving as a juror in the case.

5. Jurors and Their Expertise

One in five jurors claimed on their questionnaire that they had some relevant expertise. The deliberations reveal that the jurors often cited that expertise or drew on it to justify their positions. Not all of these claims of expertise, however, reflect occupational or education-based expertise. Some of the sources of particular knowledge that the jurors identified would fall in the category of ordinary common sense or experience (e.g., “I drive,” or “I am a parent”). Jurors often refer to, and indeed are expected to draw on, their more general personal experiences to provide a context for the evidence or a basis for evaluating the plausibility of a claim.83 Thus, in a case in which some jurors expressed skepticism about the severity of a plaintiff’s injury in view of his stoic testimony in describing the event, another juror attributed it to a male tendency not to express emotion, claiming that she was very familiar with that tendency because she grew up with four brothers. In another case, jurors were impatient with a plaintiff’s decision to go to a chiropractor rather than a medical doctor and her failure to fill the prescription given to her in the emergency room. One of the jurors offered a potential explanation: “I’m Mexican [by heritage] and some Mexican people will only go to chiropractors, not MDs and [they] don’t like taking drugs.” In the normal flow of conversation in the deliberation room, jurors often refer to prior accidents and injuries, those they

82. Id. at 18.  
83. See supra notes 14-15 and accompanying text.
personally experienced, as well as those of friends or relatives. They discuss the kind of activity that can lead to carpal tunnel syndrome, whether it is possible to remove a neck brace for a short time without causing further injury, whether chiropractors are typically open during the evening hours, or why someone might take steroids other than to build muscle. The jurors drawing on such experience may or may not convince others that their experience or the knowledge they claim is relevant or accurate, and their fellow jurors may or may not accept what the juror says as providing a legitimate basis for the claim. As in conversation outside the jury room, speakers draw on their experiences and listeners find what they say to be useful or irrelevant.

Jurors who have occupational or educational expertise, however, have more than the usual content of common experience, and can offer a credential that may bolster the credibility of their comments. That is not to say that a juror with a specified occupational or educational background would qualify as a testifying expert, but rather that the juror can draw on, and point to, relevant training or occupation-related experience that is different from, and presumably superior to, that of the average jury member. More than half of the jurors (forty-nine of eighty-two) who reported on the post-deliberation questionnaire that they had particular knowledge or expertise mentioned a case-related occupational or educational basis for the expertise. That number amounts to 12.2 percent of the total sample, an average of one juror per eight-member jury. If we add to that number the forty-six jurors whose occupations indicated relevant expertise, but who did not cite it as a source of relevant expertise on the questionnaire, a total of ninety-five—24 percent of the jurors and an average of two jurors per eight-member jury—began their deliberations with potentially relevant occupational expertise. The most common form of relevant expertise was medical (n=36), ranging from nurses and nursing assistants to

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84. Our focus in this Article is on occupational and education-based expertise. In future analyses, we will examine juror use of personal experiences that do not implicate specialized quasi-expertise because they are not occupation or education-based.

85. We considered the occupational background of the juror relevant only if the case involved issues that touched on the juror's area of expertise. Thus, a medical background was not relevant in a property tort case in which no personal injury was alleged.
radiation therapists and a Ph.D. physiologist. Next was the category that included engineers and jurors in occupations dealing with vehicles (n=21; e.g., mechanics, truck drivers). These jurors had specialized occupational knowledge relevant to cases involving automobile accidents. A third category consisted of jurors with some legal background (n=19; e.g., attorney, legal secretary, “took courses in law”). Some jurors also had financial expertise that was relevant in cases in which financial transactions were at issue (n=7). The remaining juror-experts had a variety of other case-related work backgrounds (n=12; e.g. a volunteer first aid worker in a case involving safety training; a restaurant worker in a case involving a restaurant).

The presence of this potential resource on the jury is not lost on the other jurors. Indeed, a juror need not explicitly refer to his or her source of expertise during deliberations. The jurors have an opportunity during jury selection to hear about the occupations of their fellow jurors, a familiarity that may be reinforced as the jurors share that information during breaks in the trial. As a result, jurors sometimes specifically turn to another juror for professional expertise. In a case involving how patients were handled by a clinic, a juror wanted to know whether it was common practice to call patients who don’t come back to pick up their medication and said, “Let’s hear from the pharmacist.” In an auto accident case involving a dispute over how the accident occurred, a juror asked, “As an engineer, what do you think?”

In some cases, jurors were hesitant to share their expertise during deliberations. Thus, one juror turned to a nurse on the jury who was examining some of the exhibits and asked, “Are those the medical records?” The juror responded, “Um-hum. I’m not here as an expert witness, so I won’t bore you with my opinions.” In several cases, a juror-expert provided useful—and relevant—information. These juror-experts substantially added to the competence of the jury by translating some of the technical material that experts on the witness stand failed to clarify, promoting educational (versus deferential) evaluation of the expert testimony.86 Here is an example

from a juror-engineer (Juror 1) describing the testimony of the testifying engineer-experts:

Juror 1: If you’re rear-ended, the first thing you do—

Jurors 5 and 7 interrupt: You go backwards.

Juror 1: You go backwards, but then you get the recoil going forward. And that’s when the seatbelt catches you and stops you. What [the experts are] having arguments on—

Juror 7: [interrupting] Is whether he went forward first?

Juror 1: Is, one ... did [the plaintiff’s car] go forward instantly? Did it accelerate? If it accelerated, you get the same thing ... it’s like you’ve been rear-ended: you’re going to go back first and then go forward, recoil. If you all of a sudden decelerate, that means the car keeps going forward, I mean, the car also stops, but you’re going to keep on going forward. And that’s when you’re going to hit. And the engineer was claiming that the time before they actually hit, when they crumpled each other and then when they started to turn, the time it took to crumple, the car was absorbing energy and—

Juror 5: [interrupting] That’s when he went forward.

Juror 1: He had enough time to go forward before the car started turning. That’s why when I asked those questions, he said “No, no, he’ll have time to go forward and [injure himself] before he starts going forward and backwards,” which I don’t know is truly the case.

Juror 5: But I think the question we were hearing from the other side is: if the hit was like this [uses hands to indicate diagonal impact at side of car], doesn’t the [striking car] contribute some more energy to that sort of general forward movement in the car? Because it’s not at right angles, and it’s not head-on.

Juror 1: My general impression is that that’s true. If you have something going at an angle [makes same diagonal diagram with his hands], you have some motion going perpendicular to
the car and you have some motion going along the car. And when you get hit, you get shoved [uses hands to indicate motion to the side] and you also get shoved forward. And, at least for a short while, before friction, your car would actually go forward for a little while as it got hit, and you would go back. And that’s why I was asking him and I was, like, “That seems a little strange.” And he’s saying there’s something actually happening in between, while it’s crumpling. And he didn’t make that particularly clear.

Other jurors with relevant occupational expertise provided little instruction but offered strong opinions. In a low impact collision, the driver of one vehicle failed to stop and slammed into the automobile he was following. The plaintiff claimed soft tissue injury and sued to recover for the cost of past and future chiropractor expenses, along with pain and suffering. A key question in the case was the speed at which the impact occurred, in light of the damage to the vehicles. Both the plaintiff and the defendant called experts in accident reconstruction who calculated their estimates based on the statements of the plaintiff and defendant on how far the vehicles moved in the course of the collision and the damage to the vehicles. The defendant admitted negligence, but denied that the plaintiff was injured in the collision. The attorneys removed two mechanics during voir dire, but retained an artist/mechanic who worked with metal. After two other jurors expressed their views that the plaintiff’s injuries were overstated, the artist offered a series of opinions on the plausibility of the two expert witnesses based on his experience and his own analysis of the pictures of the vehicles involved in the accident:

First of all, I’ve been a mechanic, raised in it my whole life. I’ve also been exposed to welding with metals… he said that bumper was .1 in thickness, which is not very thick. My guess is it is probably 13 gauge, which is a thin metal. Now the metal of the back end is even thinner than that. Now, I don’t know if you notice, but when you are on the road, and you see an accident, these little cars wad up. The engineers design the cars to absorb as much energy as possible as opposed to in the old days. So I’m not impressed by the back end being bent. You could dent it with a bicycle.... So they wanted us to believe that a majority of the
back of their car was damaged. My own guesstimation—maybe forty percent or less. Just the very left corner .... [A]nd his hook [on the defendant's vehicle] may have penetrated the bumper. Well, I fool around with metal all day and it don't take much to bend a 13 inch gauge.

The other members of the jury did not dispute this analysis, although their silence does not necessarily indicate that they accepted the juror's evaluation. The position he was advocating was consistent with the assessment offered in more esoteric terms by the defense expert, whose testimony the jury discussed with approval.

To provide an overall assessment of the behavior of the juror-experts during deliberations, we developed a number of measures designed to reflect activity level, influence, and contributions to deliberations. The comparisons between juror-experts and other jurors on these measures are presented in Table 3:
Table 3. Participation Measures for Juror-Experts and Nonexperts During Deliberations

<table>
<thead>
<tr>
<th>Index of Participation Behavior</th>
<th>Juror-Experts</th>
<th>Non-expert Jurors</th>
<th>p-level</th>
<th>Controlling for Participation Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Comments this Juror Contributed of Total Comments on this Jury (overall participation level)</td>
<td>14.6%</td>
<td>11.9%</td>
<td>( t_{pr}, 43 \text{ df} = 2.63, p = .012 )</td>
<td>---</td>
</tr>
<tr>
<td>Participation sub-types:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of Correct Instruction References this Juror Contributed of Total Correct References on this Jury</td>
<td>16.0%</td>
<td>11.7%</td>
<td>( t_{pr}, 42 \text{ df} = 2.48, p = .017 )</td>
<td>Becomes nonsignificant</td>
</tr>
</tbody>
</table>

87. In the forty-four cases with juror-experts (351 jurors, including 95 juror-experts), except as otherwise indicated. Results in the middle three columns of this table reflect paired t-tests, conducted on the total mean percentages (or, for self-rated influence, the averaged means) for experts on the jury versus the nonexperts on that same jury. We conducted paired tests on group-level means so that each jury would have one observation each for the experts and nonexperts on a given jury-group, thus satisfying the requirement that all observations across the pairs be independent.

Hierarchical mixed models provide another method for analyzing data that are nonindependent, or “nested” (jurors are nested within jury groups). That approach attempts to estimate simultaneously both the individual-level variability in the outcome and the group-level variability. See, e.g., STEPHEN W. RAUDENBUSH & ANTHONY S. BRYK, HIERARCHICAL LINEAR MODELS: APPLICATIONS AND DATA ANALYSIS METHODS 3-4 (2d ed. 2002). However, such models are problematic to use on the type of variables analyzed here, which not only have few observations for each group (and therefore low power to estimate group-level variability), but also tend to produce so-called “negative intraclass correlations.” See David A. Kenny et al., The Statistical Analysis of Data from Small Groups, 83 J. PERSONALITY. & SOC. PSYCHOL. 126, 128 (2002). In these instances, grouping tends to exaggerate differences within a group, rather than—as is more typical—to make group members more alike. See id. The iterative maximum likelihood estimation procedures used in these models sometimes do not converge and therefore fail to provide any estimates, which was our experience in analysis of nearly all the variables listed in Table 3. Where models did converge on a solution, results always substantively confirmed the paired t-test results. To control for participation, we used a combination of linear and mixed-model methods.
<table>
<thead>
<tr>
<th>Table 3 cont.</th>
<th>Index of Participation Behavior</th>
<th>Juror-Experts</th>
<th>Non-expert Jurors</th>
<th>p-level</th>
<th>Controlling for Participation Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Incorrect References to Jury Instructions this Juror Contributed of Total Incorrect References on this Jury</td>
<td>16.2%</td>
<td>11.2%</td>
<td>$t_{pr, 41 \text{ df}} = 3.29$, $p = .002$</td>
<td>Becomes nonsignificant</td>
<td></td>
</tr>
<tr>
<td>% of Corrections to Inaccurate Instruction References this Juror Contributed of Corrections made on this Jury*</td>
<td>16.5%</td>
<td>10.9%</td>
<td>$t_{pr, 39 \text{ df}} = 1.79$, $p = .081$</td>
<td>Becomes nonsignificant</td>
<td></td>
</tr>
<tr>
<td>% Comments about Experts this Juror Contributed of Total Comments about Experts on this Jury**</td>
<td>14.8%</td>
<td>11.3%</td>
<td>$t_{pr, 35 \text{ df}} = 2.25$, $p = .031$</td>
<td>Becomes a trend effect ($p &lt; .10$)</td>
<td></td>
</tr>
<tr>
<td>% Calls to Vote this Juror Contributed of Total Calls to Vote on this Jury</td>
<td>15.4%</td>
<td>11.9%</td>
<td>$t_{pr, 43 \text{ df}} = 1.06$, $p = .293$</td>
<td>Remains nonsignificant</td>
<td></td>
</tr>
<tr>
<td>% Probes this Juror Contributed of Total Probes on this Jury</td>
<td>14.7%</td>
<td>11.9%</td>
<td>$t_{pr, 39 \text{ df}} = .995$, $p = .326$</td>
<td>Remains nonsignificant</td>
<td></td>
</tr>
<tr>
<td>Source of the First Verdict Proposal (probability)</td>
<td>.179</td>
<td>.105</td>
<td>$t_{pr, 43 \text{ df}} = 1.52$, $p = .136$</td>
<td>Remains nonsignificant</td>
<td></td>
</tr>
<tr>
<td>Source of the Final Actual Verdict (probability)</td>
<td>.112</td>
<td>.125</td>
<td>$t_{pr, 43 \text{ df}} = .305$, $p = .762$</td>
<td>Remains nonsignificant</td>
<td></td>
</tr>
<tr>
<td>Source of First Valenced Comment (probability)</td>
<td>.133</td>
<td>.122</td>
<td>$t_{pr, 43 \text{ df}} = .25$, $p = .803$</td>
<td>Remains nonsignificant</td>
<td></td>
</tr>
</tbody>
</table>

*In the forty cases with corrected instructions and juror-experts (319 jurors, including 86 juror-experts).
**In the thirty-six cases with expert witnesses and juror-experts (290 jurors, including 78 juror-experts).
The behavior of the juror-experts and the other jurors differed on several of these measures, but was remarkably similar on others. On average, the juror-experts were more active than nonexperts, contributing a significantly greater percentage of comments than jurors without relevant occupational/educational expertise: 14.6 percent versus 11.9 percent on average, a 23 percent higher rate of activity compared to the nonexpert jurors. And they tended to be more active on a range of activities, contributing significantly more correct references to jury instructions as well as more incorrect references, with a trend toward contributing more corrections for instruction errors made by other jurors. They also contributed significantly more comments on expert witnesses. The first three of these differences, however, were bound up in the overall greater activity of the juror-experts: as described in the results in the last column of the table, when we controlled for overall juror activity, all three differences relating to jury instructions became nonsignificant. In contrast, the greater focus on expert testimony by the juror-experts persisted, although it was reduced to a trend. The disproportionate commentary from juror-experts on testifying experts is precisely the double-edged sword that lurks in the benefits juror-experts can offer and in the concerns raised about undue influence from juror-experts. As jurors who are more familiar and comfortable with the content of the testimony, these juror-experts are in a position to explain what others might find difficult, just as the juror did in the lengthy quotation above. But juror-experts may also influence other jurors’ assessments of the testifying expert based merely on their apparent knowledge, and such influence would be the result of opinions untested in court during the trial.

The other measures reveal surprisingly little evidence that as a group the juror-experts exerted a particularly powerful influence during deliberations. For example, one way that jurors can play a leadership role is to call for a vote, attempting to move the group toward a verdict. As might be expected, forepersons were more likely than other jurors to call for a vote, on average initiating five times as many calls to vote as nonforepersons. But juror-experts were no more likely to become forepersons than nonexperts.88

88. See Table 4 infra.
Moreover, juror-experts were no more likely to initiate calls for a vote than were nonexperts.

Another potential method jurors could use to guide deliberations was at the individual juror-to-juror level, by probing another juror for their viewpoint (e.g., “Why did you vote that way?” or “What do you think about an award of $10,000?”). Juror-experts did not take on a greater leadership role in deliberations by disproportionately probing the views of the other jurors.

Another way to influence group decision making is to propose a decision the group might adopt. Yet juror-experts were no more likely than the other members of their jury to offer the first suggested verdict, to propose a verdict that the jury ultimately adopted, or even to offer the first comment during deliberations that favored one party over the other (i.e., the first valenced comment).

Measures not reflecting level of juror participation, too, as Table 4 shows, revealed no evidence of substantial influence from the juror-experts based on an aura of authority stemming from their greater expertise.

89. Possible verdict categories included liability verdicts, comparative fault percentage allocations, and damage awards.
Table 4. Non-Participation Measures of Juror-Experts and Nonexpert Jurors During Deliberations

<table>
<thead>
<tr>
<th>Nature of Non-Participation Measure</th>
<th>Juror-experts</th>
<th>Nonexpert jurors</th>
<th>p-level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self-rated Influence*</td>
<td>4.44</td>
<td>4.26</td>
<td>t_{pr, 40 df} =1.04, p=.306</td>
</tr>
<tr>
<td>Foreperson (probability)</td>
<td>.140</td>
<td>.126</td>
<td>t_{pr, 43 df} =0.26, p=.799</td>
</tr>
<tr>
<td>Holdout (probability)**</td>
<td>.339</td>
<td>.210</td>
<td>t_{pr, 14 df} =1.31, p=.213</td>
</tr>
<tr>
<td>Average % of Juror’s Own Comments that were Valenced</td>
<td>43.9%</td>
<td>43.0%</td>
<td>t_{pr, 43 df} =0.66, p=.513</td>
</tr>
<tr>
<td>Average % of Juror’s Own Valenced Comments that were Mixed</td>
<td>4.3%</td>
<td>3.3%</td>
<td>t_{pr, 43 df} =1.70, p=.097</td>
</tr>
<tr>
<td>One-sided Jurors—90% or more Valenced Comments in favor of one Party (probability)</td>
<td>.106</td>
<td>.191</td>
<td>t_{pr, 43 df} =-2.51, p=.016</td>
</tr>
</tbody>
</table>

*This analysis is based on the 322 jurors who completed this post-trial questionnaire measure. The 1 to 7 scale goes from 1 (not at all influential) to 7 (extremely influential). These jurors came from forty-one cases.

**In the fifteen cases with nonunanimous verdicts and juror-experts (121 jurors, including 33 juror-experts).

Juror-experts and nonexperts did not differ on their self-rated influence as reported on the postdeliberation questionnaires (averaging 4.44 versus 4.26 on a 7-point scale). Self-reports can of course be notoriously unreliable, particularly when self-assessment...
is involved. Here, however, the lack of difference in self-reported influence was also reflected in observable behavioral measures, including selection as foreperson. Moreover, if the juror-experts were disproportionately successful in influencing their fellow jurors in a more subtle fashion, they should have been able to avoid ending up as holdouts when a final verdict was reached. Yet, if anything, these juror-experts were more likely to be holdouts on the nonunanimous juries than were their fellow jurors.

Given their greater level of activity, the juror-experts might have been able to exert undue influence if they were particularly opinionated and had strongly advocated for one of the parties. We used three measures to assess the extent to which juror-experts expressed strong views during deliberations, comparing the juror-experts and nonexperts on the contributions they made to deliberations that favored one of the parties. We coded the valence of each comment in the context of the discussion occurring at the time and in the context of the entire case, assessing whether the observation favored one of the parties. We defined a valenced remark as any comment that one of the parties would, and the opposing party would not, want a juror to say. If a remark was mixed in that it included some material favorable to both parties or unfavorable to both, it was valued for both. A total of 24,402 comments were coded as valenced using this basic valenced coding system.


91. The decision rule for civil juries in Arizona requires six of the eight jurors to agree in order to reach a verdict. Ariz. Rev. Stat. Ann § 21-102 (2013). If the jury is not unanimous at the end of the deliberations, only those jurors agreeing with the verdict sign the verdict form. Revised Arizona Jury Instructions (Civil) Standard 8 (4d. 2005). We refer to the others as the “holdouts.”

92. For example, the following comment was coded as a pro-plaintiff valenced statement: “But I think he [the plaintiff] really was in pain.” In contrast, the following comment was coded as a pro-defendant valenced statement: “She [the plaintiff] didn’t follow the instructions that [the hospital] gave her. Because right here it says, uh, [juror pages through a document], oh, ‘as soon as possible make an appointment to see the doctor in two days.’”

93. Mixed comments with material favorable or unfavorable to both sides were weighted .5 for each side. The basic valenced coding system was developed to assess balance and extremity in jury deliberations. The coding system produced good reliability. Two coders independently coded two full transcripts. For each coding category, we created an index of agreement following the procedure described by Charles P. Smith consisting of twice the number of agreements on a category divided by the sum of the frequency that each coder used
In addition, jurors made comments that simply advocated a particular amount or range in dollars (e.g., $10,000) or a metric for damages (e.g., two months of lost wages). These comments required a context to interpret as pro-plaintiff or pro-defendant, so we used the final verdict as the reference. We characterized the amount as pro-plaintiff if it exceeded the amount the jury actually awarded (in total or in the category to which it applied) and as pro-defendant if it was less than that final amount. This reference point thus distinguished the amounts favored by the members of the jurors who would have given more than the jury eventually did from the amounts favored by the other jurors who would have given less than the jury eventually did. Because juries rarely returned damages that approached what plaintiffs requested, however, some of the “pro-plaintiff” suggestions were only modestly favorable to the plaintiff in the case. An additional 1254 comments were valenced on this measure, for a total of 25,656 valenced comments.

The juror-experts on average did not contribute a higher proportion of valenced comments than did the nonexperts. To the extent that valenced comments are sources of persuasion, either by emphasizing a particular piece of evidence or by interpreting the facts in a way that favors one party, the similar proportion of valenced comments contributed by juror-experts and nonexperts provides no evidence that the juror-experts disproportionately engaged in these persuasive efforts.

Two other ways of using these valenced contributions allowed us to assess the balance and complexity of contributions jurors made

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the category. See Charles P. Smith, Content Analysis and Narrative Analysis, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 313, 313-27 (Harry T. Reis & Charles M. Judd eds., 2000). Comments valenced in favor of the defendant had indices of .82 and .85; the indices for comments valenced for the plaintiff were .62 and .85; for comments valenced for both, .55 and .66 (this category was assigned no more than ten times in each of the two transcripts). The remaining categories in the coding system (e.g., comment was neutral or ambiguous) all had comparable indices.


95. An additional 16,328 juror comments could not be valenced because the comments were fragments (e.g., “I just can’t believe ...”), mere utterances (e.g., “Um-hum”) or ambiguous (e.g., “Oh my god ...”). With these comments excluded, 62,536 substantive comments remained, of which 41 percent were valenced (43 percent for the cases with juror-experts that appear in Table 4).
to deliberation: the frequency of a juror’s mixed comments and whether the juror’s comments tended to be one-sided. The frequency of mixed comments reflects the extent to which jurors offered more complex evaluations of the evidence, making mixed comments that included points favorable or unfavorable to both sides. Although only 3.8 percent of all juror valenced comments in the forty-four cases with at least one juror-expert were mixed, juror-experts offered somewhat more mixed comments than did nonexperts (4.3 percent v. 3.3 percent, p < .10).

One-sided jurors constitute the other extreme, discussing the evidence in terms that entirely favor one party. It is sometimes claimed that jurors enter deliberations at the end of trial with a firm and monolithic view favoring one side or the other.96 Deliberations then consist of a conversation with a preordained outcome: the majority persuades or browbeats the minority into changing their position. Our work with these fifty jury deliberations suggests a more complex and important role for deliberations, perhaps because most jurors do not appear to have reached closure as deliberations begin. Yet some jurors do consistently express a single view throughout deliberations.

We identified jurors as demonstrating a one-sided approach if 90 percent or more of their valenced comments favored one party. These jurors constituted 15 percent of all jurors.97 A more evenly divided distribution of valenced comments provided evidence that the juror was engaging in more complex thinking and deliberation. Thus, if a juror said that the inconsistency between the defendant’s deposition and trial testimony made him less believable—something that favored the plaintiff—but also argued that the evidence showed the defendant’s behavior was reasonable under the circumstances, the juror would be showing a more complex consideration of the evidence than one who persistently rejected any evidence favorable to the defendant. On this measure, the juror-experts and nonexperts differed significantly. The juror-experts were significantly less likely to be one-sided jurors. Among juror-experts, 10.6 percent were in the one-sided category, but 19.1 percent of nonexpert jurors

97. These sixty jurors were distributed across thirty different juries.
qualified as one-sided.

In the empirical picture that emerges from this aggregate view of the behavior of the embedded experts, we find that the modern American jury shows little evidence of overbearing behavior or undue influence by juror-experts at the aggregate level. Indeed, the aggregate data suggest that juror-experts as a whole make at least one unambiguously positive contribution to deliberations in that they are less likely to take a consistently one-sided view of the evidence.

Our final approach to assessing the behavior of the juror-experts comes from a closer examination of the content of the specialized comments the juror-experts offered in the course of deliberations and the response from other jurors. (See Table 5). On some occasions, the juror explicitly claimed expertise by announcing the source of her specialized knowledge in the context of offering a comment (e.g., “I have a background in real estate, so when they were talking about mixing up the parcels I’m like, why, how could you do that with the parcel number?”). On other occasions, the context or the substance of the comment itself indicated the juror’s expertise. Context provided the cue to expertise when another juror explicitly referred to the juror-expert’s occupation in drawing out the juror-expert’s response (e.g., addressing the radiation therapist on the jury: “So if you took those [x-rays taken by a chiropractor] to the neurologist or back to her primary physician, they wouldn’t be of any value to them?” The radiation therapist’s response: “Probably not. But, he wouldn’t be able to read them anyway, because he’s not a radiologist. He’s an M.D.”).

The specialized content of the comment itself could also provide evidence that the juror was drawing on occupational expertise if a juror made a comment with content so specific to his or her specialized background that only someone with a similar background would be likely to offer that comment (e.g., the owner of an auto shop, describing how a seat belt works, explains, “It does not lock until the car falls forward. It’s on an exocentric system.”). To ensure that all potential expert-based comments were identified, we

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98. These no doubt represent an undercount of elicited juror-expert comments because they include only those comments elicited with an explicit reference to the juror-expert’s occupational background.
included some comments that could conceivably have been made by a juror without the same occupational background of the juror-expert (e.g., a juror-expert with a background in law explained: “Dismissed with prejudice, it cannot be refiled; dismissed without prejudice, it can be refiled.”). Nonetheless, even with this generous coding standard, only fifty-nine of the ninety-five juror-experts made identifiable occupation-related comments and those comments accounted for a remarkably small percentage (2.3 percent) of the comments made by juror-experts in deliberations:

Table 5. Specialized Comments Offered by Juror-Experts

<table>
<thead>
<tr>
<th>Type of Comment</th>
<th>N of Comments</th>
<th>N of Jurors Who Made Comments</th>
<th>% Valenced</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self-Identified Expert Comments</td>
<td>94 ( 0.6%)</td>
<td>39</td>
<td>76.8%</td>
</tr>
<tr>
<td>Other Expert-Related Comments</td>
<td>281 ( 1.7%)</td>
<td>53</td>
<td>47.0%</td>
</tr>
<tr>
<td>Remaining Comments</td>
<td>15,684 (97.7%)</td>
<td>95</td>
<td>42.7%</td>
</tr>
<tr>
<td>Total Comments By Juror Experts</td>
<td>16,059 (100.0%)</td>
<td>95</td>
<td>42.9%</td>
</tr>
</tbody>
</table>

Out of the total 16,059 comments made by the juror-experts, a total of ninety-four self-identified comments were offered by thirty-nine different jurors. Unlike other comments, these self-identified expert comments were likely to be valenced (76.8 percent), suggesting that the juror was announcing a source of specialized knowledge as a means of justifying the pro-plaintiff or pro-defendant position the juror was taking. Here are several of these comments:

Case A: Medical experts gave strongly conflicting testimony on what caused the plaintiff’s brain injury. The plaintiff’s expert, a medical doctor, claimed that the plaintiff lost oxygen as a result of how his head was positioned after sustaining a trauma. By the time the following discussion occurred in deliberations, a number of jurors had already expressed the view that the plaintiff had not proved liability. One juror (Juror 1), however, was not convinced that
a defense verdict was warranted and a juror-expert (Juror 6), claiming expertise, addressed her:

Juror 6: Okay, it says in our instructions that we’re supposed to judge this on the basis of our experience.

Juror 1: We have to be satisfied.

Juror 6: Okay. I’m a physiologist. I have a Ph.D. in physiology, okay. And I just want to say that to me, the whole thing with [the plaintiff’s cause of injury] is totally unsubstantiated.

Juror 3: [nods in agreement]

Juror 6: I ... I as a physiologist cannot believe that a person who does not have something on top of their head can suffocate just from having their head down.

Juror 4: [nodding in agreement] Just by ... right.

Juror 6: I’m sorry. I just cannot believe that.

Juror 4: I can’t either, I mean, like we said, we’d have a town full of brain-injured drunks.

Juror 3: Right. Exactly. How many drunks fall asleep like this. [putting her head down]

Juror 4: Exactly.

Juror 7: How many times do your children ... my children.

Juror 6: Oh. That’s a good point.

Juror 7: They fall asleep like this. [putting her head down on her chest]

Juror 5: No kidding.

Juror 7: While we’re driving. They fall asleep and they’re down.

Juror 5: [indicates agreement]
Juror 6: So I just ... I just don't buy that with my training and experience.

Juror 1: There was trauma and maybe something happened with [the oxygen supply] or something.

Juror 5: No.

Juror 6: No. It’s physiologically impossible.

Juror 1: Ya’ know, you’re talking about a physiologist compared to an M.D. [plaintiff’s expert].

Juror 6: Okay, okay, so....

Juror 2: Um, what is medically more reasonable, I think, is the trauma.

Because most of the jurors had agreed on the cause before this discussion occurred, we cannot attribute the verdict for the defendant to the juror-expert’s claimed expertise. Indeed, other jurors responded to the juror-expert’s opinion by offering other confirmatory experiences (e.g., a parent noting how children sleep). In any event, the juror-expert was not effective in persuading Juror 1, who ended deliberations as a holdout.99

Case B: The issue was whether it was appropriate for a medical facility to contact former patients to gather some follow-up information. Juror 8, a pharmacist, reinforced the majority’s sense that the follow-up was reasonable and the approach taken by the defendant was acceptable:

Juror 8: Okay, the way that confidentiality, that, we use it at work.

Juror 1: [interrupting] Let the pharmacist speak here.

Juror 8: [continuing] for records and things like that.

Juror 7: Um-hmm.

Juror 8: They did not violate—in my opinion—that they did not violate confidentiality because, um, I don’t find it unreasonable for them to say they did a follow-up.

Juror 5: Right.

Juror 8: We do follow-up at work also.

Although several of the jurors were deferential (e.g., “Let the pharmacist speak here.”), the pharmacist was voicing a view that had little opposition from the jury.

Case C: The jury had decided to find the defendant liable in an auto accident, but was questioning the length of the chiropractic therapy required for the plaintiff. A juror-expert (Juror 1), who worked in a physical therapy/occupational therapy office, found support in arguing that the length claimed was too long:

Juror 1: Well, I worked, I worked in a physical therapy office—

Juror 3: Uh huh.

Juror 1: for quite a while. And, I mean, three months for one patient—

Juror 3: Is a lot.

Juror 1: much less what they are asking for here, would have been just insane. I mean, we would have sent them back to the doctor, and had re-x-rays and would not, we would not have continued with therapy for that long, not fixing anything.

Juror 7: Yeah.

Juror 1: Because even three months would have been too long to just sit around and wait.

Again, the juror-expert was offering evidence based on experience to confirm that the jury was on the right track. Had there been an opposing view, it is difficult to know how the conflict would have
been resolved.

On other occasions, a juror-expert who claimed the relevance of his occupational expertise was treated with some disdain by the other jurors:

Case D: In an employment dispute, a juror-expert repeatedly recounted his experiences in the workplace and met impatience:

Juror 3: I have one senior supervisor who’s—

Juror 6: Stick to this.

Juror 4: Please.

Juror 5: You have a story for everything. Let’s just stay with this, if we’re going to get through this.

Finally, on occasion a juror-expert claimed expertise and encountered overt disagreement:

Case E: The jury in a medical malpractice case discussed whether the defendant had met the appropriate standard of care. The two juror-experts with similar medical backgrounds initially disagreed on whether the defendant had failed to properly monitor and treat the patient’s condition and whether the patient would have improved with appropriate care. Both drew on their professional experience to justify their positions. Juror 3 was initially convinced that the defendant’s actions did not affect the patient’s outcome because medical conditions can change suddenly. In contrast, Juror 7 focused on the absence of communication among the medical personnel and argued that the failure to communicate and alter treatment was responsible for the bad outcome. The majority of jurors agreed with Juror 7, but Juror 3 was more fatalistic based on her experience with patient care:

Juror 3: I took care of a lady, I was sittin’ there talking to her in a chair and she—

Juror 2: [nods]

Juror 3: was talkin’ to me and then all of a sudden she slumps in her chair. She had a stroke right in front of me in mid-sentence.
And a little later in deliberations:

Juror 2: I think they would’ve gotten things better under control with the medication—that maybe that would—

Juror 3: [interrupting] See, I have a real problem with that 'cause I think he was gonna have an attack one way or the other.

Juror 2: Not necessarily.

Juror 7: I don’t agree with that.

Juror 3: But I’m just giving my opinion.

Juror 2: I know, I know.

Juror 4: We want to hear it.

Juror 3: But I don’t know if anything could’ve been done, even if he was on the meds, if it would’ve stopped it.

Eventually, Juror 3 was persuaded to join the other jurors in finding liability on the grounds that the defendant’s inaction, while not the only cause, was in fact a cause of the plaintiff’s outcome.

As the pattern in Table 4 showed, juror-experts in ten cases encountered an extreme version of opposition that led them to be holdouts at the end of deliberations, refusing to sign the verdict form. In five of the cases, a close look at the nature of their disagreement with the verdict revealed that the source of their disagreement was unrelated to their area of occupational expertise. For example, a juror-expert with a medical background refused to sign the verdict form because he would have attributed a higher percentage of responsibility to the defendant in an automobile accident based on his belief that the plaintiff had the right of way.

In the remaining five cases, the juror-expert’s occupational background may have accounted for the juror’s decision to resist the jury verdict and holdout. In two of those cases, a medical juror-expert was skeptical about the plaintiff’s claimed injuries and refused to agree with the jury’s decision on an award; in a third case, an engineer wanted to make a modest award (<$10,000) even lower because he questioned whether the low impact collision had caused any injury. In a fourth case, a medical juror-expert was convinced that earlier medical treatment might have made a difference, but the rest of the jury found the defense expert persua-
sive in concluding that no earlier intervention would have been effective. Finally, in the remaining case, the juror-expert’s disagreement was directly linked to his occupation: the holdout juror-expert, a physical therapist, was persuaded that the car accident had exacerbated the plaintiff’s previous injury and would have awarded her a small amount for the equivalent of four physical therapy visits. The other jurors found no evidence of injury and awarded nothing. Thus, in none of these five cases was the juror-expert effective in convincing the majority to change its position.

In sum, our close analysis did not reveal any instances in which a juror-expert offered specialized information during deliberations that led other jurors to change their opinions or preferred verdicts. Of course, opinions may have been affected by more subtle forms of influence than we were able to detect. More plausibly, the tiny proportion of comments that drew on specialized juror knowledge—2.3 percent of all comments made by juror-experts—may simply not have a big impact on the average jury’s course of deliberations.

But even if juror-experts rarely exert substantial influence by introducing specialized information into deliberations, that evaluation is only part of the story. We have not yet considered precisely what behavior is desirable for these jurors. That is, what should jurors be doing with their specialized knowledge during jury deliberations?

III. HOW SHOULD JURORS HANDLE SPECIALIZED KNOWLEDGE?

If expertise is a resource for the jury, should jurors be explicitly encouraged to share their relevant expertise? Alternatively, if the educative resource imposes an unacceptable cost from the influence of unsworn witnesses on deliberations, is there a need for efforts at greater control over attempts by such jurors to influence deliberations? Or is it appropriate simply to rely on the good sense of the jury to take this expertise for what it is worth?

To address these questions, we begin by examining the responses of experienced judges and attorneys to situations in which jurors referred to information based on specialized expertise during the deliberations. We gave the respondents a description of six instances of juror behavior. In each case, we asked whether the juror was behaving appropriately or inappropriately. As we told respondents, we were interested in learning whether these judges and attorneys viewed the juror’s behavior as inappropriate, whether or not the behavior would necessarily lead to a new trial. The respon-
dents were 68 judges and 60 attorneys attending an annual federal circuit court conference. All received the same six scenarios with one exception. There were two versions of the fifth scenario, which involved an attorney-juror. In one version, the attorney’s advice on the meaning of the jury instructions was correct; in the second version, it was incorrect. Table 6 shows the scenarios and the percentage of respondents who viewed the juror’s behavior as appropriate.

Table 6. Survey Results on Appropriate Juror Behavior

Please consider the following statements that a juror might make during deliberations. In each case, indicate whether the juror was behaving appropriately or inappropriately. (Note that evidence of inappropriate behavior would not necessarily lead to a new trial).

<table>
<thead>
<tr>
<th>Scenario Description</th>
<th>Juror behaved appropriately or inappropriately</th>
</tr>
</thead>
</table>
| **Scenario 1.** In a motor vehicle tort case, a juror who has worked for an insurance company for 20 years informs his fellow jurors that any award they make will not be taxed. (n=128) | Appropriately 14.8%  
  (Judges = 19.1%)  
  (Attorneys = 10.4%)  
  Inappropriately 85.2% |
| **Scenario 2.** In a slip and fall case involving a glass table, the plaintiff’s expert has taken pictures of the table. One of the jurors, whose husband is an amateur photographer, argues that it is easy to alter photographs so that the pictures cannot be trusted. (n=128) | Appropriately 57.8%  
  (Judges = 58.8%)  
  (Attorneys = 56.7%)  
  Inappropriately 42.2% |
| **Scenario 3.** In a tort suit, a physician on the jury convinces her fellow jurors that the medical expert who testified for the plaintiff was incorrect in claiming that the plaintiff’s injury made him more susceptible to the viral infection he contracted six months after the accident. (n=127) | Appropriately 38.6%  
  (Judges = 44.1%)  
  (Attorneys = 32.2%)  
  Inappropriately 61.4% |
| **Scenario 4.** In a motor vehicle tort case, the defense expert testified that, based on the minimal damage to the vehicle, the plaintiff could not have received the severe injuries he was claiming. An artist on the jury who creates metal sculptures by welding metal components, explains that the defense expert is correct because, as the artist knows, metal of that gauge dents easily. (n=127) | Appropriately 66.1%  
  (Judges = 58.8%)  
  (Attorneys = 74.6%)  
  Inappropriately 33.9%  
  (judges vs. attorneys, p<.10) |
Table 6 cont.

Scenario 5. A lawyer on the jury answers a question from another juror about the meaning of one of the jury instructions. His answer is correct/incorrect. (n=127)

Correct v. Incorrect: ($\chi^2 = 9.02, p = .003$)
- Within correct, judges v. attorneys: ($\chi^2 = 4.20, p = .04$)
  - Correct: Appropriately 55.4% (Judges = 44.7%, Attorneys = 70.4%)
  - Incorrect: Inappropriately 44.6%
- Within incorrect, judges v. attorneys, no difference

Scenario 6. The defendant is on trial for criminally negligent homicide in connection with the death of his girlfriend. There is conflicting medical testimony on the cause of death (repeated punching versus an embolism stimulated by intercourse too soon after giving birth). A nurse on the jury offers her professional analysis of the expert medical testimony. (n=123)

- Appropriately 45.5% (Judges = 42.9%, Attorneys = 48.3%)
- Inappropriately 55.4%

The first four scenarios were based on events that occurred during deliberations on juries in the Arizona Jury Project.100 The sixth is based on the New York case of People v. Maragh.101 The responses to these scenarios reveal little agreement with the exception of the first scenario. The behavior of the juror who offered the jury accurate but legally irrelevant information was labeled inappropriate by 85 percent of respondents. The minority position in all of the other scenarios captured at least a third of the respondents. The ordering of the scenarios on appropriateness of the juror’s behavior was fairly comparable for the judges and attorneys as a whole, although the attorneys were significantly more likely than the judges to find correct advice on the law given by an attorney-juror to be appropriate. A majority of both judges and attorneys found the behavior of the photographer’s spouse and the metal artist to be appropriate, although the attorneys were somewhat more accepting; a majority in both groups found the physician and the nurse to have behaved inappropriately. The specialized knowledge claimed in the latter two scenarios was both more technical and specialized, as well as more likely to be influential in view of the fact that the jurors in both of these cases were professionals. Finally, whether the respondents viewed the behavior

100. See supra Part II.B.4.
of the attorney-juror as appropriate depended on whether he turned out to have given correct or incorrect advice on the law. With this hindsight\textsuperscript{102} information, the benefit—or alternatively, the cost—of his advice was clear.

The variation in response as to what constitutes juror misbehavior may be one reason why appellate courts have struggled—and differed—in responding to the use of juror expertise when it has come to their attention.\textsuperscript{103} The relatively easy-to-administer rule captured in Federal Rule of Evidence 606(b) and adopted by many jurisdictions would rule out post-trial intervention in any of these situations, and yet many of the respondents found the juror’s behavior inappropriate.

IV. WHAT (IF ANYTHING) SHOULD BE DONE ABOUT JUROR-EXPERTS?

The evidence from the survey of judges and attorneys presented in Part III is consistent with the ambivalent response of the legal system to juror-experts reflected in the case law on those rare occasions when use of specialized expertise comes to the attention of a court.\textsuperscript{104} Thus, these sources provide little guidance on what steps, if any, should be taken in response to the increased presence of potential jurors with specialized expertise in the jury venire.\textsuperscript{105}

Two scholars have suggested that the presence of jurors with specialized knowledge warrants substantial court intervention at the outset. Professor Paul F. Kirgis draws an analogy to the court’s gatekeeping obligation, described in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.},\textsuperscript{106} to prevent an unqualified expert from testifying.\textsuperscript{107} He concludes that “the only way to guard against spurious juror expertise is to ensure that jurors do not have expertise and so cannot misuse it in the jury room.”\textsuperscript{108} The solution then is for the court to strike the juror for cause, expanding the availability of the challenge for cause beyond its traditional use in

\begin{itemize}
  \item[103.] See supra notes 33-54 and accompanying text.
  \item[104.] See supra Part I.
  \item[105.] \textit{Id.}
  \item[106.] See 509 U.S. 579, 589 (1993).
  \item[108.] \textit{Id.}
\end{itemize}
removing jurors who give an indication that they may be biased.\textsuperscript{109} Professor Kirgis sees this approach as a way to avoid the high cost of overturning verdicts post-trial in response to the use of specialized information during deliberations.\textsuperscript{110} He also views the cost of the challenges for cause in this situation as relatively low, both because the juror is easily replaced and because the stricken juror can serve on another case in which his expertise will not be relevant.\textsuperscript{111}

Similarly, Professor Michael B. Mushlin, acknowledging that his proposal would constitute a major change in the law, also advocates expansion of the challenge for cause to make professional expertise a sufficient basis for removal.\textsuperscript{112} While Kirgis would expand the challenge for cause only to professionals who would qualify as experts,\textsuperscript{113} Mushlin would use a more expansive definition of juror expertise, presumably covering a significant portion of the prospective jurors appearing in some modern jury venires.\textsuperscript{114} As he explains, his proposal “is meant to remedy the very real possibility that professional jurors routinely exert undue influence over trial outcomes.”\textsuperscript{115}

The expansion of the challenge for cause to remove juror-experts is a substantial intervention in the jury selection process. Moreover, it has the effect of reducing heterogeneity on the jury and removing jurors who, as the deliberations from the Arizona Jury Project reveal, may make valuable contributions to the deliberation process.\textsuperscript{116} And, as the deliberations show,\textsuperscript{117} the fear that these jurors “routinely exert undue influence”\textsuperscript{118} appears to be inflated.

\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 527-28.
\textsuperscript{113} See Kirgis, supra note 107, at 496 n.24 (describing focus on “those topics of juror background knowledge that implicate the Daubert principle”).
\textsuperscript{114} See Mushlin, supra note 112, at 272 (“The law should be changed so that professional expertise touching on an essential trial issue would, in and of itself, be sufficient cause to strike a prospective juror.”).
\textsuperscript{115} Id.
\textsuperscript{116} See supra Part II.B.2.
\textsuperscript{117} Id.
\textsuperscript{118} Mushlin, supra note 112, at 272. Professor Mushlin conducted a survey of twenty-nine jury consultants, at least three of whom reported instances in which they believed that professional jurors swayed the jury’s deliberations. Id. at 266-67, 269-70. It is difficult to know how representative these instances were or whether the reports were accurate, but it is worth noting that jury consultants are not typically hired for routine cases.
In response to the value of maximizing heterogeneity on the jury and the absence of evidence that jurors with specialized knowledge routinely exert undue influence, we would not favor changes in jury selection to remove such jurors. Yet we acknowledge the potential for undue influence from a juror who has neither been qualified as a testifying expert or been subject to cross-examination to test his opinions. That danger ought to be addressed.

Jurors currently receive no advice on how to handle their specialized knowledge. In view of the apparent lack of agreement on what constitutes appropriate juror use of specialized knowledge, the failure to provide any guidance is perhaps no surprise. Instead of guidance, however, jurors are provided with mixed messages on what behavior is appropriate. The ambiguity of the current situation can leave attentive jurors unsure of what they should share concerning their own arguably relevant expertise. For example, here is the reaction of an Arizona Jury Project juror with medical training to the evidence about the cause of the plaintiff’s health problems:

Juror 7: That’s another thing, one of the things I was listening really carefully ... they didn’t say ... They said two things that kind of confused me. They said we can bring our experiences ... to bear and our judgment and they also said you can't use any evidence that wasn’t introduced.

Juror 6: Right

Juror 7: Now I can sit here and think a lot about the reasons she would have a lot of the symptomatology she does ... that they never said, ‘What about this? What about this [counts on fingers] you know. Now, can we consider those things?

It seems inappropriate to leave this ambiguity unaddressed. Yet only New York, in response to People v. Maragh, has attempted to take on the challenge of striking out through the fog. The courts of New York have developed a jury instruction that at least acknowledges the expertise that jurors may possess:

119. See supra note 55 for a rare exception involving jurors with language expertise. See also infra note 123 and accompanying text.
120. See supra Part I.
121. See supra notes 14-18 and accompanying text.
Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional expertise you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during the trial.122

This approach has two fundamental weaknesses. First, it assumes that the individual juror possessing specialized knowledge will be able to distinguish between what she knows as a professional and what she knows as a knowledgeable layperson. Consider, for example, the fact that steroids can be an anti-inflammatory used to treat injuries or a supplement used in body-building. Surely a health care professional knows this, but so do many people who have been injured and prescribed a steroidal anti-inflammatory. Second, following this instruction deprives the jury of the full contributions of its most knowledgeable members. In addition, it fails to enlist the full jury in the effort to sensibly examine and analyze the relevant evidence. An alternative approach would be to construct a more collaborative instruction that directly warns jurors about the potential limits of information offered by their fellow jurors. The result is that jurors with specialized knowledge would be free to share their relevant expertise, but the jury would be on notice to guard against uninformed overstepping. An instruction might look something like the following:

As jurors we expect you to draw on your common sense and experience in evaluating the evidence. Any background or experience that you or any other juror has may or may not help with the evaluation of the evidence.

Please remember that your views and those of your fellow jurors, whatever their backgrounds, have not been subjected to the testing of cross-examination in the courtroom.

When any juror claims to know something about the law that is not in my written instructions to you, you should check with me. The role of all jurors, even jurors who are lawyers, is to find the facts. It is not to determine the law. The law must come from me.123

122. NEW YORK PATTERN JURY INSTRUCTIONS (CIVIL) 1:25A (3d ed. 2013).
123. The Arizona Jury Project had one attorney-juror and a series of paralegals, legal secretaries, and other jurors who claimed legal expertise, a total of twelve jurors in all, so that a legal quasi-expert appeared roughly on one jury in four or five. Some of these jurors made
Our observations of the Arizona juries reveal that when jurors feel that another juror may be going beyond what the evidence has shown, they regularly refer to the jury instruction that warns jurors not to speculate. Applying this approach to expertise on the jury offers a promising way to assist jurors in managing the contributions of the often valuable, but potentially misleading, juror-expert in their midst.
A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?

JAMES M. BINNALL

In the United States, a vast majority of jurisdictions statutorily exclude convicted felons from jury service. Justifying these exclusions, lawmakers and courts often cite the inherent bias rationale, which holds that convicted felons harbor a prodefense/antiprosecution pretrial bias that would jeopardize the impartiality of the jury process. The inherent bias rationale has never been the subject of empirical analysis. Instead, authorities seemingly accept the logic of the rationale unconditionally. This study (1) explores the prevalence, strength, and direction of convicted felons’ pretrial biases; (2) compares the group-level pretrial biases of convicted felons, nonfelon eligible jurors, and nonfelon law students; and (3) examines if and how a felony conviction shapes pretrial biases. The results of this study indicate that a majority of convicted felons harbor a prodefense/antiprosecution bias and, in this way, differ from eligible jurors generally. Yet, the results of this study also show that many convicted felons are neutral or harbor a proprosecution pretrial bias, and that the strength and direction of convicted felons’ group-level pretrial biases are similar to those of other groups of nonfelon jurors. In sum, this study suggests that while felon jury exclusion does not offend applicable constitutional standards, it is an imprecise and perhaps unnecessary practice that may come at substantial costs.

INTRODUCTION

The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state—a conviction of felony and punishment therefore—might well harbor a continuing resentment against “the system” that punished him and equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils. Because these antisocial feelings would often be consciously or subconsciously concealed, the Legislature could further conclude that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in

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jury selection proceedings. The exclusion of ex-felons from jury service thus promotes the legitimate state goal of assuring impartiality of the verdict. (*Rubio v. The Superior Court of San Joaquin County* 1979 at 101)

Typically, research on the civic marginalization of convicted felons focuses on those legal measures burdening a convicted felon’s right to vote (Manza and Uggen 2006). Yet, for those who bear the felon label, exclusion from the electorate is not the sole barrier to meaningful civic participation. Forty-nine states, the federal government, and the District of Columbia restrict a convicted felon’s opportunity to serve as a juror (Online Appendix; Figure 1). Of these jurisdictions, twenty-eight ban convicted felons from jury service permanently (Online Appendix; Figure 1), eliminating approximately thirteen million Americans from the national jury pool (Uggen, Manza, and Thompson 2006; Kalt 2003).

Justifying the statutory exclusion of convicted felons from jury service, policymakers and courts cite a need to protect the adjudicative process from those who might compromise its integrity (Kalt 2003). Purportedly, would-be felon jurors threaten the jury’s neutrality because they harbor an “inherent bias” (ibid., 105), making each sympathetic to criminal defendants and adversarial toward prosecutorial agents.1 As the District of Columbia Court of Appeals explains, “[t]he presumptively ‘shared attitudes’ of convicted felons as they relate to the goal of juror impartiality are a primary reason for the exclusion” (*Carle v. United States* 1998 at 686).3

Though an extensive body of research focuses on the pretrial biases of prospective jurors, no study has assessed the viability of the inherent bias rationale. Nevertheless, lawmakers proceed undeterred. Felon jury exclusion statutes often appear as riders on larger pieces of legislation, seldom eliciting debate (Travis 2005; Editorial 2003; Rubinstein and Mukamal 2002). And in those atypical instances during which policymakers consider the wisdom of barring convicted felons from the venire, they assume the merits of the inherent bias rationale.

Courts, too, are ostensibly unfazed by a want of empirical evidence on the inherent bias rationale. Faced with constitutional challenges to felon jury exclusion statutes, they conduct only cursory reviews. Courts do not force jurisdictions to clarify or defend their proffered justifications for banning convicted felons from the venire. Rather, they accept the inherent bias rationale *a priori*. Hence, while “[t]here is hardly an opinion involving jury law that does not cite empirical research findings” (Hans and Vidmar 1986, 5; see also Vidmar and Hans, 2007), such findings play no role in felon jury exclusion precedent.

Though the jury system performs an adjudicative function, “[i]t would be a very narrow view to look upon the jury as a mere judicial institution” (Tocqueville 1835, 282). The jury process is symbiotic. Citizens serve the justice system by settling legal disputes. At the same time, the jury bestows on society instrumental benefits, transcending its time-honored station as a decision-making tribunal (Amar 1995; Haddon 1994). Still, almost all
jurisdictions preclude convicted felons from the venire permanently or temporarily—but at what cost? By imposing such restrictions, jurisdictions limit the diversity of jury pools (Wheelock 2011) and may forego opportunities to enhance convicted felons’ views of the law (Gastil et al. 2012; Consolini 1992) and facilitate their enduring civic involvement (Gastil et al. 2010)—two factors linked to criminal desistance (Miller and Spillane 2012; Manza, Uggen, and Behrens 2006; Tyler 2006).\(^4\) Despite these potential costs, however, jurisdictions still justify felon jury exclusion statutes by relying on an untested, “intuitively based theory of personality” (Sealy 1981, 190).

Felon jury exclusion statutes are categorical and, as such, are seemingly premised on the claim that convicted felons would harbor a “universal, unidirectional bias” (Kalt 2003, 106) against the government and in favor of criminal defendants (Kalt 2003).\(^5\) Felon jury exclusion statutes also presume that convicted felons pose a unique threat to the jury process. No other group of prospective jurors is categorically excluded from the jury pool because of an alleged pretrial bias. Instead, other groups, which may assumedly harbor some form of pretrial bias (e.g., law enforcement personnel or crime victims), take part in the jury selection process; are subject to individual screening; and, if bias presents, are removed through challenges for cause or peremptory strikes.

This study is the first empirical analysis of the inherent bias rationale. Using the Revised Juror Bias Scale (Myers and Lecci 1998; Kassin and Wrightsman 1983), I examine the pretrial biases of a group of otherwise juror-eligible convicted felons (N = 242). I then compare convicted felons to a group of nonfelon eligible jurors (N = 245) and a group of nonfelon eligible jurors currently enrolled in law school (N = 218). Three inquiries drive this study. First, how prevalent is prodefense/antiprosecution bias among convicted felons? Second, how do the direction and strength of convicted felons’ pretrial biases compare to other groups of nonfelon jurors? And third, in relation to demographic and viewpoint factors shown to influence pretrial biases, how salient is a felony conviction in the formation of such biases? The goal of this project is to, for the first time, provide data that will inform a debate about felon jury exclusion statutes and the inherent bias rationale. To that end, this article surveys the pervasiveness of felon jury exclusion statutes, reviews failed legal attacks on their enforcement, and details prior empirical research on the pretrial biases of prospective jurors. This article then describes the methods, results, and potential weaknesses of a field study of the inherent bias rationale. And finally, this article discusses the findings of that study, contemplating the actual and prospective costs of excluding convicted felons from jury service.

THE SEVERITY AND PREVALENCE OF FELON JURY EXCLUSION STATUTES

In the United States, roughly sixteen million citizens bear the “felon” label (Uggen, Manza, and Thompson 2006). For those to whom the criminal justice system affixes this permanent mark, its salience makes reentry
exceedingly difficult (Bushway, Stoll, and Weiman 2007; Chiricos et al. 2007; Bontrager, Bales, and Chiricos 2005; Mele and Miller 2005; Travis and Visher 2005; O’Brien 2001). Numerous collateral sanctions and discretionary disqualifications restrict convicted felons’ freedoms (Ewald and Smith 2008; Pinard 2006; Petersilia 2005). Differing wildly from one jurisdiction to the next, such provisions affect a host of life choices. Among such restrictions are legislative mandates that categorically limit or eliminate a convicted felon’s opportunity to engage in certain civic processes (Manza and Uggen 2006 [voting]; Kalt 2003 [jury service]; Steinacker 2003 [holding office]). Felon jury exclusion statutes are the most prevalent class of “civic restrictions” (Binnall 2008, 2009, 2010; Love 2007; Love and Kuzma 1997).

Felon jury exclusion statutes roughly divide into two types: those that eliminate a convicted felon’s chances of ever serving as a juror (permanent ban) and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (temporary ban). While twenty-eight jurisdictions permanently disqualify convicted felons from jury service, the remaining jurisdictions impose less severe record-based juror eligibility criteria that vary significantly (Online Appendix; Figure 1).

Thirteen states bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony parole and felony probation. In two states, a felony conviction alone supports

Figure 1. Felon Jury Exclusion Policies by Jurisdiction.

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lifetime for-cause challenges, often permitting a trial judge to dismiss a convicted felon from the venire without conducting an individualized assessment of that convicted felon’s fitness as a juror. And finally, eight jurisdictions enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, and/or a term of years. For example, the District of Columbia and Oregon adhere to differing hybrid models; the former excludes convicted felons from jury service during any period of supervision and for ten years following the termination of supervision, while the latter excludes convicted felons solely from grand jury proceedings. Only Maine places no restrictions on a felon’s opportunity to serve as a juror (Online Appendix; Figure 1).

Thus, while divergent statutory schemes comprise a patchwork of standards, a majority of jurisdictions adhere to the most drastic form of felon jury exclusion—permanently banishing would-be felon jurors from the venire (Online Appendix; Figure 1).

LEGAL CHALLENGES TO FELON JURY EXCLUSION STATUTES

Legal challenges to felon jury exclusion statutes have taken two forms—cross-section claims and equal protection claims. Yet, these challenges have never met with success. The Supreme Court has held “jurisdictions are ‘free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character’ ” (Carter v. Jury Commission, 1970 at 332), and lower courts have rejected all constitutional attacks on felon jury exclusion statutes (Kalt 2003; Buchwalter 2000).

Cross-section claims are the most common challenges to felon jury exclusion statutes (State v. Compton 2002; United States v. Best 2002; Carle 1998; United States v. Barry 1995; Rubio 1979; United States v. Foxworth 1979; State v. Brown 1975; Shows v. State 1972). Alleging that felon jury exclusion compromises the representativeness of the jury pool, cross-section claims are rooted in the Sixth Amendment’s guarantee of an impartial jury (Taylor v. Louisiana 1975; U.S. Const. Amend. VI). As the Supreme Court has stated, “[t]he Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)” (Holland v. Illinois 1990 at 480–81).

Though the cross-section doctrine has evolved considerably over time (Thiel v. Southern Pacific Railway 1946; United States v. Ballard 1946; Strauder v. West Virginia 1880), in 1979, the Supreme Court enunciated a standard for such claims (Duren v. Missouri 1979). In Duren v. Missouri (ibid. at 364), the Court held that a cross-section claim requires a prima facie showing:

(1) that the group alleged to be excluded is a “distinctive group” within the community; (2) that the representation of this group in venires from which
juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

The Court explained, however, “[t]he demonstration of a prima facie fair-cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred” (ibid. at 367). Writing for the Court, Justice White noted that such schemes also “require that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group” (ibid. at 367–68).

Yet, courts have unanimously held that cross-section attacks on felon jury exclusion do not meet even the prima facie elements of cross-section claims, concluding that convicted felons do not constitute a distinct group (Rubio 1979). To establish that a group is distinct, a defendant must show:

(1) that the group is defined and limited by some factor (i.e. that the group has definite composition such as by race or sex); (2) that a common thread or basic similarity in attitude, ideas, or experiences runs through the group; and (3) that there is a community of interest among members of the group such that the group’s interests cannot be adequately represented if the group is excluded from the jury selection process. (Kalt 2003, 82)

Evaluating cross-section claims to felon jury exclusion, law professor Brian C. Kalt (2003) argues that convicted felons satisfy this vague definition of distinctiveness. He contends that, in making the distinctiveness determination, courts “distort” the legal standard (ibid., 85; see also Lockhart v. McCree 1986). He suggests that courts may be hesitant to engage in “demographic micromanagement” (Kalt 2003, 86–87), and perhaps view groups as distinct only when they warrant heightened constitutional protections under the equal protection doctrine or are defined by immutable characteristics (Kalt 2003). Nevertheless, no court has classified convicted felons as a distinct group. As a result, courts have never completed the cross-section analysis and definitively determined whether preserving the impartiality of the jury is a significant state interest manifestly and primarily advanced by felon jury exclusion statutes.6

While most challenges to felon jury exclusion statutes allege a violation of the cross-section requirement, some assert that record-based juror eligibility criteria contravene the Equal Protection Clause (U.S. Const. Amend. XIV; Greene 1993; United States v. Arce 1993; Rubio 1979). Brought by litigants on behalf of excluded jurors, equal protection claims allege that the exclusion of convicted felons from jury service violates the equal protection rights of those with a felony criminal record.

Equal protection attacks on felon jury exclusion statutes have never met with success. Courts hold that such challenges do not warrant heightened constitutional scrutiny, as they do not recognize jury service as a fundamental or important right (United States v. Conant 2000), and do not classify
convicted felons as a protected class (Aukerman 2005; Hilliard v. Ferguson 1994). Rather, when analyzing equal protection challenges to felon jury exclusion, courts apply only rational basis review. Under that minimal standard, courts authorize state action if it is rationally related to a state’s legitimate interest (United States v. Carolene Products Co. 1938). Not surprisingly, under rational basis review, state action almost always survives challenge (Saxonhouse 2004; Issacharoff, Karlan, and Pildes 2002). Felon jury exclusion statutes are no exception.

The failure of cross-section claims and equal protection challenges is principally attributable to courts’ unwillingness to group or classify convicted felons. Some commentators contend that this unwillingness has little to do with objective legal criteria. They argue that courts will not categorize convicted felons because they are at least partly responsible for their membership in their class or group (Geiger 2006; Aukerman 2005). Yet, interestingly, courts authorize felon jury exclusion statutes by relying on the inherent bias rationale, a justification that turns on the presumption that many convicted felons are alike, in that they allegedly harbor a prodefense/antiprossecution pretrial bias.

RESEARCH ON JURORS’ PRETRIAL BIASES

Empirical juror research examines how individuals evaluate evidence, interpret law, and ultimately reach a verdict (Mazzella and Feingold 1994). One strain of empirical juror research explores how jurors’ pretrial biases influence their verdict preference.

Pretrial biases can take two forms: specific or general (Villiers 2010; Cammack 1995; Brown 1994; Ellsworth 1993; Kaplan and Miller 1978; People v. Wheeler 1978; Note 1977). While specific biases are those spawned by the attributes of a given case or defendant, general biases are unrelated to case features (Myers and Lecci 1998). Instead, general biases are individualized, shaped by jurors’ perspectives and life experiences (Cammack 1995). The inherent bias rationale invokes a theory of general bias.

Since the early 1970s, the predictive value of general biases has been the subject of extensive research (Devine et al. 2001; Hastie, Penrod, and Penington 1983). Yet, that research is mixed (Devine 2012; Devine et al. 2001; Saks 1997). Studies demonstrate that juror demographics, attitudes, and personality traits seldom yield biases that accurately and uniformly influence juror decision-making processes (Devine 2012; Bonnazoli 1998; Ellsworth 1993). These results have prompted some scholars to conclude that, “few if any juror characteristics are good predictors of juror verdict preferences” (Devine et al. 2001, 673).

Research on general pretrial biases most often focuses on juror demographics and their potential influence on verdicts. Yet, studies exploring the predictive value of juror demographics have largely yielded inconclusive
results (Devine et al. 2001). Evidence indicates that juror demographics alone are inaccurate predictors of verdict preference. Rather, demographic variables play a more nuanced role in the juror decision-making process, eliciting predictive biases that are case and defendant specific (Lynch and Haney 2009; Mitchell et al. 2005; Bonnazoli 1998; Sweeney and Haney 1992).

Research also demonstrates that juror attitudes seldom predict verdict (Devine et al. 2001). One notable exception, however, are jurors’ views of the death penalty. Studies have shown that a juror’s attitude toward capital punishment spawns a general bias that can influence verdict preference (Bowers, Sandys, and Steiner 1998). Across cases, death qualified jurors are far more likely to convict than are jurors who oppose the death penalty (Allen, Mabry, and McKelton 1998; Horowitz and Seguin 1986; Bernard and Dwyer 1984; Cowan, Thompson, and Ellsworth 1984; Moran and Comfort 1982b).

Studies of general biases have also focused on juror personality traits and their impact on juror decision-making processes. Though research in this area has established few links between juror personality traits and verdict preference (Devine et al. 2001), studies do reveal that the personality trait of authoritarianism can significantly affect a juror’s determination of guilt or innocence in a variety of cases (Narby, Cutler, and Moran 1993; Gerbasi, Zuckerman, and Reis 1977; Lerner 1970). In a meta-analysis of studies exploring the impact of traditional authoritarianism and legal authoritarianism on juror verdict preference,7 Narby, Cutler, and Moran (1993) discovered that jurors who scored high on measures of authoritarianism, and to a greater extent legal authoritarianism, tended to convict more often.

Though views of the death penalty and the personality trait of authoritarianism can affect juror decision-making processes, studies show that general biases are typically weak predictors of jurors’ verdict preferences (Devine 2012). In this way, prior research indirectly calls into question the empirical viability of the inherent bias rationale. This study further explores the empirical underpinnings of that justification.

A FIELD STUDY OF THE INHERENT BIAS RATIONALE

This study examines the pretrial biases of convicted felons, compares convicted felons to other groups of nonfelon jurors, and explores the possible nexus between a felony conviction and pretrial biases. Three inquiries drive this study: (1) Is there a level of bias homogeneity among convicted felons such that all, or at least the vast majority of convicted felons harbor a prodefense/antiprosecution pretrial bias? (2) Are the strength and direction of convicted felons’ pretrial biases markedly different than those of other groups of nonfelon jurors? (3) What possible role does a felony conviction play in the formation of pretrial biases? To explore these inquiries,
I conducted a field study in a large county in southern California comparing a group of otherwise juror-eligible subjects with a felony criminal record (focal group) to a group of eligible jurors (comparison group 1) and a group of eligible jurors currently enrolled in law school (comparison group 2), a group often assumed to harbor prodefense/antiprossecution pretrial biases.

PARTICIPANTS

This study includes 707 participants that divide into three groups: 247 otherwise eligible jurors with a felony criminal record (“convicted felons”), 242 eligible jurors without a felony criminal record (“eligible jurors”), and 218 eligible jurors without a felony criminal record and currently enrolled in law school (“law students”). To construct each study group, I recruited participants at a variety of locations over the course of twelve months. To avoid conditioning during recruitment, I presented prospective subjects with only a brief overview of the study before asking each to respond to a series of written questions. Because this study involves eligible jurors in California, I used California’s juror eligibility guidelines as exclusionary criteria, prescreening participants to ensure they met these guidelines.

The focal group includes 247 convicted felons. I recruited convicted felons from Parole and Community Team (PACT) meetings over three months in 2011 (Ross 2008). The California Department of Corrections and Rehabilitation (CDCR) requires all newly released prisoners to attend a PACT meeting within thirty days of their release from prison. The CDCR conducts five PACT meetings per month in the host county. For three months, I attended all PACT meetings in the host county, recruiting participants at a total of fifteen meetings at which attendance ranged from ten to fifty convicted felons. In total, I solicited 304 PACT meeting attendees. A response rate of 81 percent yielded 247 convicted felon participants. Appendix 1 provides a description of participant characteristics.

When constructing the focal group, rather than recruiting convicted felons who had completed their term of supervision, I chose to recruit parolees. I hypothesized that if a strong pretrial bias were to exist, it would likely present most regularly and strongly in convicted felons who had recently finished a period of incarceration. Accordingly, the focal group is comprised exclusively of participants who were no more than thirty days removed from prison.

Comparison group 1 consists of 242 eligible jurors without a felony criminal conviction. I recruited eligible jurors from business and community centers in four culturally and socioeconomically diverse areas of the host county. Though the setting for recruitment varied slightly from location to location, I consistently chose highly trafficked areas. I recruited eligible jurors for six months in 2011, soliciting approximately 380 eligible jurors. A 64 percent response rate resulted in 242 eligible juror participants.
Comparison Group 2 is comprised of 218 eligible jurors who are currently enrolled in law school. I recruited law students from a local law school in the host county. There, I conducted in-person solicitation in ten individual classes over the course of four weeks in 2011. Classes ranged in size from twelve to sixty students, were topically varied, and included students at various stages of their legal studies. In sum, those classes were comprised of 248 students. The response rate for law students was 88 percent.

I chose to include law students as a comparison group to assess whether prodefense/antiprosecution bias exists in other groups of nonfelon jurors. As part of their training, law students learn that in a criminal case, defendants are innocent until proven guilty. They also learn that to secure a conviction, the prosecution must prove—beyond a reasonable doubt—that the defendant committed the crime in question. I recruited law students from a small, regional law school that produces many lawyers who practice criminal defense and public interest law. Given law students’ training and the culture of the recruitment site law school, I hypothesized that the law student group would harbor a prodefense pretrial bias.

MEASURES

To explore the underlying presumptions of the inherent bias rationale, I used a measure of pretrial bias (the Revised Juror Bias Scale [RJBS]). Additionally, from each subject, I collected demographic and viewpoint data.

Developed by Kassin and Wrightsman (1983), the Juror Bias Scale (JBS) is the most commonly used measure of juror bias (Devine 2012; Smith and Bull 2012). The JBS measures prospective jurors’ pretrial dispositions toward guilt or innocence (Kassin and Wrightsman 1983), using two separate but related constructs: Probability of Commission (PC) and Reasonable Doubt (RD) (ibid.). The PC subscale measures a subject’s “beliefs about how likely criminal defendants are to have committed a crime,” while the RD subscale measures “the level of subjective certainty needed to (personally) justify convicting a defendant” (Devine 2012, 106; Kassin and Wrightsman 1983). A number of studies have demonstrated that JBS scores predict verdict (De La Fuente, De La Fuente, and Garcia 2003; Tang and Nunez 2003; Warling and Peterson-Badali 2003; Lecci et al. 2000; Myers and Lecci 1998; Chapdelanie and Griffin 1997; Narby, Cutler, and Moran 1993; Cutler, Moran, and Narby 1992; Dexter, Cutler, and Moran 1992; Kassin and Wrightsman 1983), only two have called into question the predictive validity of the JBS (Kassin and Garfield 1991; Weir and Wrightsman 1990). As a result, scholars generally characterize the JBS as a reliable measure of pretrial bias (Devine 2012; Smith and Bull 2012).

In 1998, Myers and Lecci (1998) performed a confirmatory factor analysis on the JBS and found that empirical evidence did not support the underlying
two-factor structure of the scale. Using exploratory factor analysis, Myers and Lecci (1998) then generated an alternative model of the JBS with higher predictive validity than the original (Devine 2012). The resulting scale, the RJBS, consists of twelve questions that assess a juror’s pretrial propensity to favor either the defense or the prosecution. In a cross-validation study, the RJBS has proven a more robust measure of pretrial juror bias than the original JBS (Devine 2012; Lecci and Myers 2002).15

Scored on a standard five-category Likert scale (strongly disagree, disagree, no opinion, agree, strongly agree), the RJBS produces total scores that range from 12 to 60, with a scale median score of 36 (Myers and Lecci 1998). Generally, researchers employing the JBS or the RJBS as possible predictors of verdict use subject groups’ median score to divide participants into prodefense and propopsecution groups (Tang and Nunez 2003; Narby, Cutler, and Moran 1993; Cutler, Moran, and Narby 1992; Dexter, Cutler, and Moran 1992; Kassin and Garfield 1991; Weir and Wrightsman 1990; Kassin and Wrightsman 1983). Scores below the subject groups’ median indicate a prodefense bias, while scores above the subject groups’ median indicate a propopsecution bias (Myers and Lecci 1998; Kassin and Wrightsman 1983). Because the present study does not test the predictive validity of the RJBS, but rather compares the pretrial biases of groups, I use the scale median of the RJBS to delineate prodefense and propopsecution.

Prior studies on juror decision-making processes reveal that some juror characteristics can spawn general pretrial biases. Accordingly, along with responses to the RJBS, I collected data on a number of characteristics shown to potentially influence jurors’ pretrial attitudes. The data record subjects’ age (Higgins, Heath, and Grannemann 2007), gender (Quas et al. 2002; Moran and Comfort 1982a), race (King 1993; Mills and Bohannon 1980), native language (Hsieh 2001), occupational status (Cowan, Thompson, and Ellsworth 1984; Bridgeman and Marlowe 1979; Simon 1967), religion (Miller et al. 2011; Seltzer 2006; Eisenberg, Garvey, and Martin T. Wells 2001), socioeconomic status (Adler 1994; Reed 1965), level of education (Mills and Bohannon 1980; Bridgeman and Marlowe 1979; Simon 1967), history of victimization (Culhane, Hosch, and Weaver 2004), political affiliation (Krivitz, Cutler, and Brock 1993), and view of the death penalty (Allen, Mabry, and McKelton 1998; Horowitz and Seguin 1986; Bernard and Dwyer 1984; Cowan, Thompson, and Ellsworth 1984; Moran and Comfort 1982b).

I also employed a measure of subjects’ perceptions of the law’s fairness and legitimacy to assess the possible connection between view of the law and pretrial bias. Developed for this study, the Fairness and Legitimacy Scale (FLS) operationalizes subjects’ views of the law. In their research on how perceptions of the law impact legal compliance, procedural justice scholars have developed measures to assess subjects’ feelings about the perceived fairness of legal processes (Gottfredson et al. 2007; Tyler 2006;
McIvor 1999; Taxman, Soule, and Gelb 1999; Paternoster et al. 1997). The FLS draws on these measures. The FLS contains eight questions, scored on a standard Likert scale (strongly disagree, disagree, no opinion, agree, strongly agree) with possible scores ranging from 8 to 40 and a standard median score of 24. Higher scores indicate a favorable view of the law’s fairness and legitimacy; lower scores indicate a negative view of the law’s fairness and legitimacy.16

RESULTS

THE PRETRIAL BIASES OF CONVICTED FELONS

To explore prevalence of a prodefense/antiprosecution pretrial bias among convicted felons, I first examine the central tendencies and dispersion of convicted felons’ scores on the RJBS (Table 1). Convicted felons’ mean score on the RJBS (33.29) falls below the scale’s standard median (36), indicating that convicted felons, as a group, are prodefense/antiprosecution. Yet, as Table 1 also illustrates, convicted felons’ RJBS scores range considerably (17 to 55).

A frequency distribution of convicted felons’ RJBS scores reveals that 151 felons scored below the scale median, seventeen scored at the scale median, and sixty-six scored above the scale median (Figure 2). Thus, 65 percent possessed a prodefense/antiprosecution pretrial bias, 7 percent were neutral, while 28 percent favored the prosecution. While these results tend to show that categorical felon jury exclusion statutes are overinclusive, they also demonstrate that a majority of convicted felons harbor the prodefense/antiprosecution bias that such statutes seek to eradicate.

Table 1. Revised Juror Bias Scale Scores by Group—Descriptive Statistics

<table>
<thead>
<tr>
<th></th>
<th>Eligible Jurors</th>
<th>Convicted Felons</th>
<th>Law Students</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>235</td>
<td>234</td>
<td>209</td>
</tr>
<tr>
<td>Mean</td>
<td>35.41</td>
<td>33.29</td>
<td>32.07</td>
</tr>
<tr>
<td>Median (36)</td>
<td>35</td>
<td>33</td>
<td>33</td>
</tr>
<tr>
<td>Std. Deviation</td>
<td>5.10</td>
<td>6.08</td>
<td>5.64</td>
</tr>
<tr>
<td>Range (12–60)</td>
<td>21–49</td>
<td>17–55</td>
<td>18–53</td>
</tr>
</tbody>
</table>

Note: Parentheses indicate the scale properties. The RJBS’s median score is 36 and its possible range is 12–60. N’s differ from the total number of participants because I did not impute missing values for dependent variable (RJBS score), dropping participants who did not answer all items on the RJBS scale.
I next explored the group level biases of study participants. To do so I first examine the central tendencies and dispersion of each group’s scores on the RJBS (Table 1). Each group’s mean RJBS score falls below the scale median (36), suggesting a prodefense/antiprosecution bias across groups. Additionally, the mean RJBS score of convicted felons matches that of law students (33) and is lower than the mean RJBS of eligible jurors (35). This suggests that convicted felons and law students harbor similar prodefense pretrial biases that are more extreme than those of eligible jurors. Among groups, the dispersion of RJBS scores takes on a comparable pattern. The range of RJBS scores for convicted felons and law students are alike and vary substantially (17 to 55 and 18 to 53, respectively), while the RJBS scores of eligible jurors are more centralized, ranging from 21 to 49. These results seem to demonstrate that the pretrial biases of convicted felons and law students (1) differ from the pretrial biases of eligible jurors but (2) are similar in strength, direction, and variation. A graphical comparison of group RJBS scores illustrates these relationships. Figure 3 shows the score distribution, interquartile range, and median of group RJBS scores.

Figure 2. Frequency Distribution of Convicted Felons’ Scores on the Revised Juror Bias Scale.
*Note:* The bolded line identifies the Revised Juror Bias Scale’s median value of 36. Scores below that median indicate a prodefense bias and scores above that median indicate a proprosecution bias.

**FELONS VS. NONFELONS**

I next explored the group level biases of study participants. To do so I first examine the central tendencies and dispersion of each group’s scores on the RJBS (Table 1). Each group’s mean RJBS score falls below the scale median (36), suggesting a prodefense/antiprosecution bias across groups. Additionally, the mean RJBS score of convicted felons matches that of law students (33) and is lower than the mean RJBS of eligible jurors (35). This suggests that convicted felons and law students harbor similar prodefense pretrial biases that are more extreme than those of eligible jurors. Among groups, the dispersion of RJBS scores takes on a comparable pattern. The range of RJBS scores for convicted felons and law students are alike and vary substantially (17 to 55 and 18 to 53, respectively), while the RJBS scores of eligible jurors are more centralized, ranging from 21 to 49. These results seem to demonstrate that the pretrial biases of convicted felons and law students (1) differ from the pretrial biases of eligible jurors but (2) are similar in strength, direction, and variation. A graphical comparison of group RJBS scores illustrates these relationships. Figure 3 shows the score distribution, interquartile range, and median of group RJBS scores.
Using mean as the measure of central tendency, I then compare each group's RJBS score. The Shapiro-Wilk test of normality reveals that all groups are normally distributed on the RJBS (Eligible Jurors: \( p = .82 \), Felons: \( p = .18 \), Law Students: \( p = .87 \)) (Shapiro and Francia 1972; Shapiro and Wilk 1965). Yet, Bartlett’s test of group-wise heteroskedasticity shows that variances are not equal across groups (Felons/Eligible Jurors: \( p = .0001 \), Felons/Law Students: \( p = .291 \), Eligible Jurors/Law Students: \( p = <.0000 \)) (Brown and Forsythe 1974; Box 1953). For this reason, I use a series of unequal variance t-tests to test the null hypothesis that the intergroup means are equal (Welch 1947; Satterthwaite 1946). Table 2 presents these results.

Table 2. Unequal Variance t-tests Comparing Revised Juror Bias Scale Scores

<table>
<thead>
<tr>
<th></th>
<th>Satterthwaite df</th>
<th>( p )-value</th>
<th>Welch df</th>
<th>( p )-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convicted Felons v. Eligible Jurors</td>
<td>452.7</td>
<td>0.0001***</td>
<td>454.58</td>
<td>0.0001***</td>
</tr>
<tr>
<td>Eligible Jurors v. Law Students</td>
<td>422.04</td>
<td>&lt;0.0000***</td>
<td>423.95</td>
<td>&lt;0.0000***</td>
</tr>
<tr>
<td>Convicted Felons v. Law Students</td>
<td>440.33</td>
<td>0.29</td>
<td>442.34</td>
<td>0.29</td>
</tr>
</tbody>
</table>

Note: ***\( p < .001 \).
The results of these comparisons reveal two notable findings. First, a comparison of mean group scores on the RJBS shows a statistically significant difference between convicted felons and eligible jurors. Yet, results also indicate that there is no statistically significant difference between the mean RJBS scores of convicted felons and law students. Thus, as a group, law students appear to harbor a prodefense/antiprosecution bias as severe as that of convicted felons.

THE IMPACT OF A FELONY CONVICTION ON PRETRIAL BIASES

As part of the present study, I also performed an exploratory analysis examining the significance of a felony conviction in the formation of pretrial bias. To do so, I conducted a multivariate regression (ordinary least squares) that examines the relationship between RJBS scores, group membership, FLS scores, and subject characteristics that studies have shown may impact a juror’s pretrial biases.\textsuperscript{19} Table 3 summarizes the results of this analysis.\textsuperscript{20}

Table 3. Revised Juror Bias Scale Scores as a Function of Juror Demographics, Viewpoints, and Fairness and Legitimacy Scale Scores.\textsuperscript{22}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Convicted felon</td>
<td>-2.282**</td>
<td>0.705</td>
<td>-0.190**</td>
</tr>
<tr>
<td>Law student</td>
<td>-3.533***</td>
<td>0.653</td>
<td>-0.288***</td>
</tr>
<tr>
<td>Fairness and legitimacy</td>
<td>0.400***</td>
<td>0.047</td>
<td>0.328***</td>
</tr>
<tr>
<td>Age</td>
<td>-0.003</td>
<td>0.020</td>
<td>-0.005</td>
</tr>
<tr>
<td>Gender</td>
<td>-0.249</td>
<td>0.462</td>
<td>-0.020</td>
</tr>
<tr>
<td>African American</td>
<td>-1.032†</td>
<td>0.597</td>
<td>-0.070†</td>
</tr>
<tr>
<td>Latino/a</td>
<td>0.991</td>
<td>0.617</td>
<td>0.072</td>
</tr>
<tr>
<td>Other race</td>
<td>0.982†</td>
<td>0.570</td>
<td>0.066†</td>
</tr>
<tr>
<td>Less than high school</td>
<td>2.756**</td>
<td>0.902</td>
<td>0.134**</td>
</tr>
<tr>
<td>Some college</td>
<td>-0.493</td>
<td>0.644</td>
<td>-0.040</td>
</tr>
<tr>
<td>College</td>
<td>-0.510</td>
<td>0.804</td>
<td>-0.036</td>
</tr>
<tr>
<td>Graduate school</td>
<td>-0.475</td>
<td>0.876</td>
<td>-0.035</td>
</tr>
<tr>
<td>Income</td>
<td>-0.113</td>
<td>0.010</td>
<td>-0.045</td>
</tr>
<tr>
<td>Language</td>
<td>0.083</td>
<td>0.642</td>
<td>0.005</td>
</tr>
<tr>
<td>Victimization</td>
<td>-0.980*</td>
<td>0.442</td>
<td>-0.079*</td>
</tr>
<tr>
<td>Strongly support death</td>
<td>2.181***</td>
<td>0.616</td>
<td>0.156***</td>
</tr>
<tr>
<td>Support death penalty</td>
<td>0.748</td>
<td>0.567</td>
<td>0.056</td>
</tr>
<tr>
<td>Oppose death penalty</td>
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<td>0.586</td>
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<tr>
<td>Strongly oppose death</td>
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<tr>
<td>Very liberal</td>
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<tr>
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<td>-0.104**</td>
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<tr>
<td>Adjusted r\textsuperscript{2}</td>
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</table>

Note: †p < .10, *p < .05, **p < .01, ***p < .001. N differs from the total number of participants because I did not impute missing values for dependent variable (RJBS score), dropping participants who did not answer all items on the RJBS scale.
As shown in Table 3, felony conviction has a significant negative regression weight ($b = -0.190$), indicating that, after controlling for other discernable variables, a felony conviction predicts a lower score on the RJBS (a prodefense/antiprosecution pretrial bias) relative to eligible jurors. Yet, a number of other variables also predict such a bias. For example, those subjects who self-identify as law students ($b = -0.288$), African American ($b = -0.070$), crime victims ($b = -0.079$), strongly opposed to the death penalty ($p = -0.109$), or liberal ($b = -0.104$), are also more likely to harbor a prodefense/antiprosecution bias (relative to the respective reference groups listed in the caption in Table 3). Conversely, participants who have less than a high school education ($b = 0.134$), strongly support the death penalty ($b = 0.156$), or have a positive view of the law ($b = 0.328$)$^{21}$ are more likely to favor the prosecution (relative to reference categories).

In sum, these results tend to show that though a felony conviction is a statistically significant predictor of a prodefense pretrial bias, it is not the sole predictor of such a bias, as a host of other factors can contribute to or mitigate the pretrial dispositions of prospective jurors. These results are consistent with this study’s earlier findings, suggesting that while many convicted felons are likely to harbor a prodefense/antiprosecution pretrial bias, so too are other identifiable nonfelon groups.

STUDY LIMITATIONS

This posttest only, nonequivalent design has limitations. When assessing the frequency of a prodefense pretrial bias among convicted felons and other nonfelon groups, I relied on volunteer participants from a limited geographic location. Accordingly, a measure of self-selection bias was likely present, limiting this study’s generalizability. Additionally, those groups may not accurately represent their corresponding populations. Yet, for some characteristics (e.g., race), this makes statistically significant group differences more robust. For example, given the racial discrepancies, the host county’s population is more likely to favor the prosecution than is this study’s eligible juror group.

To analyze the effect of a felony conviction on pretrial bias, I compared three nonequivalent groups in the field. These groups differ on a number of characteristics apart from a felony criminal history. To account for these anticipated differences, I used aggregate matching, purposively recruiting eligible jurors and law students that shared observable characteristics with convicted felons (Schutte 2012). I also attempted to mitigate group differences by using multiple regression analyses. Using aggregate matching and regression analyses, I was able to control for only a limited number of possible confounding variables (Schutte 2012), calling into question this study’s internal validity (Shadish, Cook, and Campbell 1979). Because unidentified factors may have influenced findings, this study does not allow for unambiguous causal claims.
Despite these limitations, this study does allow for qualified inferences that shed light on a previously unexplored topic. As importantly, this study has the potential to initiate a line of inquiry into a pervasive practice that could have a profound impact on a uniquely democratic process.

**DISCUSSION**

**DOES FELON JURY EXCLUSION ENSURE IMPARTIALITY?**

In the present study, I first explored the prevalence of prodefense/antiprosecution pretrial bias among convicted felons. I then compared convicted felons to two groups of nonfelons jurors: eligible jurors and law students. Through these comparisons, I examined the relative direction and strength of convicted felons’ pretrial biases. I also assessed how a felony conviction may shape pretrial biases. Though the results of this study tend to show that felon jury exclusion statutes are rationally related to a legitimate state interest, they also cast doubt on the necessity of precluding convicted felons from the adjudicative process.

Courts have held that convicted felons do not constitute a “distinct” group for purposes of establishing a prima facie cross-section claim (Rubio 1979). Moreover, to survive an equal protection challenge, a felon jury exclusion statute must only rationally relate to a legitimate state interest (United States v. Conant 2000; Hilliard v. Ferguson 1994). Of the convicted felons who took part in the present study, 65 percent possessed a prodefense/antiprosecution pretrial bias, and additional analyses demonstrated that a felony conviction is a significant predictor of a prodefense bias. Results also suggest that convicted felons, as a group, are statistically more prodefense/antiprosecution than eligible jurors. Taken together, these findings tend to support a claim that, unlike eligible jurors generally, a majority of felonious jurors would favor criminal defendants and disfavor the government (see, e.g., State v. Baxter 1978). Thus, the present study does not undermine the legality of felon jury exclusion statutes, as results clearly establish a rational relationship between excluding convicted felons from jury service and preserving the impartiality of the jury pool.

This study does, however, call into question the need to exclude convicted felons from the jury pool. As law professor Brian Kalt notes, “[o]nly if every, or almost every, felon is irretrievably biased against the government might it make sense to have a blanket exclusion of felons from criminal juries on these grounds” (Kalt 2003, 106). Kalt contends that excluding convicted felons from the jury process is an overinclusive measure that does little to ensure the impartiality of the jury process (2003). The results of the present study seemingly support those contentions.

Instrument responses reveal considerable variability in convicted felons’ pretrial biases. Of the convicted felons who took part, 7 percent
were neutral and 28 percent favored the prosecution, a pretrial bias acceptable under the inherent bias rationale. Nationally, the exclusion of convicted felons from jury service bars roughly thirteen million Americans from the adjudicative process (Kalt 2003). This study suggests that as many as 4.5 million of these citizens may not hold prodefense/antiprossecution pretrial biases and are therefore unnecessarily skimmed from jury pools.

Describing voir dire, the Supreme Court has stated, “it is fair to assume that the method we have relied on since the beginning usually identifies bias” (Patton v. Yount 1984 at 1038). Likewise, lower courts laud the jury selection process noting, “voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner” (In re Application of National Broadcasting Co. 1981 at 362). These sentiments make clear that courts view voir dire as an accepted, accurate method for identifying and eliminating pretrial biases. Nevertheless, the vast majority of jurisdictions preclude convicted felons from taking part in voir dire because of their alleged pretrial biases.

This study’s findings reveal no significant difference between the group-level bias of convicted felons and that of law students, suggesting that law students pose as much of a threat to the jury process as do their felonious counterparts. This study also tends to show that a number of factors contribute to and mitigate prodefense/antiprossecution pretrial biases, such that convicted felons, law students, and perhaps other non-felon groups, are likely to exhibit statistically similar levels of prodefense/antiprossecution bias. Still, while convicted felons are banished, law students and other potentially biased groups of nonfelon jurors take part in the jury selection process (voir dire). The present study, therefore, ostensibly undermines a claim that convicted felons pose a unique threat to the jury and casts doubt on the level of protection felon jury exclusion statutes afford jury pools. So why are convicted felons the only group of prospective jurors barred from the jury selection process because of a presumed pretrial bias?

The inherent bias rationale is only one justification for categorical felon jury exclusion statutes. Courts and lawmakers also often note that convicted felons lack the requisite character to take part in jury service (see, e.g., Barry 1995; Arce 1993). Though they do not identify the exact mechanism by which a felon’s character diminishes his or her capabilities as a juror, authorities suggest that convicted felons would lessen the quality of deliberations and compromise the appearance of the jury as a legitimate finder of facts (Kalt 2003). Jurisdictions may forbid convicted felons from taking part in voir dire solely because they do not possess the obligatory character to serve as jurors. If so, the inherent bias rationale is not actually directed at ensuring impartiality but is instead a “convenience rather than a sincere belief” (Kalt 2003, 108).
THE POTENTIAL COSTS OF FELON JURY EXCLUSION

In *Peters v. Kiff* (1972 at 503–04), Justice Marshall explained,

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience unknown and perhaps unknowable . . . [i]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Impacting millions of convicted felons and countless litigants, felon jury exclusion statutes homogenize the racial and viewpoint composition of jury pools. Such statutes disproportionately reduce the number of minorities who are eligible for jury service (Wheelock 2011). Felon jury exclusion statutes also remove from the justice system a unique and potentially valuable viewpoint distinct from propensities to favor a side in a dispute. Convicted felons likely interpret evidence and assess witness credibility differently than nonfelon jurors, possibly enriching jury deliberations.

As importantly, the practice of excluding convicted felons from jury service robs prospective felon jurors of a crucial lesson in what Justice Breyer (2005) terms “active liberty.” Jury service enhances jurors’ views of the justice system (Gastil et al. 2012; Cutler and Hughes 2001; Consolini 1992; Shuman and Hamilton 1992; Durand, Bearden, and Gustafson 1978; Allen 1977; Pabst Munsterman, and Mount 1976, 1977; Richert 1977) and encourages future civic engagement (Gastil et al. 2008; Gastil and Weiser 2006; Gastil, Deess, and Weiser 2002; Freie 1997; Finkel 1985; Barber 1984; Pateman 1970), factors that may prompt legal compliance (Tyler 2007, 2009; Manza and Uggen 2006; Tyler, Casper, and Fisher 1989). Yet, felon jury exclusion statutes eliminate the possibility that jury service will effect change among convicted felons. By promulgating and authorizing record-based juror eligibility criteria, lawmakers and courts forsake an opportunity to nurture convicted felons’ respect for and participation in the law. Moreover, research suggests they turn away citizens who could most benefit from inclusion (Gastil et al. 2008), and to justify doing so, claim that felons pose a uniquely serious threat to the jury process. This study does not support that claim.

Instead, the present study challenges the premises of the inherent bias rationale and the wisdom of alienating those we profess to want to rehabilitate. Most of the nation struggles with ever-escalating recidivism rates, yet most of the nation also ignores the jury as a potential tool with which to promote prosocial attitudes and behaviors. As it has been for over 200 years, the American jury is a powerful vehicle for structural and individual change (Gobert 1998). This study suggests that jurisdictions face relatively little risk if they choose to call on the jury as a means of promoting change among former offenders.
CONCLUSION AND FUTURE RESEARCH

Voter disenfranchisement often dominates discussions on the civic marginalization of convicted felons. Each election cycle, commentators debate the justifications for and the appropriateness of precluding convicted felons from the electorate. Conversely, though they are far more pervasive than felon voter disenfranchisement laws, felon jury exclusion statutes receive little attention. Courts and scholars seldom question the proffered rationales for expelling convicted felons from the venire. This study calls into question the wisdom of that approach. Though constitutional, felon jury exclusion statutes and the inherent bias rationale warrant debate. As this study suggests, the justification may lack an empirical foundation, and excluding felons from the venire may be a needless exercise that homogenizes jury pools and has the potential to taint views of the law, stunt civic engagement, and hinder reintegration.

Future research on felon jury exclusion can help complete our understanding of the consequences of removing convicted felons from the adjudicative process. How do convicted felons influence deliberations? Do convicted felons have the negative impact on the group decision-making process that is presumed in their exclusion? How might felon jury inclusion shape convicted felons’ perceptions of themselves and the law in ways that facilitate active civic engagement and successful reintegration?

NOTES

1. Though the exclusion of felons from jury service includes both civil and criminal litigation, this article addresses the justifications for felon jury exclusion solely in the context of criminal trials. Courts have questioned the inherent bias rationale as a justification for excluding convicted felons from civil trials. See, for example, Companioni Jr. v. City of Tampa (2007 at 413 [“To the extent that the theory that felon jurors have an ‘inherent bias’ has any validity at all, its applicability is limited to criminal cases.”]).
2. The federal court system and the District of Columbia are not shown. The federal court system excludes convicted felons from jury service for life and the District of Columbia imposes a hybrid restriction.
3. Courts and lawmakers often cite two additional rationales for felon jury exclusion statutes. The first holds that convicted felons lack probity or character and would undermine the jury process. The second, more philosophical than practical, is premised on the notion that convicted felons have violated the social contract and are undeserving of serving as a juror (see Kalt 2003). Though these rationales warrant further study, this article focuses only on the inherent bias rationale for felon jury exclusion.
4. Tyler and others (Gottfredson et al. 2007; Tyler 2006; McIvor 1999; Taxman, Soule, and Gelb 1999; Paternoster et al. 1997) have conducted numerous studies that suggest that those who view the law more favorably are more likely to comply with its mandates. In their work on felon voter disenfranchisement, Miller and Spillane (2012) and Manza and Uggen (2006) found a strong correlation between civic engagement and criminal desistance.
5. When interpreting the inherent bias rationale, courts do not explicitly state the assumed pervasiveness of a prodefense/antiprosecution bias among felons but
suggest that most, if not all convicted felons harbor such a bias. See, for example, *Commonwealth v. Aljoe* (1966 at n. 6 ["It is well known by Judges and lawyers that in the selection of a jury, most defense lawyers welcome a person who has been previously convicted of a crime."]); see also *State v. Baxter* (1978 at 275 ["[Juror’s] former conviction and imprisonment would ordinarily incline him to compassion for others accused of crime."]); *Rubio* (1979 at 101 ["a person who has suffered the most severe form of condemnation that can be inflicted by the state—a conviction of felony and punishment therefore—might well harbor a continuing resentment against ‘the system’ that punished him and equally unthinking bias in favor of the defendant on trial"]); *United States v. Greene* (1993 at 796 ["[It is rational to assume that persons currently facing felony charges may be biased against the government."]] ; *Carle* (1998 at 686 ["The presumptively ‘shared attitudes’ of convicted felons as they relate to the goal of juror impartiality are a primary reason for the exclusion."]); *Companioni Jr.* (2007 at 413 ["[t]he per se rule assumes that the felon juror harbors an ‘inherent bias.’"]); *People v. Miller* (2008 at 874 ["At some point, a juror’s past experience must lead to a presumption of bias because of the juror’s inherent knowledge from experience."]); Michigan Senate Fiscal Agency Bill Analysis (2003, 5 ["A person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant. Such a situation is blatantly unfair to the prosecution and the crime victim."])(emphasis added in all cases).


7. Narby et al. (1993, 286–87) describe traditional authoritarianism as “an individual’s tendency to be politically conservative, hold conventional values, prefer powerful leadership, engage in stereotypical thinking, and manifest overly punitive and rigid thinking.” They describe legal authoritarianism as “an individual’s tendency to engage in anti-libertarian thinking and specifically focuses on beliefs related to the legal system and an inclination to slight the defendant’s civil liberties.”

8. At PACT meetings, local community agencies discuss the services available to parolees.

9. The convicted felon group mirrors California’s parolee population on several important factors. As of December 31, 2011, California’s parolee population consisted of 10 percent females and 90 percent males. The average age of female parolees is thirty-eight, males thirty-seven. In the present study, 24.07 percent of convicted felons are women and 75.93 percent are men. The ages of female convicted felons ranged from nineteen to sixty with a mean age of thirty-five (SD = 9.61), while the ages of males ranged from nineteen to seventy-one with a mean age of thirty-six (SD = 11.19). Hence, though female convicted felons are overrepresented in this study, the average ages of female and male felons are comparable to California’s parolee population (California Department of Corrections and Rehabilitation 2012; Appendix 1).

   The racial composition of convicted felons in this study differs slightly from California’s parolee population. Of parolees in California, 29.9 percent are White, 27.9 percent are Black, 36.7 percent are Latino/a, and 5.5 percent are some other race. In the present study, 32.5 percent of convicted felons are White, 23.5 percent are Black, 30 percent are Latino/a, and 14 percent are some other race. Thus, Black and Latino/a felons are slightly underrepresented in the present study while White and “other” ethnicities are slightly overrepresented (California Department of Corrections and Rehabilitation 2012; Appendix 1).

10. The host county does not collect or maintain data on its juror demographics. The closest approximation is U.S. Census data for the host county. For 2010, the U.S.
Census reported that the host county was approximately 49.8 percent female and 50.2 percent male. Roughly 48.5 percent of the residents in the host county are White, 4.7 percent are Black, 32 percent are Latino/a, and 14.8 percent are of some other ethnicity. The eligible juror group in the present study consists of fifty-eight females (24 percent) and 184 males (76 percent). Of the eligible juror group, 33 percent are White, 24 percent are Black, 27 percent are Latino/a, and 17 percent are of some other ethnicity (U.S. Census Bureau, 2010; Appendix 1).

Overall, the gender and race of the eligible juror group is dissimilar to the population of the host county. Specifically, males and Black eligible jurors are significantly overrepresented in the eligible juror group, while White eligible jurors are underrepresented. Though the gender and race distribution in the eligible juror group approximate that of the felon group, the discrepancies between the eligible juror group and the host county’s census data likely detract from the generalizability of the present study (U.S. Census Bureau 2010; Appendix 1).

11. The gender and ethnic breakdown of the law student group are similar to the fall 2011 matriculant group. The Law School Admission Council reports that the matriculant group for fall 2011 totaled 45,600 students. Of those students, roughly 47 percent are female and 53 percent are male. In the present study, 44.5 percent of the law student group is female and 55.5 percent is male. Hence, the gender distribution of the law students in the present study closely resembles that of the law student matriculation group for fall 2011 (Law School Admission Council 2011; Appendix 1).

Of the fall 2011 matriculant group, 61 percent are White, 7 percent are Black, 6 percent are Latino/a, and 26 percent are some other ethnicity. Of the law students in the present study, 60.4 percent of students are White, 7.8 percent are Black, 7.8 percent are Latino/a, and 24 percent are some other ethnicity. Thus, the ethnic breakdown of law students in the present study approximates that of the law student matriculation group for fall 2011 (Law School Admission Council 2011; Appendix 1).

12. The law students at the recruitment site were relatively homogenous with respect to age and race. Hence, purposive sampling did not yield a law student group that approximated the convicted felon group. Group differences between law students and convicted felons were largely controlled for using regression analyses.

13. The RJBS is a refined version of the Juror Bias Scale and measures the pretrial biases of subjects using two underlying constructs: probability of commission and reasonable doubt. In this context, bias is defined as an inclination to favor the prosecution or the defense without knowledge about the facts of a particular case or the evidence presented.

14. Narby, Cutler, and Moran (1993, 36) note that in a personal communication, Kassin indicated that the JBS could be considered a measure of legal authoritarianism, a personality trait shown to generate general biases that influence juror decision-making processes in a variety of cases.

15. I chose to use the RJBS because the RJBS is a refined version of the JBS—the most tested and validated measure of pretrial bias. Another modified version of the RJBS/JBS—the Pretrial Juror Attitude Questionnaire (PJAQ)—was developed by Myers and Lecci (2008) but has not undergone extensive validation.

16. The FLS was pretested on ten members of each group. Participants were asked to answer the questions contained in the FLS and to then take part in a thirty-minute interview about their experiences with, and views of, the law and legal processes. In all cases, subjects’ FLS score mirrored their interview responses.

17. Sensitive to departures from normality, Barlett’s test of group heteroskedasticity is optimal when the variable of interest is normally distributed. The results of Levene’s test of groupwise heteroskedasticity produced results similar to

18. A series of t-tests presuming equality of variances across groups yielded similar results (Eligible Jurors/Convicted Felons: $p = 0.0001$, Eligible Jurors/Law Students: $p = < 0.0000$, Convicted Felons/Law Students: $p = 0.2909$).

The results of a one-way analysis of variance with post-hoc multiple group comparison tests (Bonferroni, Scheffé, and Sidak) also mirrored prior tests (Bonferroni—Eligible Jurors/Convicted Felons: $p = < 0.0000$, Eligible Jurors/Law Students: $p = < 0.0000$, Convicted Felons/Law Students: $p = 0.808$: Scheffé—Eligible Jurors/Convicted Felons: $p = < 0.0000$, Eligible Jurors/Law Students: $p = < 0.0000$, Convicted Felons/Law Students: $p = 0.543$: Sidak—Eligible Jurors/Convicted Felons: $p = < 0.0000$, Eligible Jurors/Law Students: $p = < 0.0000$, Convicted Felons/Law Students: $p = 0.61$).

Results from the Kruskal-Wallis test, a nonparametric analysis of variance, are consistent with the above results (Eligible Jurors/Convicted Felons: $p = 0.00013$, Eligible Jurors/Law Students: $p = < 0.0000$, Convicted Felons/Law Students: $p = 0.1999$) (Kruskal and Wallis 1952).

19. A preliminary investigation of the data revealed that 20 percent of the possible responses on predictor variables were missing at random (Enders et al. 2006; Little and Rubin 2002). I used multiple imputation by chained equation (MICE) to handle this missing data (Little and Rubin 1989–90; Rubin 1987). In several studies, MICE outperformed other common techniques for handling missing data (e.g., complete case analysis or single imputation), yielding the least biased parameter estimates (White, Royston, and Wood 2011; Graham 2009). See Appendix 2 for a more thorough discussion of the missing data in this study.

20. Because my dependent variable (RJBS) is bounded (12–60), for the multiple regression analysis presented, I predicted values of RJBS postestimation to ensure that all values fell within the bounds of the scale. No problems presented.

21. Further analyses also showed that (1) FLS scores were significantly and positively correlated with RJBS scores across groups, and (2) being a convicted felon or a law student is not a statistically significant moderator of the effect between FLS score and RJBS score (Interaction Terms: FelonFLS, $p = 0.125$; LawStudentFLS $p = 0.527$). Prior to computing these interaction variables, I centered Fairness and Legitimacy Scale scores (Aiken and West 1991).

22. Reference categories: eligible jurors, female, White, high school education, native English speaker, no history of victimization, neutral view of the death penalty, moderate political perspective, self-identifies as not religious, does not have an occupation.

23. I did not impute values for missing dependent variables.

JAMES M. BINNALL is a PhD candidate at the University of California at Irvine. His research explores legal constructs that civically and socially marginalize former offenders and how those restrictions shape former offenders’ efforts to reintegrate and desist from criminal activity.

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LAWs CITED

U.S. Constitution. Amendment VI.
---. Amendment XIV.
### APPENDIX 1: PARTICIPANT CHARACTERISTICS (N = 707)

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APPENDIX 1: (Continued)

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APPENDIX 2: MISSING DATA ANALYSIS

Like many data sets in the social sciences, my data set suffered from missing values. A preliminary investigation of the data revealed that 20 percent of the possible responses to measures of juror characteristics were missing at random (Enders et al. 2006; Little and Rubin 2002). For my analyses, I used multiple imputation by chained equation (MICE) to handle this missing data (Little and Rubin 1989–90).

In several studies, MICE outperformed other common techniques for handling missing data (e.g., complete case analysis or single imputation), yielding the least biased parameter estimates (Graham 2009). MICE is also flexible, as it allows a researcher to specify imputation models that are variable specific (e.g., continuous, binary, ordinal, or nominal). Performing analyses using MICE requires 3 steps: (1) creating a multiply imputed data set, (2) analyzing each imputed data set, and (3) combining estimates from multiply imputed data sets (White, Royston, and Wood 2011).

Generally, MICE uses observed data to estimate a set of plausible values for the missing data (Rubin 1987). For each missing variable $z$, a specified imputation model regresses $z$ onto a series of complete variables for which there are observations of $z$. From this posterior predictive distribution of $z$, $m$ random draws create $m$ imputed data sets (White, Royston, and Wood 2011). For data sets that involve a number of incomplete variables, this process...
utilizes previously imputed values for each subsequent imputation. As a general rule, to stabilize the results, the number of imputations $m$ should match the percent of missing data in a data set (Rubin 1987). Hence, I created twenty imputed data sets.

Initially, I used logistic regression to impute variables with two categories, multinomial logistic regression for variables with three to five categories, and linear regression to impute variables with more than five categories. Yet, using these default models, my first attempt to impute missing data failed to converge, even at thirty, forty, and fifty cycled imputations.

Suspecting that the number of parameters was preventing convergence, I coarsened variables with multiple categories but with few responses for several of those categories. Specifically, I reduced the number of categories for Education, Race, and Religion. I coarsened Education from ten categories to five categories (less than high school, high school diploma/GED, some college/associates degree/vocational training, college graduate, and post-graduate), Race from seven categories to four categories (White, African American, Latino, Other), and Religion from nine categories to two categories (self-identified as having a religion, self-identified as not having a religion).

Using a series of box plots and F-tests, I also determined that several ordinal variables showed linearity. Specifically, to impute values for Death Penalty View and Political Affiliation I used ordinal logistic regression models, but treated these variables as linear for the imputation model and in subsequent regression analyses of the entire data set. For these two measures, I then passively imputed dummy variables postimputation to preserve individual categories for later analyses.

After recoding and specifying different imputation models, the overall model converged; yielding twenty imputed data sets. To verify that the imputed data set accurately reflected the original data, I used histograms to compare the distribution of imputed values against the values of the original data. No gross discrepancies presented.

I then analyzed each imputed data set and combined estimates from multiply imputed data sets using Rubin’s rules (White, Royston, and Wood 2011; Rubin 1987). These rules combine the twenty imputed estimates “into an overall estimate and variance–covariance matrix . . . incorporat[ing] both within-imputation variability (uncertainty about the results from one imputed data set) and between-imputation variability (reflecting the uncertainty due to the missing information)” (White, Royston, and Wood 378). The results of these analyses appear in Table 3.
Table listing occupational exemptions by state:

http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikview.wisa&anonymous=true&bookmark=Document\BM178

**Volunteer jurors**

What to be a juror? Bill would let you volunteer


**Non-citizen jurors**

Veto Halts Bill for Jury Duty by Noncitizens in California

I. Purpose
The purpose of this policy is to document juror qualifications, reasons for excuse from service, and the options for postponements and transfers. The court and jury services staff will employ all necessary and appropriate means to ensure that citizens fulfill this important civic responsibility.

II. Authority
- 2 United States Code § 30a
- California Elections Code §§ 2020 et. seq.
- Code of Civil Procedure §§ 187, 190 et seq.
- Penal Code §§ 830 et seq.
- California Rules of Court, rules 2.1004, 2.1006, 2.1008, 10.603, 10.610
- California Attorney General Opinion No. 81-1114
- Operational Policy 12.B.4
- The authority referenced in this document may not include all law that is applicable to the subject.

III. Policy
A. Failure to Appear. Pursuant to Code of Civil Procedure §209, any prospective juror who fails to appear for jury duty when summoned, or to respond to the court or jury commissioner and be disqualified, excused, or postponed from attendance, may be attached and compelled to attend. Following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by fine, incarceration, or both, as otherwise provided by law.

B. Requests for Disqualification or Excuse. Citizens summoned for jury service are required to complete the Juror Affidavit Questionnaire located on the back of the Notice for Trial Jury Service (jury summons) to request disqualification or excuse from service. If a prospective juror submits an incomplete questionnaire or if additional information is required to make a determination of disqualification or excuse, authorized Jury Services staff will respond in a timely manner using only an approved response letter (“kickback letters”) (SDSC Form #’s ADM-221, 222, & 223) instructing the prospective juror on how to respond correctly to their Notice for Trial Jury Service.
A request to modify an existing response letter or a request to create a new one must be submitted in writing to the Manager of Jury Services. Jury Services staff are not authorized to modify, create, or use response letters that have not been approved by the Manager of Jury Services.

C. Juror Qualifications. Pursuant to Code of Civil Procedure §203, all persons are eligible and qualified to be prospective trial jurors, and no person shall be excluded from eligibility for jury service for any reason other than the following:
   1. Persons who are not citizens of the United States;
   2. Persons who are less than 18 years of age;
   3. Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code;
   4. Persons who are not residents of the jurisdiction wherein they are summoned to serve;
   5. Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored;
   6. Persons who do not possess sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person’s ability to communicate or which interferes with the person’s mobility;
   7. Persons who are serving as grand or trial jurors in any court of this state; or
   8. Persons who are the subject of conservatorship.

All requests for disqualification from jury service must be in writing and require a signature of the prospective juror, or of an individual completing the response form on behalf of the prospective juror. Disqualifications may not be granted without written verification and signature.

Authorized Jury Services staff will review all requests for disqualification and will deem those that meet any of the reasons included above as being disqualified from jury service. A response will not be sent when a person’s request for disqualification from service is granted.

D. Juror Excuses
   1. Pursuant to Code of Civil Procedure §204, no eligible person will be exempt from jury service because of occupation, race, color, religion, sex, national origin, economic status, or sexual orientation, or for any other reason. No person shall be excused from service as a trial juror except as specified by law. An eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council. Excuses from jury service are governed by California Rules of Court, rule 2.1008, California Code of Civil Procedure §219, and applicable federal statutes.
No class or category of persons is automatically excused from jury service except as provided by law. A statutory excuse from jury service will only be granted when claimed. Inconvenience to a prospective juror or an employer is not an adequate reason to be excused from jury service, although it may be considered as grounds for postponement.

2. **Permanent Excuses for Grounds Constituting Undue Hardship.** All requests for excuse from jury service due to an undue hardship must be in writing and signed by the prospective juror, or by a person on the juror’s behalf. Requests to be excused must include facts specifying the hardship and a statement why the circumstances constituting the undue hardship cannot be avoided by postponing the prospective juror’s service.

Authorized Jury Services staff may grant a prospective juror a permanent excuse from jury service for grounds constituting undue hardship if either of the following two criteria is met:

a. The prospective juror is deceased.

b. Permanent Physical or Mental Disability. Applies if the prospective juror has a physical or mental disability or impairment that would expose him or her to undue risk of mental or physical harm. Unless the person is 70 years or older, verification of the disability or impairment is required, including its probable duration and the particular reason for the person’s inability to serve as a juror. Verification must be in writing and signed by a treating physician, stating the physical or mental disability or impairment, as well as its probable duration, and the particular reason for the particular person’s inability to serve as a juror. If the person is 70 years or older or this excuse is supported by the required verification, excuses under this type may be made permanent.

3. **Temporary Excuses for Grounds Constituting Undue Hardship.** All requests for excuse from jury service due to an undue hardship must be in writing and signed by the prospective juror, or by a person on the juror’s behalf. Requests to be excused must include facts specifying the hardship and a statement why the circumstances constituting the undue hardship cannot be avoided by postponing the prospective juror’s service.

Authorized Jury Services staff may grant a temporary excuse from jury service if any of the following criteria is met:

a. Transportation Hardship. Applies if the prospective juror has no reasonably available means of public or private transportation to any division of the court, taking into consideration that San Diego County has public and/or private transportation provided in the form of buses, trains, and trolley.

b. Excessive Travel Distance Hardship. Applies if the prospective juror must travel an excessive distance. This is defined as a standard travel time that is more than one and one-half hours from the prospective juror’s home to the court.
c. **Extreme Financial Hardship.** Applies if the prospective juror will bear an extreme financial burden. To determine whether to excuse the prospective juror, consideration will be given to the sources of the prospective juror’s household income, the availability and extent of income reimbursement, the expected length of service, and whether service can be expected to compromise that prospective juror’s ability to support himself or herself or his or her dependents, or so disrupt the economic stability of any individual as to be against the interests of justice.

d. **Undue Risk of Material Injury to or Destruction of Property Hardship.** Applies if the prospective juror will bear an undue risk of material injury or destruction of the prospective juror’s property or property entrusted to the prospective juror, and it is not feasible to make alternative arrangements to alleviate the risk. To determine whether to excuse the prospective juror, consideration will be given to the nature of the property, the source and duration of the risk, the probability that the risk will be realized, the reason alternative arrangements to protect the property cannot be made, and whether material injury to or destruction of the property will so disrupt the economic stability of any individual as to be against the interest of justice.

e. **Temporary Physical or Mental Disability Hardship.** Applies if the prospective juror has a physical or mental disability or impairment that would expose the potential juror to undue risk of mental or physical harm. Unless the person is 70 years or older, verification of the disability or impairment is required, including its probable duration and the particular reason for the person’s inability to serve as a juror.

f. **Public Health or Safety.** Applies if the prospective juror’s services are immediately needed for the protection of the public health and safety, and it is not feasible to make alternative arrangements to relieve the person of those responsibilities during the period of service as a juror without substantially reducing essential public services.

g. **Care To Another or Child Care Hardship (Non-job Related).** Applies if the prospective juror has a personal obligation to provide actual and necessary care to another person. This includes care to the sick, aged, or infirm dependents, or a child who requires the prospective juror’s personal care and attention, and no comparable substitute care is either available or practical without imposing an undue economic hardship on the prospective juror or person cared for. The prospective juror must provide a list of the name(s), age(s) and relationship(s) of the person(s) being cared for and the reason the care is necessary. If the request is based on care provided to a sick, disabled, or infirm person, verification may be required.
h. **Prior Jury Service.** Authorized Jury Services staff may, upon request, grant a temporary excuse from service to a prospective juror who has served on a grand or trial jury in any state or federal court during the previous 36 months. A prospective juror who was summoned and appeared for jury service in any state or federal court during the previous 12 months will be temporarily excused from service, upon request.

i. **Active Duty Military.** Authorized Jury Services staff will grant a temporary excuse from service to all persons who are active duty military in the United States Armed Forces (California Attorney General Opinion No. 81-1114). If a prospective juror is in the military reserve and not on active duty, the juror will not be excused on this basis alone. If the prospective juror has reserve training at the time of the date summoned, authorized Jury Services staff will postpone service pursuant to paragraph III.E. below.

j. **Elected Officials of the United States Congress.** Authorized Jury Services staff will grant a temporary excuse from service to all elected members of the legislative branch of Congress (2 United States Code, § 30a). This includes only United States Senators and members of Congress. It does not include elected state or local officials.

k. **Peace Officers.** Authorized Jury Services staff will grant a temporary excuse from service to peace officers as follows: Pursuant to California Code of Civil Procedure § 219, peace officers as defined in §§ 830.1, 830.2(a), and 830.33(a) are exempt from jury service in all cases, while peace officers as defined in §§ 830.2(b) and 830.2(c) are exempt from jury service only in criminal cases.

4. **Unscreened Panels.** Pursuant to Operational Policy 12.B.4, when an unscreened panel of jurors is requested, Jury Services staff may not grant temporary hardship excuses from service.

E. **Postponements**

1. It is the court’s policy that citizens summoned for jury service may report anytime two weeks prior or two weeks after the reporting date shown on the original summons without the need to request a postponement.

2. Citizens summoned for jury service, or persons authorized to act on their behalf, requesting to postpone or reschedule their service for longer than two weeks, may do so via telephone, U.S. mail, in person, or by any electronic means available to the court. Postponing jury service is preferred to excusing a prospective juror for a temporary hardship.

3. Authorized Jury Services staff will grant up to two separate requests to postpone for as long as six-months each, for a total of no more than 12 months from the original summons date. A mother who is breastfeeding a child will be granted a request for postponement of her service for up to one year, and may renew that request as long as she is breastfeeding. A prospective juror postponing service may select an available and applicable date most convenient to them.
4. In unusual circumstances, authorized Jury Services staff may grant a third postponement to a prospective juror for a period of up to an additional two months for unforeseen events beyond the control of the prospective juror. Scheduling postponements for peace officers, as defined by Penal Code § 830.5, will be controlled by California Rules of Court, rule 2.1004.

5. Jury services staff will not grant any further requests for postponement.

F. **Transfer Between Court Divisions**

If a person summoned for jury service makes a request via telephone, U.S. mail, or in person to transfer their service to a different San Diego County court division, authorized Jury Services staff will grant up to two separate transfer requests on a single summons. A transfer request will only be granted if the date is available at the court division requested.

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_Dated: 3/19/07_  
_JANIS SAMMARTINO, Presiding Judge_
I. Purpose
This policy establishes standard guidelines for requesting jury panels and for jury panel selection.

II. Authority
- Code of Civil Procedure §§ 187, 190 et seq.
- California Rules of Court, rules 10.603 and 10.610
- Administrative Policy 4.3
- Operational Policies 12.B.1 and 12.B.2
- The authority referenced in this document may not include all law that is applicable to the subject.

III. Policy
A. Request for Jury Panel
   1. Jury Services staff will take requests for jury panels Monday through Friday between the hours of 8:00 a.m. and 5:00 p.m. A direct telephone line dedicated for the use of making such requests is available at each court division for use by judicial officers or their staff. These numbers are available on the Jury Services page of the court’s intranet site.
   2. When requesting a panel, the following information must be provided to Jury Services staff:
      a. Department number and name of judicial officer.
      b. Case name and number.
      c. Type of case (civil, criminal, misdemeanor, felony).
      d. Number of jurors requested for panel.
      e. Reporting time. “Will Call” is the label used if the panel is requested but reporting time is not known. “Send” is the label used if the panel is requested for a specific time.
      f. Estimated duration of the trial, including anticipated time for jury selection and deliberations.
      g. All time-qualifying requirements, if applicable.
   3. Timelines for Requesting Jury Panels. To ensure that an adequate number of prospective jurors are summoned and available for a given day, and to allow time for any requested time qualification screening processes, the following timelines for requesting jury panels apply:
      a. Time Qualified “Screened” Panels of 150 jurors or less. Requests for panels of 150 jurors or less that have been “screened” for each juror’s availability to serve on trials estimated to last five court-days or longer should be made by
4:00 p.m. one court-day in advance. Due to the limited number of jurors available, it may be necessary to time-qualify additional jurors on subsequent days to meet the needs of the requesting courtroom.

b. **Time Qualified “Screened” Panels of more than 150 jurors.** Requests must be made six weeks in advance. This will provide sufficient time for Jury Services staff to summon additional jurors to meet the needs of the court.

c. **“Unscreened” panels.** Requests for “unscreened” panels that have not been screened for hardships or juror availability, must be made by 4:00 p.m. one court-day in advance. If such a request is made, the “unscreened” panel will be selected first before any “screened” panels are selected. If request(s) for time-qualified “screened” panel(s) are also made for that day, Jury Services staff will refer to Operational Procedure 12.B.4.A, Time Qualifying Jury Panels, for procedures.

d. **Friday jury panels.** For divisions where call-in and group management is available, the request must be made by 4:00 p.m. one court-day in advance. This will allow sufficient time for Jury Services staff to provide the correct reporting instructions to the call-in and group management jurors. Requests for Friday jury panels in the Central Division must be a “send” panel (see paragraph III.A.2 for definitions) unless there are circumstances that require the need to have jurors available (e.g., zero day cases). This will prevent the unnecessary use of jurors that may be needed in the following week.

4. **Priority**
   a. Requests for “unscreened” panels will take priority over requests for time qualified “screened” panels.
   b. Requests for jury panels for criminal cases take priority over civil cases.
   c. Requests for jury panels made with the status of “send” take priority over “will calls” regardless of the time and date the original request was made.
   d. Requests for jury panels made with the status of “send” will be prioritized according to the panel reporting times for that day.

B. **Jury Panel Selection**

1. **Juror Attendance.** Before selecting the first jury panel, attendance of all prospective jurors must be taken and entered into the computer by authorized Jury Services staff. This will ensure a complete pool of all qualified prospective jurors.

2. **Time Qualified “Screened” Jury Panel.**
   a. A judicial officer or designated staff may request that a jury panel be screened in accordance with the timelines included in sections III.A.3.a & b. above, prior to being sent to a courtroom. If requested, the panel will be screened for each juror’s availability to serve on trials estimated to last five court-days or longer. Jury panels will not be screened for juror’s availability for trials estimated to last less than five court-days.
   b. When time qualifying jurors at the request of the court, authorized Jury Services staff are authorized to exclude a juror from being assigned to a jury panel in a time qualified case for any of the following reasons:
      i. Extreme financial hardship.
      ii. Full-time student enrollment or day-time class schedule.
Jury Panels, continued

iii. Prepaid vacations with non-refundable tickets.
iv. Medical appointment or procedures that cannot be changed.
v. Care to another or child care hardship.

Jury Services staff will ensure that each juror who requests to be excluded from participating in the jury selection process for one of the five above-mentioned reasons, has clearly documented that reason in detail on item #18 on the Summons for Jury Trial Service, or in the event of a post-orientation time qualification, on the Juror Time Qualification Hardship Form (SDSC Form #ADM-231). Prospective jurors excluded from a time qualified case will remain eligible on their reporting date for any panels that are not time qualified.

3. “Unscreened” Jury Panel
a. A judicial officer may request that a jury panel be unscreened in accordance with the timelines included in paragraph III.A.3.c above. When this request is made, no reference to time availability or undue hardship excuses will be made during orientation.
b. When a request is made for an “unscreened” panel, Jury Services staff are only authorized to:
i. Excuse jurors that are not qualified to serve (see Operational Policy 12.B.2).
ii. Grant postponements.
iii. Grant transfers.
c. All excuses for hardship must be expressed in the courtroom. Pursuant to Operational Policy 12.B.1, authorized Jury Services staff may contact the “on-call” judge to assist with jurors who have immediate hardships that must be addressed.

3/19/07  Approved
3/2/09  Amended. Policy to permit requests for time-qualified panels for trials estimated to last five court-days or longer, to sunset June 30, 2009, and revert to ten days, absent an extension by the Presiding Judge.
6/30/09  Sunset provision removed.

Dated: 6/30/09  

KENNETH K. SO, Presiding Judge

Drafter’s Note:
March 2009 – Amended to allow for both unscreened and screened panels to be selected in a single day, to add priority to unscreened panels, and to require the use of ADM-231 in certain circumstances. Also amended to permit requests for time-qualified screened panels for trials estimated to last five court-days or longer. This amendment will sunset on June 30, 2009 absent an extension by the Presiding Judge.
June 2009 – Sunset provision removed by Presiding Judge.

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### OPERATIONAL PROCEDURE

**SECTION:** Jury Services  
**SUBJECT:** Time Qualifying Jury Panels  
**Number:** 12.B.4.A  
**Effective Date:** 3/2/09

**Purpose**

The purpose of this procedure is to provide instruction on how to time-qualify a jury panel for a trial estimated to last five days or longer if the juror orientation has already been given, or if a request for an unscreened panel was made for the same day. This procedure ensures the randomness of the jury panel and the proper documentation of hardship excuses.

**Authority**

- Code of Civil Procedure, §§ 205, 218, 222
- California Rules of Court, rule 2.1008
- People v Basuta (2001) 94 Cal. App. 370, 394-396
- San Diego Superior Court Operation Policy 12.B.4
- The authority referenced in this document may not include all law that is applicable to the subject.

**Fee**

None

**Forms**

SDSC Form #ADM-231, Juror Time Qualification Hardship Form

**Procedure**

When a judicial officer or designated staff makes a request for a time-qualified screened jury panel after juror orientation has been given, or if an unscreened panel has also been requested for the same day, the jury services clerk will proceed as follows:

1. Inform the judicial officer or designated staff that additional time will be required to form the panel.
2. Pull a panel of jurors to time qualify using the NextGen jury management application.
3. Call jurors into the Jury Services Office or back of the jury lounge depending on court location, using the alphabetical juror list.
4. Take roll to ensure that all jurors included on the list are present.
5. Time qualify all the jurors using the time qualifying portion of the juror orientation script.
6. Inform all jurors who are not requesting to be excluded from participating in the jury selection process due to hardship, that they will be sent to a courtroom shortly and to return to their seat to wait for further instructions.

1 Continued on next page
7. Give the Juror Time Qualification Hardship Form (SDSC Form #ADM-231) to those jurors requesting to be excluded from participating in the jury selection process due to hardship.

8. Verify that the Juror Time Qualification Hardship Form (SDSC Form # ADM-231) has been completed in full, dated, and signed.

9. If the juror qualifies to be excluded from participating in the jury selection process in accordance with Operational Policy 12.B.4, Jury Panels, return the juror to the jury pool for potential assignment to another trial, using the NextGen jury management application.

10. Pull additional panels and follow the above steps until the requested number of time-qualified jurors is obtained.

11. Print the alphabetical and random jury lists for the courtroom.

12. Maintain all completed Juror Time Qualification Hardship Forms (ADM-231) with the daily summons for serving jurors.

Approved. Policy to permit requests for time-qualified panels for trials estimated to last five court-days or longer to sunset June 30, 2009, and revert to ten days, absent an extension by the Presiding Judge.

Dated: 3/2/09

MICHAEL RODDY, Executive Officer
A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs
Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, Rule One Initiative empowers, encourages, and enables continuous improvement in the civil justice process.
About ABOTA

The American Board of Trial Advocates, founded in 1958, is an organization dedicated to defending the American civil justice system. With a membership of 6,800 experienced attorneys representing both plaintiffs and defendants in civil cases, ABOTA is uniquely qualified to speak for the value of the constitutionally mandated jury system as the protector of the rights of persons and property. ABOTA publishes Voir Dire magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

ABOTA’s National Board of Directors has taken a stand regarding expedited jury trials and unanimously passed the following resolution:

**Expedited Jury Trials**

Whereas, ABOTA recognizes that the number of civil cases in the United States actually tried to a jury is rapidly decreasing and that litigation costs and delays are a major contributor to the reduction in the number of civil juries trials, and

Whereas, ABOTA recognizes that several states have adopted expedited jury trial programs which provide for streamlined pretrial procedures and abbreviated jury trials in many civil cases in an effort to thereby reduce the cost and time involved, yet preserving the civil jury system in this Country,

It is therefore, RESOLVED, that ABOTA supports the concept of streamlined pretrial procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.


**American Board of Trial Advocates**

2001 Bryan St., Suite 3000, Dallas, TX 75201
(800) 93-ABOTA (932-2682) | www.abota.org
The National Center for State Courts (NCSC) is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts and courts around the world. Founded in 1971, the NCSC provides education, training, technology, management, and research services to the nation's state courts. The NCSC Center for Jury Studies engages in cutting-edge research to identify practices that promote broad community participation in the justice system, that enhances juror confidence and satisfaction with jury service, that provides jurors with decision-making tools necessary to make informed and fair judgments in the cases submitted to them, and that respects jurors contributions to the justice system by using their time effectively and making reasonable accommodations for their comfort and privacy. The NCSC is headquartered in Williamsburg, Virginia and has offices in Denver, Colorado, Arlington, Virginia, and Washington, DC.

Mary C. McQueen    President

Richard Schaufller    Director of Research Services

Paula Hannaford-Agor    Director, NCSC Center for Jury Studies
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INTRODUCTION

There is a widespread perception—among lawyers and litigants—that the civil justice system is too complex, costs too much, and takes too long. There is also data documenting that civil jury trials have decreased precipitously over the last decade.¹ The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smear on the Constitutional promise of access to civil, as well as criminal, jury trials.

As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials. The programs involve not only a simplified pretrial process, but also a shortened trial on an expedited basis. While some programs focus on jury trials, the overall goal of such programs is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials. For purposes of this report, we are calling these programs Short, Summary, and Expedited Civil Action programs (SSE programs).

The National Center for State Courts (NCSC) has just completed a report detailing the elements of various examples of these programs.² In the wake of that report, the NCSC, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver), and the American Board of Trial Advocates (ABOTA) have taken on the task of collating information about what seems to be working in these programs, how to use the process well, and how a jurisdiction might choose to put a program in place if it does not now have one.

For all three organizations, this work represents an ongoing commitment to processes that provide less expensive access to the civil justice system and a commitment to the preservation of the civil jury trial.

In preparation for the drafting of this report, the three organizations formed a Committee (members listed on Appendix A), agreed upon a charge to the Committee (Appendix B), and reviewed all available information regarding existing programs around the country. The Committee then met in person and thereafter worked collaboratively on the report. The Committee was chosen on the basis of balance, knowledge about different programs, and experience.

The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

¹ According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating the historic trend away from trials. Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 461, 464 (2004) (noting that in 1938, "the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial").

of existing programs, and the different needs that each of these programs meet in their respective jurisdictions, the Committee has chosen not to recommend a specific set of parameters to be implemented in every program and for every case. Instead, the following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level.

Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale. The organizations and individual members who make up this Committee believe in the importance of Rule One of the Federal Rule of Civil Procedure’s goals of a “just, speedy, and inexpensive determination” of every civil action. Yet today, pressures on client and court resources have only increased, making access even more problematic. While these pressures make attainment of this goal more difficult, they also create space for innovation. Our organizations hope that what follows is a resource for creating and implementing these innovative programs in your jurisdiction.
What is a Short, Summary, and Expedited (SSE) Civil Action Program?

Before trying to identify what works and what does not, it is important to define the characteristics of an SSE program for purposes of this Report. The programs vary greatly across the country, and none are identical.

However, there are five constants that the Committee suggests are present in almost all of the programs and are critical for success:

**First, the trial itself is short.**
Most jurisdictions limit the trial to one or two days. The Committee believes that the length is not necessarily dispositive, but there must be an expectation that the trial will be short and to the point. By necessity, the evidence also must be limited. Length of trial is a critical component, both for purposes of the trial itself and for purposes of structuring the pretrial process, which is then necessarily focused and abbreviated.

**Second, the trial date must be certain and fixed.**
The trial date must not be susceptible to continuance, at the behest of the court or counsel, except in extraordinary circumstances. One of the key features of the programs is the fact that litigants know they must be prepared for the trial on the date on which it is set. Such certainty drives the pretrial process and many of the benefits of the programs. In some of the more successful programs, the litigants also know who their judge will be if they choose the SSE program: either they have access to a judge pro tempore, whom they jointly choose, or they know who the judge assigned to the case will be. Hence, the program achieves a level of certainty and predictability that may not otherwise be available.

**Third, the program extends to the whole litigation process—not just the trial.**
The pretrial process is also expedited and focused.

**Fourth, the program encourages issue agreements and evidentiary stipulations.**
Rules promoting evidentiary agreements, encouraging stipulations, and allowing relaxed evidentiary foundational standards save time and narrow the focus to the key issue(s) to be addressed at trial.³

Fifth, almost all of the programs are either partially or wholly voluntary. The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of the litigants and counsel to decide whether the case at issue is appropriate for an abbreviated process and the program.

While one or a few of these characteristics may be instrumental in achieving greater access and quicker resolution, such as establishing a firm trial date and utilizing agreements and stipulations to achieve a more streamlined trial, the SSE programs discussed here generally include most, if not all five, of these characteristics. While generally applicable rules and case management techniques that mandate streamlined pretrial process and expedited trial settings do not in and of themselves satisfy the defining characteristics of an SSE program (such as voluntariness), the Committee does not mean to infer that such procedures may not also be an effective means of assuring access and efficiency.

Beyond these fundamental characteristics, however, there are a host of variations. All of these variations are components that the local bench and bar can review and build upon. The program characteristics chosen by a particular jurisdiction should be responsive to its needs and is likely to be quite individualized.

Benefits of SSE Programs

There are a variety of benefits that SSE programs can provide. First, the benefits to the court system itself include the dedication of fewer judicial officers and court staff to the process. In one jurisdiction, the whole process happens without any involvement from the court, except for the assignment of a courtroom and the summoning of jurors. In other jurisdictions, sitting judges oversee the process, but it takes far less time than civil cases handled under the traditional rules of civil procedure. Once judges become familiar with the SSE program, they tend to like the process because it allows them to clear their docket, achieve better closed case numbers, and preside over jury trials, without investing weeks of court time. The system also benefits from the increased numbers of jury trials, which involve more people in the system and inform them about the process. More broadly, by making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded. The court system benefits equally from SSE bench trials. Judges are able to resolve matters more quickly and efficiently, with streamlined procedures and a short trial that resolves the case in a day or two.
The **benefits for the litigants** are, first and foremost, that their case will take less time and cost less money than if they had proceeded along a regular case track. In short, the process increases access to the system and decreases expense and time. But there are additional benefits as well. The process may provide more certainty. This can include certainty of trial date and perhaps of judge assignment. In some programs, this can include certainty of outcome, with limited appeal rights, and possible risk containment, if damages are limited or agreed to on a high-low basis.4

**Benefits for jurors** include more opportunity to participate and a shorter, more focused process when they do participate. Jurors benefit from serving for both a shorter and more defined period of time.5 Because of the streamlined process, and resulting streamlined issues, SSE programs also create less confusion and greater clarity for jurors about what is being asked of them. For these reasons, SSE programs may actually result in a better process for the jurors.

**Benefits for attorneys** are both immediate and long-term. First, these trials may provide an opportunity for younger attorneys to handle jury trials. Second, being able to take smaller or less complex cases for less investment on a per-case basis may actually serve to increase an attorney’s client base and build good will. Lastly, an expedited process forces attorneys to focus very acutely on what is important in a case—and to shape both the discovery and the trial presentation around those key issues. It improves case management skills, attention to what is important, and clarity and brevity of trial presentations. It can also encourage cooperation in the discovery process in order for the attorneys to get the discovery they need in a short period of time. In jurisdictions where the whole process is the result of attorney negotiation, there is additional incentive to cooperate. Appendix C identifies a set of criteria that counsel can use to identify appropriate cases for an SSE program, as well as recommendations for maximizing effective preparation for and presentation at an SSE trial.

The development of all of those skills has possible pervasive implications. The current litigation process encourages attorneys to develop an all-inclusive, litigious approach to cases, whereas the SSE program prioritizes and hones the skill of highlighting only what is important. SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases. It is also possible to make the pretrial and trial process more efficient in non-SSE program cases by incorporating some of these same principles. Moreover, the more attorneys try cases in front of juries, the more comfortable they become both with the process and the potential outcome. Thus, it is possible that use of SSE programs could actually change the litigation culture as a whole over time.

4 Some parties that agree to a short, summary, and expedited procedure also enter into a high-low agreement, where both parties agree that the outcome of the case will be no less than the low amount, nor in excess of the high amount.

5 Employers also benefit significantly from reduced employee absence and, as a result, employers may be more willing to pay employee wages even when not required by law.
Implementing an SSE Program

The Design

The Committee has pooled both anecdotal and empirical data about SSE programs around the country and has drawn from the individual expertise of the Committee members. Out of that pool of information, the Committee has distilled the elements that characterize the more successful programs and has also created a check-list of decisions that a jurisdiction should review when designing a program.

The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes. The table below identifies some common obstacles described in the NCSC study and the solutions that the SSE programs implemented to address those obstacles. At the same time, changes in procedures should be made only as needed to craft an effective SSE program. For example, jury procedures should be the same in the SSE programs as in regular civil litigation wherever possible.

The obstacles posed, and the corresponding SSE program benefits that may be achieved, may also shift during the course of an individual case. For this reason, programs should be sufficiently flexible to permit early entry, for those who seek a streamlined pretrial procedure, and late entry, for those who just want an abbreviated trial, perhaps because only one issue remains after summary judgment. Other components of successful programs appear to be presenting the option to counsel and the parties on an individualized basis (through case management orders or at status conferences) and creating certainty regarding who the judge will be for the case.

<table>
<thead>
<tr>
<th>Common Obstacles</th>
<th>Potential SSE Program Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil case backlogs create scheduling delays for civil trials with regularly assigned civil trial judges</td>
<td>Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges</td>
</tr>
<tr>
<td>Calendaring preferences for non-civil trials undermine trial date certainty</td>
<td>Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges</td>
</tr>
<tr>
<td>Pretrial case management does not permit early identification of trial judge</td>
<td>Assign SSE program cases to one or more highly qualified and SSE designated trial judges</td>
</tr>
<tr>
<td>Length of civil trials makes it difficult to calendar cases for trial</td>
<td>Restrict trial length; restrict amount or form of trial evidence</td>
</tr>
<tr>
<td>Length of voir dire makes civil jury trials too lengthy</td>
<td>Designate smaller jury panel size; provide fewer peremptory challenges; shorter voir dire time</td>
</tr>
<tr>
<td>Expert witness fees make it too expensive to take cases to trial</td>
<td>Restrict expert evidence (number and/or form)</td>
</tr>
<tr>
<td>Discovery process is disproportionately excessive for lower value or less complex cases</td>
<td>Restrict the scope and/or time limit for discovery</td>
</tr>
<tr>
<td>Discovery disputes take too long to resolve, increasing expenses and delaying trial readiness</td>
<td>Create a process to expedite resolution of discovery disputes, including more immediate access to trial judge or discovery master and preference for informal telephonic conferences rather than formal motions, briefs, and hearings</td>
</tr>
<tr>
<td>Mandatory ADR creates needless procedural hurdles without significantly improving case resolution rates</td>
<td>Permit SSE program cases to opt out of mandatory ADR</td>
</tr>
</tbody>
</table>
When implementing a program, the local jurisdiction should review the following checklist of possible components:

- **Rigid versus tailor-made procedures:**
  - Some programs allow counsel great latitude in deciding upon the particular rules that will govern both the trial and the pretrial process.
  - Other jurisdictions have fairly rigid procedures that apply to every case submitted to the program.

- **The questions to be addressed**—either by counsel in a stipulation, or by rules or case management orders—are:
  - **Time limits**: How much time is allotted for discovery, as well as the length of the trial itself?
  - **Rules of evidence**: Do they apply, and to what extent?
  - **Discovery**: Requests for production, depositions, and interrogatories—what will be allowed?
  - **Experts**: Are expert witnesses allowed? If so, do they provide a report, can they be deposed, and do they testify at trial?
  - **Motions**: Will motions be allowed? If so, what kinds of motions? Does the court provide an expedited process for the resolution of those motions?
  - **Client consent**: Is a client's signature documenting informed consent required?

- **Selection of judge**: Will the judge be assigned or chosen by the parties (e.g., a senior judge, judge pro tempore, magistrate judge, or sitting judge)?

- **When opt-in may occur**: Is there a limited window of time at the beginning of the case when the parties may opt in, or is it available throughout the litigation process?

- **Number of jurors** (almost all specify a smaller panel than other civil jury trials).

- **Unanimous jury verdict?** If non-unanimous verdicts are permitted, what decision rule applies?

- **Binding decision or not?**

- **On the record or not?**

- **Appealable decision or not?**

- **Is the program perceived as a form of alternative dispute resolution** (this relates directly to whether it is binding)?

- **Is the program statutory, supported by statewide rules, or put in place by a particular judge in his or her courtroom?**

- **Extent of informal versus formal procedures recognized.**

- **Restrictions on the amount of trial time and division of that time between the parties.**

- **Calendaring variations** (some programs mandate a trial within four months, others within six months).

- **Limits on damage awards coming out of the process**: Many jurisdictions specifically limit the process to smaller cases and cap damage awards; other jurisdictions make the process available more broadly, but attorneys often agree to high-low parameters for the verdict.
This list illustrates the variation in program elements across the country. As a jurisdiction is designing an SSE program, it should balance the tailoring of the above variations to meet its specific needs with the benefits of uniformity and consistency. There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.

The New York model provides a useful example. What began as a local Summary Jury Trial (SJT) program on a pilot basis has since expanded to all thirteen judicial districts in the state. The New York program was not expanded wholesale, but rather has been implemented with flexibility to allow the program to meet local needs. Nevertheless, there are rules and procedures that are consistent across the program, including:

1. an evidentiary hearing before trial;
2. a statement determining whether the SJT is binding or nonbinding;
3. expedited jury selection with limited time for attorney voir dire;
4. opening statements limited to ten minutes;
5. case presentation limited to one hour;
6. modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony;
7. presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes.6

Judicial support of the program has been a hallmark since its inception, first under Justice Joseph Gerace’s guidance, and today with the efforts of the program’s statewide coordinator Justice Lucindo Suarez.7

In contrast, the South Carolina’s Summary Jury Trial program is an attorney-controlled program that takes advantage of relatively abundant court resources such as courtrooms and jurors, while addressing the need for additional judicial resources by utilizing temporary judges.8 Because jury trials are assigned to a rolling docket in South Carolina’s circuit court such that the cases are on call for trial, everyone involved also benefits from a firm trial date. The South Carolina program has evolved to meet the needs of the legal community and stands as a testament to the importance of considering what resources a jurisdiction brings to the table, as well as those that may be in scarce supply, when designing a program.

THE IMPLEMENTATION PROCESS

First and foremost, the program should be developed by the bench and bar—and perhaps community—in an individual jurisdiction, and it should be responsive

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6 National Center for State Courts, supra note 2, at 35.
8 See National Center for State Courts, supra note 2, at 12-25.
to the needs of that jurisdiction. There is no one-size-fits-all formula. Further, when the program is the result of local investment, it is much more likely to succeed. The first step, therefore, should be to identify the problems that the program is intended to address. The bench and the bar in a jurisdiction interested in building out an SSE program should identify a small group of individuals who can assess the problems of the jurisdiction and build the specifics of a program designed to address those problems. The group should then distribute their proposal broadly and invite input.

There must be broad judicial and administrative support for the program. It cannot just be one judge who champions it, but rather a full bench or court system. If one judge takes the lead, as is true with many other programs, when that judge rotates or leaves, the program falters. Similarly, there must be broad-based administrative support. Court staff must view the program as good for the system, and cooperate in making it work. The program should NOT be viewed as a second-class program designed for less important matters. Rather, it should be viewed as an expedited process, available to all litigants for any appropriate case.

Communications and training are essential. When the program is launched, there should be widespread communication. The program should be touted in terms of benefits that the system, the attorneys, jurors and—most importantly—litigants stand to gain. Judges, court staff, and attorneys all need training on the benefits and application of the program. Because of their length, SSE trials can also more easily be taped and used for education and promotion, for practicing attorneys and law students. In the Eighth Judicial District Court of Nevada, instruction has been an important tool in selling the program, in addition to educating participating attorneys about the process. Several short trials have been conducted at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and observed by attorneys, law students, and faculty. If there is a failure in either communication or training, the program will remain dormant—few will use it. Investing in a central coordinator can be valuable in ensuring that the communication and training component has adequate planning and support.

Judges should make counsel and litigants aware of the program on a case-by-case basis, not just as an existing rule. The challenges that any jurisdiction will face are in building trust in the bench and the bar. Attorneys will inherently distrust the process because of concerns that it will limit their ability to discover and present information, and could limit their possible damages. The South Carolina model, where attorneys design every aspect of the process on a case-by-case basis, seems to enjoy greater attorney acceptance. On the other hand, it may also create an advantage for experienced, knowledgeable attorneys and a disadvantage for younger, inexperienced attorneys, which undermines one of the potential goals of the program.

As a related matter, attorneys may have malpractice concerns. For example, if they lose their case in an SSE process, will their client assert malpractice against them?
There are multiple ways to address this issue, such as in California where the client’s signature is required to document informed consent. Addressing those concerns in advance would go a long way toward alleviating attorney reticence.

The most effective way to defuse distrust is through data and education. In the New York model, using data from other jurisdictions with such programs to convince attorneys of its utility is very powerful. Attorneys from those other jurisdictions are also generally very willing to share their experiences with other program users and offer advice.

Each jurisdiction should develop a system for keeping data about the program from the beginning, and should share that information with other jurisdictions around the country experimenting with similar programs. The jurisdiction should make a commitment to reexamine the program—perhaps every year for the first two or three years—to tailor and adapt it based upon the data. After at least two years of annual review, reexamination can be moved to every other or every third year.

**The Importance of Data**

Historically, SSE programs were developed as a creative reframing of how to reach a resolution in a civil dispute, capitalizing on the inherent strengths of a jury as the fact-finder. Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials. However, for these programs to be effective, they must document not only program operations, but also measure the program’s performance through sound performance management.

Brian Ostrom and Roger Hanson of the NCSC have proposed a High Performance Framework as best practices for performance measurement and performance management. Within this Framework lies the concept of perspectives, which are “how the interest and positions of different individuals and groups involved in the legal process are affected by administrative practices.”9 The four perspectives include: 1) the customer perspective; 2) the internal operating perspective; 3) the innovation perspective; and 4) the social value perspective.

Applying these principles, SSE programs are encouraged to:

- Collect data to monitor performance on an ongoing basis so as to be responsive to fluctuations in performance over time;
- Conduct analyses of the program’s performance to ensure compliance with program requirements;
- Supplement performance data for use in education and training programs for participants; and
- Communicate the program’s results to its partners, policy makers, and the public to promote support and buy-in.

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9 Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts v-vi (April 2010).
Unfortunately, data collection and performance management, a key component of program development, are often left to the last minute or even overlooked completely. Of the six SSE programs examined in the NCSC monograph, for example, only the New York State and the Eighth Judicial District Court of Nevada programs have implemented rigorous data collection and reporting strategies. Our Committee cannot overemphasize the importance of collecting data and assessing the program regularly. Only through the use of empirical data will any jurisdiction truly be able to determine what is working to correct the problems of cost, delay, and access to jury trials. Likewise, only through empirical data will jurisdictions be able to determine what efforts have failed to achieve their goals and to understand why. Innovation is extremely important—but not blind innovation.

Appendix D contains a detailed set of recommendations about how to design and execute an effective data collection program. Any committee charged with creating an SSE program should become familiar with the data collection requirements; and any court charged with implementing an SSE program should put the data collection process in place from the beginning.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs.

Sustaining an SSE Program

Experience from existing programs around the country proves that sustaining an SSE program is just as important, and often just as challenging, as implementing one. The same requirements for creating a solid program—including leadership by the bench and bar, training, and publicizing the benefits and data—are essential for sustaining a program long term.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs. Where the needs and circumstances change, and the program does not keep pace, the program falters. For this reason, it is essential that these programs be revisited regularly to determine whether changes need to be made. Data collection plays a key role in monitoring the success of the program and providing support for needed changes.

Finally, it is also critical to create a broad base of judicial and administrative support. Where programs have been championed by a single judge or administrator who subsequently retires, the program has waned. While such a champion can be the key to a program’s success in the first instance, jurisdictions must strive for underlying support and ensure that there is someone or some group to continue the charge.

10 See National Center for State Courts, supra note 2, at 33-57.
CONCLUSION

The general themes of this report have broad application across a variety of court reform efforts.

TO SUCCEED, COURT REFORM MUST HAVE THE FOLLOWING COMPONENTS:

- Initial and continuing judicial and court leadership;
- Buy-in from the bar;
- Responsiveness to real needs of the jurisdiction;
- Training available in advance and on an ongoing basis; and
- Data collection and assessment to ensure continuous improvement.

More specifically, jurisdictions interested in building or improving upon an SSE program can benefit from the experience of other jurisdictions as set out in this report.

Indeed, a just, speedy, and inexpensive resolution of every action is the goal, and SSE programs are one of the vehicles that may achieve that goal—both for an individual case, and perhaps, over time, in changing the culture of the legal system. The mere process of pulling together a group of judicial, bar and administrative leaders, identifying problems within a jurisdiction, coming up with proposed solutions for those problems, and experimenting with different procedures is, in and of itself, a step in the right direction.

"I CONSIDER TRIAL BY JURY AS THE ONLY ANCHOR EVER YET IMAGINED BY MAN, BY WHICH A GOVERNMENT CAN BE HELD TO THE PRINCIPLES OF ITS CONSTITUTION."

—Thomas Jefferson
APPENDIX A

SSE COMMITTEE MEMBERSHIP

Chris A. Beecroft, Jr.
ADR Commissioner
Eighth Judicial District Court, Nevada

Paula Hannaford-Agor
Director, Center for Jury Studies
National Center for State Courts

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Decision Analysis Trial Consultants
American Society of Trial Consultants Foundation

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American Board of Trial Advocates

Brittany K.T. Kauffman
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IAALS

Rebecca Love Kourlis
Executive Director
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Michael P. Maguire
Michael P. Maguire & Associates
American Board of Trial Advocates

Judge Adrienne C. Nelson
Multnomah County Circuit Court, Oregon

Justice Lucindo Suarez
Statewide Coordinating Judge for Summary Jury Trials
Bronx County Supreme Court

Nicole L. Waters, Ph.D.
Principal Court Research Consultant
National Center for State Courts

Magistrate Judge Bernard Zimmerman
Northern District of California
APPENDIX B

SSE COMMITTEE CHARGE

The American Board of Trial Advocates, IAALS—the Institute for the Advancement of the American Legal System, and the National Center for State Courts wish to undertake a joint project. This Charge outlines the reasons for the project, the allocation of responsibilities, the goals, and the time line.

ABOTA, IAALS, and NCSC are all organizations that have, as part of their missions, a focus on access to the civil justice system in general and to jury trials in particular.

Certain jurisdictions have developed what have come to be called “Expedited” or “Summary” Jury Trial procedures that are designed to provide an alternative for certain types or sizes of cases. Some of the procedures have pretrial components; others relate exclusively to the shortened trial itself. In each instance, the intent is to increase access to the process.

ABOTA, IAALS, and NCSC wish to compile information about the procedures and from that information develop a manual that can be distributed nationally to identify what emerge as best practices, both in developing and implementing a Short, Summary, and Expedited (SSE) procedure and in maximizing the effectiveness of such a procedure once implemented.

The joint project SSE Committee shall consist of two representatives from ABOTA, IAALS, and NCSC each and up to five additional members from around the country—judges, lawyers, researchers and academics who have experience with EJT procedures. The additional members shall be chosen by the six ABOTA, IAALS, and NCSC members.

The Committee shall convene at IAALS in Denver as soon as schedules permit. Each member of ABOTA, IAALS, or NCSC shall pay their own (or their organization shall pay) associated expenses.

IAALS shall staff the Committee, by compiling and distributing information in advance and taking the lead in drafting a manual/template/report (to be determined) that shall then be distributed among all members for comment. NCSC has already done the research about SSE procedures around the country. That information will be the starting place for the project.

The Committee shall make every possible effort to produce a product by the end of September of 2012. The product will bear the logos of all three organizations (unless one organization wishes to withdraw from the project at any time) and shall be available on all three websites.
Appendix C

Best Practices for Case Identification, Preparation, and Presentation

Assuming that the process is completely optional, the choice falls to counsel to decide which cases might be amenable for resolution through an SSE process. It may well be true that once the attorneys and litigants are familiar with the process, the list of appropriate cases can begin to expand. In reality, it is not just the small case, the low-dollar case, or the simple case that can benefit from an expedited and streamlined process. Many cases can benefit from a process that costs less and that forces litigants, their attorneys, and the fact-finders to focus on the most important issues in the case.

But, in the first instance, the cases that are most likely to be appropriate for this process are:

- Cases with single or limited issues to be resolved;
- Cases where many facts can either be stipulated or determined by the uncontested admission of reports or documents;
- Cases where the likely value doesn’t warrant the expense of live expert testimony or exhaustive trial;
- Cases where it is desirable to limit exposure or guarantee recovery (high-low agreements);
- Cases that can be resolved in one or two days of testimony and deliberations;
- Cases involving limited witness testimony;
- Time sensitive cases where the usual docket wait will be prejudicial to a party’s ability to present its case;
- Cases where the parties desire a certain (or almost certain) trial commencement date;
- Cases in which the parties fully understand the benefits and risks of participating in the SSE program and have consented to those risks;
- Cases with insurance coverage limit concerns where a high-low agreement is desirable;
- Cases involving insurance coverage where the carrier has consented to be bound by the proceeding.

Guidelines for Preparation and Presentation

These guidelines have been developed for participants engaged in SSE programs. If properly organized and presented, the trier of fact, be it the court or a jury, will be able to understand complex case issues and evidence in a shortened trial setting. By participating in this program, the participants agree that they have chosen to be bound by statutory or contractual obligations in presenting their cases. This guide is intended to help participants better prepare, organize, and present their cases to accommodate this shortened trial format so that the judge or jury will be able to clearly understand the case in order to make their most informed decision.
Known Limitations:
Participants should thoroughly review the statutory or contractual language to understand the time limitations and evidentiary restrictions in presenting the case. As SSE trials are conducted in such a limited fashion, each moment is precious, including that of the judge and the jury. Participants should endeavor to be timely and respectful of all the time limits.

Cooperation:
SSE trials necessitate greater agreement and cooperation between the parties. This usually means revealing more information to opposing parties prior to trial than in a traditional trial. This in no way diminishes the ability of counsel to be a zealous advocate for their client. In fact, the ability to have greater knowledge about the scope of evidence and testimony that will be presented in these trials allows the attorneys to better plan their presentations and to concentrate on the meritorious issues in the case. By necessity, attorneys for both sides in an SSE trial must exchange exhibits, including any highlighting or additional emphasis, in advance of the trial. These trial formats are not conducive to gamesmanship. And while this does not demand that counsel reveal all of their strategies regarding the way they conduct the case, they must reveal the substantive nature of their evidence. Agreed-upon evidentiary booklets also facilitate cooperation, remove surprises, and help keep the trial short, summary, and efficient.

Pretrial Hearings:
An effective pretrial hearing is essential for achieving a short, summary, and expedited trial. Many jurisdictions with SSE programs include specific requirements for the pretrial hearings, as this hearing is essential for a streamlined and efficient trial. The court and the parties should utilize this hearing to address any questions and concerns regarding all aspects of the trial, and review parameters and expectations of the trial from voir dire to verdict. The court can make rulings on previously exchanged evidentiary submissions, proposed Pattern Jury Instruction charges, and proposed verdict sheet questions. Some of these matters may involve the increase and or redistribution of peremptory challenges where more than two attorneys appear on a case, the need for an interpreter, and physical disability issues with parties.

New Information:
In preparing the case presentations, SSE participants should remember that the jury is hearing evidence for the first time. They do not have the background or familiarity with the subject matter that the attorneys, experts, and parties have. In preparing the evidence, it is important for participants to constantly evaluate the information that must be conveyed so that the jury will understand the testimony or exhibit. A commonly asked question to discern needed information for the jury would be, “If you were listening to this for the first time, what would you need to know?” If there are issues of some complexity in the case that may require time to explain in order for the jury to have context or background for the evidence, the attorneys should consider whether they would wish to draft an agreed upon tutorial to be read by the judge in the case or a glossary of terms to familiarize jurors with acronyms or terminology. This should not only address potential confusion but also potential misconceptions the jury may have about the issues in the case.

Theme:
Jurors respond best to a narrative framework or story of the case. This story helps them to organize and understand the evidence. Every case has a central theme or organizing principle. This is usually a single phrase or sentence. One of the easiest ways to develop a theme is to fill in the phrase, “This case is about . . . .” While development of a theme is important in every case, it is even more so in SSE programs, where jurors need to quickly understand the case and render a verdict.
Three to Five Points:
Once counsel has developed the theme, it is best to identify the three to five main evidentiary points that support this central principle. While this does not preclude counsel from having a different number of points, three to five main points have been shown to provide a better organizing structure to ease the comprehension level of the jury. Moreover, this will assist attorneys in narrowing the focus of their presentation so as to fit within the constraints of an SSE trial. If possible, each of these main points should be stated in a single sentence, like a headline for a news article. These single sentence headlines help jurors to retain and organize the main issues in the case. These main points should be selected because counsel believes these issues will lead the jury to an appropriate verdict in the case. This is not to exclude other important points or evidentiary issues.

Other salient issues should be examined to see if they could fit into the categories of the main points. In determining these main points, the attorneys can ask themselves several questions:
1) Why is this one of the most important points in the case?
2) What do you want the jury to conclude from this point?
3) How does this point connect to the verdict you want the jury to render in the case?

Distinguish between what the jury needs to know about the case from what the attorneys want them to know. Remember to connect all of the dots in the narrative story of the case in order to avoid leaving the jury with unanswered questions. Although pretrial rulings or time constraints may not allow the attorneys to answer all of the jury’s questions in the case, they should endeavor to answer the main questions the jury will have:
Who are the parties?
What happened?
What is the dispute?
What am I supposed to decide?

While it may not be essential to script out the entire presentation of the case, it is advisable to create a detailed outline in order to ensure that each side is able to present the optimal amount of essential evidence the attorneys feel is necessary to meaningfully represent their client’s case. While there is a tendency in a standard trial to repeat information in the belief that this repetition will influence the jury, one of the most common complaints of jurors is their belief in the needless redundancy of testimony or issues.

Outline for the Case:
These three to five main points can become an outline for presenting the case and they help the attorney to organize the testimony and exhibits. And while it is understandable that attorneys would want to include as much as they can about what they have learned about the case, given the time constraints of an SSE trial, it is advantageous to keep the presentation focused on these main points.

Sequence:
Because of the shortened time in these trials, it is also advisable to put these main points in a prioritized, sequential order that makes the best sense for the case. In other words, one point should lead to the next point, which would lead to the next point. This sequence can be organized in chronological order of the events in the case that counsel wants to describe, but can also be organized by legal issues, main conclusions of expert witnesses, or other sequential ordering.
Scheduling:
Many attorneys are not used to the rigorous scheduling of an SSE trial. It is advisable, once the attorneys have agreed upon the schedule for voir dire, opening statements, and case presentations, that they consciously plan out and allocate the amount of time they need for each of their witnesses according to the priority of issues in their case. They should then confirm that the witnesses are available on the date and time of their scheduled testimony.

Witnesses:
SSE trials generally allow attorneys to present most of their case directly to the judge or jury. However, if the attorney is able or wishes to present witnesses, include only those witnesses that are most essential to the case. For this, attorneys can ask themselves which witnesses will reasonably illustrate the three to five main points outlined above. As the rules for laying foundation or qualifying experts may be relaxed in these trials, attorneys should try and focus the testimony on the most needed areas to illustrate the main issues in his or her case. In most cases, these witnesses will have prescribed or agreed upon time for their testimony.

To ensure conformance with the agreed upon testimony, in preparing both lay and expert witnesses, it is advisable to go over these few needed questions in advance. If there is agreement to have the witness testify by videoconferencing, make sure that the internet, phone or videoconferencing equipment is tested and working at the time of testimony. If there is an agreement to include recorded witness testimony, either from deposition or by mutual consent on direct and cross examination, attorneys should conform the testimony to the time limits and the agreed upon scope of the testimony, as well as the form of the testimony (recorded testimony only, recorded testimony with subtitles, recorded testimony with deposition transcript). The attorneys should decide whether the recorded testimony will be available for later review by the jury. To help focus the testimony of each witness, the attorney may ask himself or herself what they would ask the witness if they only had five questions. That way, they can prioritize the testimony of the witness into the most germane areas. Additionally, if attorneys will be presenting a witness’ testimony (such as an expert’s) themselves, either by reading deposition transcripts, or presenting the report of that witness, it is advisable to present the written testimony or exhibit on a document projector or electronically through an LCD projector as well as giving the jurors individual copies.

Exhibits:
Similarly, in preparing exhibits for the trial, the attorney should only include exhibits that illustrate the key points the attorneys are trying to make in their presentations or illuminate the witnesses’ testimony. If there is agreement to include these in an exhibit notebook, it is important that these be clearly tabbed, marked, and limited to the information related to specific testimony. If additional exhibits are included in the document notebooks that have not been approved or have no relation to the testimony the jurors are hearing, it is counter-productive and can be misleading, causing more confusion for the jury. If the exhibit includes attorney highlighting, make sure these are pre-approved by opposing counsel before including these in the jurors’ books. Pre-approval is important to ensure that there are not later disputes about the inclusion or argumentative nature of the exhibits.
Trial Presentation:
If any of the presentations and exhibits will be shown in a PowerPoint, Trial Director, or other trial presentation system, ensure that these presentations are approved by the judge and opposing counsel before trial. Additionally, it is essential that these presentation systems be tested before the trial day to ensure they are in working order. If the attorneys would like to use blowups, a flip chart, a white board, or a Smart Board for their presentations, it is advisable that they obtain agreement on their use and practice with this media prior to the actual trial. Attorneys should also strive to be consistent in how they highlight information on a document or a demonstrative exhibit to avoid juror confusion.

Juror Note-Taking and Questions:
Whenever possible, jurors should be encouraged to take notes to aid their case organization and comprehension. Although the time frame is extremely tight, if agreed, attorneys and their clients should consider allowing juror questions. This will hopefully highlight for counsel the information jurors need to better understand and make decisions in the case.

Practice:
After months or more of working on a case, there is a natural tendency when one is working from an outline to add in details from the extensive knowledge that the attorney has of the case. When this happens in an SSE trial, with the strict time constraints, attorneys may simply run out of time to present their case, perhaps even leaving essential evidence or important issues out of their presentation. One of the ways for attorneys to avoid this unfortunate situation is to practice in order to time their presentations precisely. Additionally, with practice sessions, the attorneys may hear arguments or issues that simply seem less important when they say them out loud. This also allows counsel to avoid unwanted confusion or argumentation.

Jury Instructions and Verdict Forms:
In a short, summary, and expedited trial, the jury instructions and verdict questions are decided in advance of the beginning of the trial. This should help counsel to focus their presentations, both in their openings statements and in their presentation of evidence. In submitting instructions to the court, it is advisable to focus on only the special instructions or key definitions that are the most salient to the case. If allowed, these relevant instructions and verdict questions should be introduced to jurors at the beginning of the case to allow them to become more familiar with these legal guidelines and the questions they will need to answer. Many of the pattern jury instructions do not need to be submitted to the judge. The parties and the judge should evaluate the necessary scope of the instructions, given the limited length of the trial and deliberations. In prioritizing the evidence, counsel can ask themselves which testimony and demonstrative evidence will best address the verdict questions the jury has to answer and the instructions they will have to follow. The particular wording of a pattern jury instruction charge should be stipulated to before the evidentiary hearing. If opposing counsel does not agree, the attorney should be prepared with a draft of the charge with possible case or statutory support, and the reasons for inclusion of the charge. If attorneys are allowed closing arguments, it is advisable to use the stipulated juror instructions and verdict form in the closing argument, while showing jurors the instructions and walking them through the form, illustrating how counsel feels the evidence supports particular conclusions.
Simplify:

After the attorneys have fully planned their trial presentations, it is prudent for them to re-examine them prior to the actual trial to test the presentations for comprehension. For this, they should examine whether they can state any of the evidence or issues in a simpler and more direct manner in order for the jurors to fully understand the case. It is important that they not only analyze this simplicity themselves but also discuss the case with laypeople to assure that the comprehension levels are appropriate for the jury.

Voir Dire:

The attorneys will have extremely limited voir dire in a short, summary, and expedited trial, if allowed at all. Thus, it is important to identify the central issues that may create a bias for potential jurors in the case. After these issues have been identified, counsel should write the three main questions that identify a bias, negative predisposition, or side preference that they would not want on the jury. In asking these questions of the panel, it is important to ask open-ended questions that require the jurors to speak about the experiences or attitudes that may affect their ability to be fair and impartial in the case. It is not a good use of the limited voir dire time to ask indoctrination or leading agreement or promise questions. If there are additional concerns, the attorneys may also submit these questions for the judge to ask the jurors with support as to why the particular questions address a bias. Counsel are advised to review the voir dire and jury selection rules in an SSE trial in order to better understand whether there is attorney-conducted voir dire, the length of time allotted for questioning, how cause and peremptory challenges are conducted, and how many jurors and alternates are seated, as well their seating order.

Avoid Excessive Argument:

In an SSE trial, jurors assimilate a large amount of information in a short period of time. Thus, they will respond better to a clear presentation of evidence than to a great deal of argument. If jurors hear too much argument before closing statements in the case when they have no context, they may minimize or discredit the evidence they do hear.

APPENDIX D

BEST PRACTICES FOR DATA COLLECTION

This section describes best practices for developing and implementing a data collection plan for your SSE program.

TYPES OF DATA COLLECTION

Court-based programs typically collect two different types of information about program performance: case-level data and participant feedback. Case-level data documents objective information about the trials that take place through the program, such as the number of trials, the types of cases, trial length, and trial outcomes. Ideally, information of this type should be collected by a single person with direct knowledge or involvement in the trial, such as the trial judge or courtroom staff. Participant feedback typically focuses on the individuals who participated in the trial or have a direct investment in the trial outcome—lawyers, litigants, and jurors—to document their perceptions about program effectiveness and fairness and to solicit recommendations for program improvement. Most participant feedback methods consist of questionnaires or focus groups.

FOCUS OF DATA COLLECTION

Some basic information should be collected about all SSE trials such as the case number, the case name, the type of case (e.g., automobile tort, premises liability, breach of contract, etc.), the trial start and end date(s), and the trial outcome. This type of basic information accomplishes three things: (1) it documents the actual volume of program activity; (2) it facilitates comparison of the SSE cases with non-SSE cases and with jury trials under similar SSE programs in other jurisdictions; and (3) provides empirical evidence of fairness by documenting plaintiff versus defendant win rates.
In addition to basic information, the program should document other aspects of the SSE program. In developing the data collection methods, the overriding philosophy should be to tailor the data collection efforts to program objectives. This approach will ensure that program developers and participants can point to solid, empirical information about program accomplishments. Table D-1 below illustrates some common objectives of SSE programs and applicable data elements to measure to assess performance.

Table D-1

<table>
<thead>
<tr>
<th>IF THE PURPOSE OF THE PROGRAM IS TO ...</th>
<th>DATA COLLECTION SHOULD FOCUS ON ...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bring cases to trial faster</td>
<td>Case filing date (or date case entered program)</td>
</tr>
</tbody>
</table>
| Reduce trial costs                     | Trial length  
Amount and form of evidence introduced at trial:  
• Number of witnesses  
• Live witness/expert testimony vs. written reports |
| Provide a venue for younger, less experienced lawyers to gain trial experience | Attorney characteristics:  
• Number of years in practice  
• Law firm size  
Assessments of the program as an educational opportunity |
| Continue to attract participants (growth) | Names of the participating insurance carrier  
Insurance policy limits  
Existence and range of high-low agreements  
Identify other repeat players |

The SSE programs in New York and the Eighth Judicial District Court of Nevada offer useful illustrations of how the program managers developed their respective data collection strategies to further program objectives. See State of New York Summary Jury Trial Data Collection Form (attached as Exhibit B) and Eight Judicial District Court of Nevada Sample Data Collection Form (attached as Exhibit C). Both programs identify the case name, case number, trial date, jury verdict, and the amount of damages awarded. Because the New York State program is statewide, the NY Data Collection Form also identifies the specific type and the location of the court in which the trial took place.

The Short Trial Program in the Eighth Judicial District Court of Nevada operates under the auspices of the ADR Office. Thus, much of the detail captured on the Short Trial Information Sheet was designed to provide the ADR Commissioner with a view of Short Trial performance compared to other ADR options, including the total number of cases proceeding on the arbitration and Short Trial tracks, the number of cases scheduled for Short Trial or arbitration, and the number of completed Short Trials or arbitration decisions entered. Because many of the Short Trial cases are appeals from mandatory arbitration, the Short Trial Information Sheet also collects detailed information about the amount of damages claimed by the plaintiff and the actual damages awarded by the jury for medical expense reimbursement, pain and suffering, and lost wages, which permits a detailed comparison between jury and arbitrator decision-making in the same case. Because the decision to include previous arbitration decisions in the materials provided to the jury was somewhat contentious, the Short Trial Juror Exit
Survey largely focused on the impact that knowledge about the arbitration decision had on the jury verdict. Both the Juror Exit Survey results and the comparison of arbitration decisions with jury verdicts demonstrated that the impact was negligible, putting to rest concerns that the practice interfered with the jury’s independent judgment.

The NY Data Collection Form continues to evolve over time. In addition to basic identifying information, the current version was designed to measure the efficiencies introduced by Summary Jury Trials compared to non-Summary Jury Trial cases. For example, information about the anticipated trial length for a non-Summary Jury Trial (Question 8) provides a concrete measure for the number of trial days saved using the SSE procedures. Similarly, details about the amount of time allotted for the various segments of the summary jury trial provide benchmarks for the “normal” timeframe for conducting these trials. (The forthcoming version of the data collection form will eliminate many of these questions because they revealed almost no variation in these measures across case types or among judicial districts.) A unique feature of the NY Data Collection Form is the identification of the insurance carrier representing the defendant. This information serves as a barometer to both plaintiff and defendant’s bars, as do the insurance policy limits and high-low agreement parameters, of the breadth of acceptance of Summary Jury Trials as a method of case resolution. Over time, this information has documented significant growth of participating carriers, with policy limits and high-low parameters trending higher.

Exhibit A provides a template of data elements that SSE program developers may consider when designing their own data collection instruments. Ideally, comparable information about non-SSE program trials should be routinely available or easily compiled from existing sources to provide baseline information.

In developing case-level data collection forms or SSE participant surveys, it is often tempting to collect extremely detailed information about the cases and trials adjudicated. Program developers should keep in mind that, as the data collection process becomes lengthier and more detailed, it also becomes more time and labor-intensive and requires more resources to support. A useful technique to keep data collection objectives from eclipsing the broader objectives of the SSE program is to review each proposed data element or survey question with the following criteria in mind.

Is/Does the data element or survey question . . .
Essential documentation of basic program operations?
Clearly measure the performance of key program objectives?
Readily available from the case management system, case files, or trial participants?
Duplicate other data elements or survey questions?

PROCESS OF DATA COLLECTION
An important part of the data collection strategy is ensuring that this task is undertaken by individuals with the appropriate skills, resources, and authority to do so.

Questions that SSE program developers should address are:
- Who is responsible for collecting the data, reviewing the data to ensure its completeness, and compiling the data for analysis?
- What authority does that individual or agency have to enforce compliance with data collection efforts?
- Is any of the information collected confidential? If so, who should have access to that information? What procedures should be implemented to ensure confidentiality?

11 For more information about effective program evaluation, see IAALS, A ROADMAP FOR REFORM: MEASURING INNOVATION (2010).
- How frequently are the data compiled and analyzed? To whom and in what format are findings reported?
- Where are program reports and data archived?

Data collection should not be undertaken for its own sake, but rather to support program maintenance and sustainability. As such, it is important that program participants from whom or about whom information is collected understand the purpose of data collection and how the information will be used. Program developers should also consider the form of data collection. Electronic forms such as online surveys or fill-in PDF forms require more technological expertise to develop, but offer greater accuracy and legibility and are less labor-intensive to compile. In addition to streamlining the data collection process, involving individuals with technology expertise in the design process can facilitate the process of generating both routine and ad hoc reports.

Program developers should also have a plan to disseminate the findings from data collection efforts. In the Eighth Judicial District Court of Nevada, the ADR Commissioner provides reports detailing the number of cases that entered the Short Trial Program, were scheduled for trial, and were completed to the local court administration and to the Nevada Administrative Office the Courts. Because the Eighth Judicial District Court is largely funded by local taxpayers, the Short Trial Program reports are routinely shared with the local Board of Commissioners to show how the Short Trial Program helps the court use those resources more effectively. The statewide ADR reports, including Short Trial statistics, are provided to the Nevada Legislature as mandated by statute. Under the mandatory arbitration program, arbitrators are supposed to make decisions according to how a jury would decide the case. Thus, the arbitration versus Short Trial verdict comparisons provide valuable training for and feedback to the arbitrators assigned to those cases. In addition, those comparisons are also excellent tools for dispelling common myths circulating in the legal community about how juries evaluate and assign monetary values to different categories of damage awards.

In New York State, Justice Lucindo Suarez provides quarterly reports detailing the number of Summary Jury Trials held for each of the 13 judicial districts to the Chief Administrative Judge of the New York Judicial Branch and to each of the district administrative judges. He also sends copies of the reports to each of the judges who presided in a Summary Jury Trial during the preceding quarter and their judicial clerks who submitted the data collection forms. This approach provides further encouragement for the judges and clerks to submit their data and ensures that the reports accurately reflect the actual volume of Summary Jury Trials conducted in those courts. “The judges and clerks will always let me know if they think I’ve made a mistake by omitting any of their trials from the total counts,” he explained. “I then make the corrections and resend the corrected reports with the subsequent quarterly reports.” Justice Suarez also uses the data during training workshops with judges and lawyers across the state to illustrate details about these trials such as the amount of time typically allocated for various segments of the trial or the proportion of trials undertaken with high-low agreements.
Exhibit A

Sample Data Collection Form

Case name: ________________________________  Case number: ________________

Case type (check one):
  ☐ auto tort  ☐ premises liability  ☐ contract  ☐ other (please specify) ____________

Filing date: _____/_____/____

Trial date(s): _____/_____/____ to _____/_____/____

Insurance carrier: __________________________________________
Policy limits: __________________________________________
High/low agreement range: ____________ to ____________
Arbitration decision: ____________________________________
☐ Not applicable

Damages claimed:
  Medical expenses: $________________________
  Pain & suffering: $ _________________________
  Lost wages: $ ______________________________
  Other damages: $ __________________________

Jury size (if variable): _________________________

Length of ... (in minutes)
  Voir dire: ________________________________
  Opening statements: ______________________
  Plaintiff evidence: ________________________
  Defendant evidence: ______________________
  Closing arguments: ________________________
  Jury deliberations: ________________________

Plaintiff evidence:
  Number of fact witnesses: _________________  Number testifying in person: ________
  Number of expert witnesses: ________________

Defendant evidence:
  Number of fact witnesses: _________________
  Number of expert witnesses: ________________

Verdict:
  ☐ Plaintiff  ☐ Defendant

Unanimous verdict:
  ☐ Yes  ☐ No

Damages Awarded:
  Medical expenses: $________________________
  Pain & suffering: $ _________________________
  Lost wages: $ ______________________________
  Other damages: $ __________________________
### Exhibit B

**STATE OF NEW YORK**  
**UNIFIED COURT SYSTEM**  
**SUMMARY JURY TRIAL DATA COLLECTION FORM**  
**UCS-413 (08/11)**

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Hon. Lucindo Suárez, Supreme Court - Bronx County, 851 Grand Concourse, Bronx, NY 10451; Fax: 718-537-6076. Attention Hon. Lucindo Suárez, Scan: Isuarez@courts.state.ny.us

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<td>NYC Civil Court</td>
<td>Tort</td>
<td>Defendant(s)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>County</td>
<td>Motor Vehicle</td>
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<td>City/District</td>
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<table>
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<tr>
<th>8. EXPECTED NUMBER OF JUDICIALEY DETERMINED TRIAL DAYS IF NO SJT:</th>
<th>9. DATE OF SUMMARY JURY TRIAL:</th>
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<tr>
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<td>(month / day / year)</td>
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<table>
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<tr>
<th>10. ISSUES:</th>
<th>11. WAS SJT:</th>
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<tr>
<td>Liability only</td>
<td>Binding</td>
</tr>
<tr>
<td>Damages only</td>
<td>Non-binding</td>
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<th>12. IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE:</th>
<th>12a. Carrier(s):</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ High $ Low $ None</td>
<td></td>
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<thead>
<tr>
<th>13. DID THE CASE SETTLE?</th>
<th>13a. When?</th>
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<tbody>
<tr>
<td>No</td>
<td>Before SJT</td>
</tr>
<tr>
<td>Yes</td>
<td>During SJT</td>
</tr>
<tr>
<td>Not applicable</td>
<td></td>
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<tr>
<th>13b. What was the settlement amount?:</th>
<th>12b. Policy Limit(s):</th>
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### THE PROCEEDINGS

<table>
<thead>
<tr>
<th>14. WAS THE SUMMARY JURY TRIAL PRESIDED OVER BY A:</th>
<th>15. HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>☐</td>
</tr>
<tr>
<td>JHO</td>
<td>☐</td>
</tr>
<tr>
<td>Don't know</td>
<td>☐</td>
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<tr>
<th>16. HOW MUCH TIME (IN MINUTES) WAS ALLOTED FOR VOIR DIRE?</th>
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<tbody>
<tr>
<td>Judge</td>
</tr>
<tr>
<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<table>
<thead>
<tr>
<th>17. HOW MUCH TIME (IN MINUTES) WAS ALLOTED FOR...</th>
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<tbody>
<tr>
<td>... opening statements?</td>
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<tr>
<td>Judge</td>
</tr>
<tr>
<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<tr>
<td>... case presentation?</td>
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<tr>
<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<tr>
<td>... closing statements?</td>
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<tr>
<td>Judge</td>
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<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<tr>
<th>18. HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...</th>
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</thead>
<tbody>
<tr>
<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<tr>
<th>19. HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...</th>
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</thead>
<tbody>
<tr>
<td>Plaintiff(s)</td>
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<tr>
<td>Defendant(s)</td>
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<tr>
<th>20. WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY?</th>
</tr>
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<tbody>
<tr>
<td>☐ Yes</td>
</tr>
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</table>

### THE VERDICT

<table>
<thead>
<tr>
<th>21. FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE?</th>
<th>22. VERDICT:</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 or less</td>
<td>☐</td>
</tr>
<tr>
<td>☐</td>
<td>Plaintiff</td>
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<tr>
<th>23. DAMAGES AWARDED:</th>
<th>24. WHO COMPLETED THIS FORM?</th>
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<tbody>
<tr>
<td>$</td>
<td>NAME:</td>
</tr>
<tr>
<td>Settled before deliberations</td>
<td>PHONE NUMBER:</td>
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<tr>
<th>DATE:</th>
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25
QUESTIONS TO THE JURY ABOUT THE SHORT TRIAL PROGRAM

EIGHTH JUDICIAL DISTRICT COURT

PLEASE MAIL WITHIN 10 DAYS OF THE COMPLETION OF THE TRIAL TO:
ADR Commissioner
c/o ADR OFFICE
330 S. Third St.
Las Vegas, NV 89155
Fax...(702) 671-4484
ATTN: STP Jury Survey

1. How did you feel this morning when you were advised that you would be participating in the Short Trial Program (“STP”)?

2. How did you feel when you learned that you would be a juror for just one day?

3. How do you feel about the fact that only four jurors were chosen?

4. [If applicable] Did the jury instruction regarding the fact that an arbitrator had previously heard this case and rendered an award have any impact on your verdict today?

5. [If applicable] If so, how (i.e., did it help or hinder you reaching a verdict)?

6. [If applicable] How do you feel about being given this information?

7. What did you think about the evidentiary booklet?

8. How did you feel when you were able to reach a (unanimous?) verdict?

9. What did you like most about the STP?

10. What did you like least about the STP?

11. If summoned, would you sit as a juror in the STP again?

12. If you could recommend any change(s) be made to the program, what would it/they be?
**SHORT TRIAL INFORMATION SHEET**

1. Case Name: 

2. Case No.: 

3. Trial Date: 

4. **NAME of COUNSEL (@ TRIAL) for:**
   - Plaintiff: 
   - Defendant: 
   - Other Party: 

5. **Nature of Damages:** (e.g., soft tissue, broken bones, contractual, etc.):

6. Damage **Amounts** Claimed (e.g., medical expenses incurred, property damage amount, amount of lost wages, etc.):

7. **Testimony from [please use NAMES of ALL witnesses]**
   - **Oral**
   - **Written**
   - **Plaintiff(s):**
   - **Plaintiff's expert(s):**
   - **Defendant(s):**
   - **Defendant's expert(s):**
   - **Other(s):**
   - **Other's expert(s):**

8. **Verdict:**
   - **Party**
   - **Verdict Amounts (e.g., meds, P & S, LW):**

9. **Verdict Unanimous:** __ Y / N __

10. **Liability Admitted:** __ Y / N __


12. **Interesting Notes:**

**PLEASE RETURN WITH FILE-STAMPED VERDICT FORM TO ADR OFFICE**
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Albany Law Review
2010

Article

**1379** CONVICTS IN COURT: FELONIOUS LAWYERS MAKE A CASE FOR INCLUDING CONVICTED FELONS IN THE JURY POOL

James M. Binnall

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I. Introduction

Currently, in twenty-nine states and the federal court system, a convicted felon can practice law, but cannot serve on a jury.\(^1\) In these jurisdictions, bar examiners conduct individualized evaluations of all aspiring attorneys, providing bar applicants with a felonious criminal history the opportunity to gain entry into the legal profession.\(^2\) Yet, such jurisdictions also employ categorical, record-based juror eligibility statutes, which permanently prohibit convicted felons from taking part in the adjudicative process.\(^3\) Ignored by courts and scholars,\(^4\) this incongruent framework for assessing the value of prospective legal actors with a criminal past seemingly undermines the proffered rationales for excluding convicted felons from jury service, and civic life generally; thereby delegitimizing the law and potentially threatening reintegration initiatives.

Lawyers and jurors are equally vital to democratic systems of government. As Alexis De Tocqueville noted, “the prestige accorded to lawyers and their permitted influence in the government are . . . \(^1380\) the strongest barriers against the faults of democracy.”\(^5\) while “[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.”\(^6\) Accordingly, to protect the system of justice,\(^7\) all jurisdictions screen potential lawyers and jurors,\(^8\) banishing those who may jeopardize the functionality and integrity of indispensable legal institutions. But the procedures used by a majority of jurisdictions to evaluate a convicted felon's suitability for these two legal roles differ wildly, suggesting that gatekeepers maintain keenly divergent views of convicted felons.

Specifically, legislators and courts justify the preclusion of convicted felons from jury service by alleging that all those marked with a felony conviction uniformly “lack probity”\(^9\) and are “inherently biased.”\(^10\) In this way, felon jury exclusion statutes rest solely on the presumption that a felony conviction renders one irreparably flawed,\(^11\) to the extent that lawmakers must “define and protect juries”\(^12\) by categorically locking all convicted felons out of the deliberation room.\(^13\)

Yet, a majority of jurisdictions, while permanently banning convicted felons from jury service, do not per se disqualify all bar applicants with a felonious criminal history.\(^14\) Instead, such jurisdictions opt to individually evaluate, and in some cases license, convicted felons who hope to practice law;\(^15\) ostensibly ignoring the \(^1381\) supposed permanence of character flaws and biases.\(^16\) Thus, adhering to an inconsistent evaluative framework, a majority of jurisdictions call into question the validity of the professed rationales for record-based juror eligibility statutes.
While per se excluding convicted felons from all meaningful legal roles is a tempting method by which to rectify such inconsistency, social science research demonstrates that the opposite approach is far more prudent. For example, law professor Tom Tyler's empirical work proposes that voluntary compliance surpasses deterrence as a means of social control, and that citizens are more likely to voluntarily comply with the law if they view the law as legitimate. Additionally, because citizens contemplate the fairness of their experiences with the justice system when assessing the legitimacy of legal procedures, authorities can influence one's sense of procedural justice by regulating conduct through thoughtful methods.

Tyler contends that just procedures involve measures of representation, consistency, impartiality, accuracy, correctability, and ethicality. Moreover, just procedures foster fairness, legitimacy, and ultimately voluntary compliance with the law. Yet, “[w]hen authorities are viewed as procedurally unjust, their legitimacy is undermined, leading to support for disobedience and resistance.” Hence, because per se exclusions, like record-based juror eligibility statutes, are inattentive to all of the components of procedural justice, they do not promote the legitimacy of law and potentially encourage recidivistic behavior. Conversely, the tailored assessments that govern a felon's access to the legal profession respect elements of procedural justice, legitimizing the law and likely facilitating law abiding conduct.

Though scholars have criticized felon jury exclusion statutes by highlighting their inherent flaws, this article takes a different approach. This article considers felon jury exclusion statutes contextually, arguing that by unconditionally banning felon-jurors, while individually evaluating felon-lawyers, a majority of jurisdictions undermine their own rationales for expelling millions of Americans from the adjudicative process. Moreover, informed by Tyler's theoretical framework, this article asserts that to achieve procedural justice, jurisdictions must perform case-by-case assessments of all convicted felons who seek to fulfill their civic duty as jurors, because uncompromising and inconsistent policies, in part, delegitimize the law and hinder reentry efforts.

Part II details the practice of felon jury exclusion, outlining the scope, application, and rationalization of record-based juror eligibility statutes. Part III examines the purposes and approaches for regulating a convicted felon's access to the legal profession. Part IV challenges the presumption that convicted felons threaten the probity of the jury by exposing the inconsistent conceptualizations of character at work in a majority of jurisdictions. Part IV critically assesses the inherent bias rationale for felon jury exclusion, questioning its validity by exploring the requisite duties of the lawyer and the juror. Part V acknowledges likely criticisms of challenging felon jury exclusion statutes contextually. Part VI reviews Tyler's theoretical framework, concluding that standardized individual assessments are normatively superior to inconsistent procedures that include blanket exclusions, as such uniform assessments elicit respect for the legal system and foster successful reintegration.

II. The Felonious Juror

In the United States, the “felon” label has become increasingly salient. For those to whom the criminal justice system affixes this permanent mark, there are a host of lasting consequences. Specifically, certain restrictive legal constructs curtail the civic freedoms of a convicted felon. Moreover, “collateral sanctions” or “discretionary disqualifications” are “often unknown to the offenders to [whom] they apply.” Included in this “‘national crazy- quilt of disqualifications and restoration procedures’” are legislative provisions that categorically limit or eliminate a convicted felon's chance to serve on a jury.

A. The Mechanics of Felon Jury Exclusion
To serve on a jury, a citizen must preliminarily meet statutorily enumerated juror eligibility requirements. Generally, all juror eligibility statutes require that prospective jurors: 1) are United States citizens; 2) are at least eighteen years of age; 3) live in the state and country in which they are summoned; 4) and possess a working knowledge of the English language. Thus, for most citizens, establishing their eligibility to take part in the jury process is a relatively straightforward task, rarely resulting in dismissal. But for convicted felons, an additional record-based juror eligibility criterion often curtails, to some degree, their opportunity to partake in jury service.

For example, California, a state that permanently expels convicted felons from the jury process, requires that a potential juror complete a “juror affidavit questionnaire” prior to becoming part of the venire. This questionnaire lists California's juror eligibility requirements and instructs potential jurors to indicate those they do not meet. In relevant part, the juror affidavit questionnaire reads, “I am not qualified to serve as a prospective trial juror because I . . . have been convicted of a felony or malfeasance in office.” Completed and collected by an officer of the court at the outset of the jury selection process, the juror affidavit questionnaire operates to categorically exclude all those with a felonious criminal history, foreclosing the possibility that a convicted felon might possess the requisite characteristics of a fit juror.

*1385  B. Jurisdictional Approaches to Felon Jury Exclusion

Felon jury exclusion provisions roughly divide into two types: those that absolutely remove a convicted felon's chances of ever serving as a juror (lifetime ban), and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (others). Thirty-one states and the federal court system make convicted felons permanently ineligible to take part in the adjudicative process (lifetime bans). Yet, apart from these lifetime bans, felon jury exclusion provisions vary significantly.

“Ten states . . . exclude felons during the time that they are under sentence, under the supervision of the criminal justice system, or in prison;” three states “allow parties to challenge felons for cause for life at the discretion of the court;” five states “provide hybrids of various severity, either providing different rules for different situations, or using a rule combining penal status and some term of years;” and two states place no restrictions on felon jury service. Hence, while divergent statutory schemes comprise a “patchwork” of standards, an overwhelming majority of jurisdictions banish felonious jurors for life.

C. Justifying Felon Jury Exclusion

Jurisdictions rationalize the exclusion of convicted felons from jury service by asserting that convicted felons “threaten the probity of the jury” and are “inherently biased against the government.” Hence, by preventing convicted felons from serving as jurors, jurisdictions allegedly “protect juries rather than . . . punish or degrade felons.” Yet, courts have clearly articulated the purported logic of only the inherent bias rationale for felon jury exclusion statutes. “[C]ourts have been less clear as to whether the threat that felons pose to jury probity stems from their degraded status or from their actual characteristics.”

As law professor Brian Kalt points out, two possibilities perhaps explain the probity rationale for felon jury exclusion statutes. First, a jurisdiction might presume that all convicted felons lack probity because they possess “poor character or innate untrustworthiness,” traits that could compromise the jury process. Second, a jurisdiction may suppose that the “badges of shame” or “degraded status” of all convicted felons “undermine[s] the integrity of the institution.” Yet, in either case
“[t]he precise mechanism by which felons threaten jury probity is unclear,” leaving scholars to speculate about the causal connection between a felony conviction and a supposed lack of probity.

The inherent bias rationale for felon jury exclusion statutes holds that all convicted felons harbor biases that makes them “adversarial to the government.” Such bias apparently spawns a sympathy for criminal defendants, thereby making those with a felonious criminal history “less willing, if not unwilling altogether, to subject another person to the horrors of punishment they have endured.” In this way, a felony conviction purportedly destroys the capacity for impartiality, rendering one unsuitable for jury service.

*1387 Though somewhat distinct, the justifications for felon jury exclusion possess a crucial similarity. Both the probity rationale and the inherent bias rationale rest on the assumption that all convicted felons possess traits that make them permanently unfit for jury service. While some scholars question the logic of this assumption, proponents of felon jury exclusion statutes argue that such measures are necessary to protect juries, the justice system, and even crime victims. Moreover, the Supreme Court has upheld felon jury exclusion statutes, proclaiming “jurisdictions are ‘free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character.’” Yet, an examination of the process by which a convicted felon can enter the legal profession, even in those jurisdictions that ban felonious jurors for life, reveals the flaws in the presumptions on which felon jury exclusion statutes rest.

III. The Felonious Lawyer

After successfully completing a grueling period of schooling, a prospective attorney faces two obstacles to professional licensure. A bar applicant must not only pass a comprehensive exam testing legal knowledge, but must also successfully navigate a moral character and fitness determination designed to establish that “graduating law students . . . meet high standards of moral character.” Though for many applicants this assessment amounts to a time-consuming formality, for convicted felons, a character evaluation can represent an insurmountable obstacle.

A. Jurisdictional Approaches to Felonious Bar Applicants

The moral character and fitness process begins with the requirement that bar applicants complete a lengthy questionnaire which asks a series of significantly probing questions. Contained in this application are “four major areas of inquiry, including an applicant's history of in-patient psychiatric hospitalization and out-patient mental health treatment, substance abuse and treatment, educational misconduct, and criminal conduct.” For an applicant with a felony criminal conviction, bar examiners will almost always seek out additional information about the offense.

Once an applicant has provided the requested information to the relevant jurisdiction, the process for determining fitness of character depends on the favored jurisdictional approach. In some jurisdictions, a felony conviction per se disqualifies an applicant from admission to the bar. Yet, in others, a felony conviction merely amounts to a presumptive disqualification, creating a “rebuttable presumption that an applicant with a record of prior unlawful conduct lacks the requisite character to practice law.”

1. Per se Disqualifications
Those jurisdictions that per se disqualify felonious bar applicants from the legal profession do so either permanently or temporarily. While ten jurisdictions impose some form of per se disqualification on bar applicants with a felony criminal history, only half of such jurisdictions per se disqualify convicted felons from the practice of law permanently. The remaining half per se disqualify felonious applicants for an automatically-terminating period of time, usually a set-period of years after expiration of the imposed sentence.

The severity of the per se disqualification notwithstanding, such an approach reflects the "'traditional view that 'certain illegal acts . . . evidence attitudes toward the law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession's reputation and reduce the character requirement to a meaningless pretense.'" Hence, like lifetime felon jury exclusion statutes, the per se disqualification model suggests that those with a felonious criminal history are forever blemished, and, as some scholars suggest, "destryos an individual's professional hopes and possibly deprives the bar and society of committed, rehabilitated lawyers."

2. Presumptive Disqualifications

Forty-five states and the federal court system do not per se disqualify (permanently) a convicted felon from practicing law. Instead, in these jurisdictions a felony conviction merely amounts to a presumptive disqualification rebuttable by a felonious bar applicant at a moral character and fitness determination. During the determination, "evidence of complete rehabilitation is almost always required before a bar applicant with a record of prior unlawful conduct will be admitted." Though demonstrating a change in one's character is a rather ambiguous task, "[f]or bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society."

Specifically, states that employ the presumptive disqualification framework look for evidence of rehabilitation using either a "guided approach" or an "unguided approach." Under the guided approach, jurisdictions use "specific guidelines and requirements for judging an applicant's moral character," while the unguided approach involves considering "admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners." Although scholars note that each approach has inherent drawbacks, the benefit of this rubric is that applicants receive a case-by-case determination after consideration of the 'totality of the record.' Thus, the presumptive disqualification approach is "more accepting of individuals who have, in the past, been convicted of a felony."

B. Rationalizing Moral Character and Fitness Determinations

The national governing body of legal practitioners in the United States, the American Bar Association (ABA), asserts that "[t]he primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice." Though bar examinations test professional competence, the ABA theorizes that "[t]he lawyer licensing process is incomplete if only testing for minimal competence is undertaken" because "[t]he public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law." Thus, the ABA recommends that in each jurisdiction "[t]he bar examining authority should determine whether the present character and fitness of an applicant qualifies the applicant for admission," and whether an applicant is "one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them."
*1392 Echoing the sentiments of the ABA, the Supreme Court has also noted the importance of protecting the public and
our system of justice by allowing “the profession itself [to] determine who should enter it.” 98 Emphasizing the crucial role
of practicing attorneys, Justice Frankfurter noted:

It is a fair characterization of the lawyer's responsibility in our society that he stands “as a shield,” . . . in
defense of right and to ward off wrong. From a profession charged with such responsibilities there must
be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest
observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described
as “moral character.” 99

Concerned that an attorney without the requisite moral make-up might engage in “potential abuses, such as misrepresentation,
misappropriation of funds, or betrayal of confidences,” 100 the legal profession and courts defend the use of character
evaluations by stressing the need to protect the system of justice “from those who might subvert it through subornation of
perjury, misrepresentation, bribery, or the like.” 101 Moreover, they allege that with such assessments “a state bar can maintain
control and hopefully avoid the problems that unfit attorneys may cause.” 102

Additionally, courts and bar examiners justify a heightened level of scrutiny for felonious bar applicants by noting that
“‘good’ moral character means the absence of proven ‘misconduct.”’ 103 As the ABA highlights, “[a] record manifesting a
significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial
of admission.” 104 In this way, much like felon jury exclusion statutes, supposition about those with a felony criminal record
plagues the moral character and fitness process. Yet, in a majority of jurisdictions, the moral character and fitness process allows
for the possibility that certain *1393 convicted felons are suitable to fill essential legal roles—belying the presumption that all
those with a felonious criminal history are permanently unfit to take part in the pursuit of justice. 105

IV. Undermining the Probity Rationale

As discussed, jurisdictions primarily justify felon jury exclusion statutes by arguing that convicted felons “threaten the probity of
the jury.” 106 And, while the manner in which those with a felonious criminal history threaten a jury's probity is ambiguous, 107
the rationale makes clear that a majority of jurisdictions presume that all felonious jurors possess unalterably bad character. 108
Yet, in twenty-nine states and the federal court system, that presumption exists alongside flexible moral character and fitness
standards that acknowledge a more malleable conceptualization of character, 109 casting doubt on the veracity of the probity
rationale for excluding convicted felons from jury service.

A. Two Views of Character

Discussions of one's character and its role in human behavior educe a host of varied viewpoints. Philosophers and ethicists
often contend that “character will have regular behavioral manifestations: the person of good character will do well, even
under substantial pressure to moral failure, while the person of bad character is someone on whom it would be foolish to
rely.” 110 In this way, character supposedly serves as a critical tool for predicting behavior, as it “decides the moral texture of
life.” 111 Yet, other scholars argue that experimental social psychology challenges the *1394 traditional view of character.
Specifically, situationist psychology research offers an alternative framework with which to explain conduct, suggesting that
one's environment perhaps has a greater impact on one's actions than do inherent personality traits. 112
1. Traditional Views

Law professor Anders Kaye notes that conventional character theories “assume that we have a certain sort of character, comprised of enduring, global character traits—traits that are not just consistent across time, but also across situations, and that manifest not just sporadically, but reliably.” 113 This static conceptualization of character harkens back to the Aristotelian formulation of human nature which places “[a]n emphasis on robust traits and behavioral consistency,” 114 and speculates that “[k]nowing something about a person’s character is supposed to render their behavior intelligible and help observers determine what behaviors to expect.” 115

The conventional view of character also holds that “every person chooses to develop good and bad character through autonomous actions,” 116 and “[o]nce a person [chooses] their character . . . he or she [is] not free to simply undo the choice.” 117 Moreover, traditional character theorists posit that often one socially unacceptable act is adequate evidence that one possesses a normatively undesirable trait. In this way, bad character “require[s] very little in the way of behavioral consistency.” 118 Thus, “one doesn't have to reliably falter, but only sporadically falter,” 119 to win the traditionalist’s pejorative distinction of possessing bad character.

John Doris describes this view of character as “globalism.” 120 He contends that under the globalist theory of character, “[i]f a person possesses a trait, that person will engage in trait-relevant behaviors in trait-relevant eliciting conditions with markedly above chance probability.” 121 Specifically, globalism dictates that traits are: 1) consistent, 122 2) stable, 123 and 3) evaluatively integrative. 124 For example, if one possesses the trait of dishonesty, that person will consistently act in a dishonest fashion in a host of varied situations. Moreover, in such situations, a dishonest person is also more likely to exhibit other traits of equal reprehensibility.

2. Situationist Psychology

Some scholars argue that conventional conceptualizations of character do not accurately reflect human nature. 125 Along these lines, Doris contends that “philosophical explanations referencing character traits are generally inferior to those adduced from experimental social psychology” 126 because “[t]hey presuppose the existence of character structures that actual people do not very often possess.” 127 Simply, modern research indicates that behavior may primarily derive from the situations that confront an actor, rather than an actor’s “dispositional structure.” 128

A series of experiments, now famous in social psychological literature, strengthen the claim that one's behaviors are largely a product of one's environment. By manipulating situational factors, researchers have been able to induce striking behaviors, 129 demonstrating that “situational influences can easily cause us to act in ways that we would not approve.” 130 Kaye terms this phenomenon the “puppet problem,” 131 noting that quantifiable data shows that our acts are intimately connected to our surroundings. 132

The situationist conceptualization of character challenges conventional views in several respects. Situationism holds that 1) “behavioral variation across a population owes more to situational differences than dispositional differences among persons”; 133 2) “[p]eople will quite typically behave inconsistently with respect to the attributive standards associated with a trait, and whatever behavioral consistency is displayed may be readily disrupted by situational variation”; 134 and 3)
“evaluatively inconsistent dispositions may ‘cohabitite’ in a single personality.” 135 Returning to our dishonest straw-person, the situationist would argue that one who is dishonest may only act untruthfully in certain situations, but he or she may behave quite honestly if other circumstances present. In this way, the dishonest person has the capability to be both forthright and deceptive.

B. Jurisdictional Situationism: Probity’s Detractor

Whether knowingly or unknowingly, jurisdictions that expel convicted felons from the jury process, but allow others to practice law, ostensibly join situationist theorists in acknowledging the weaknesses that plague the traditional views of character. Specifically, such jurisdictions openly accept the central precept of situationism--that perceived personality traits are often a poor predictor of human behavior--and therefore call into question the principal justification that drives their own felon jury exclusion statutes. 136

Felon jury exclusion statutes comport entirely with a conventional conceptualization of character. First, lawmakers use felony convictions as indices of flawed character, suggesting that a felony conviction “springs from or manifests the actor’s character, it comes from what makes him ‘him.’” 137 Second, by unconditionally banning convicted felons from the venire without considering the *1397 possibility that a felonious juror may be fit to serve on a jury, a majority of jurisdictions suggest that flawed character is static, irremediable, and predictive of future behavior. 138 Hence, felon jury exclusion statutes adhere to a traditional, rigid conceptualization of character.

Contrarily, the presumptive disqualification approach for assessing the moral character and fitness of felonious bar applicants departs from conventional conceptualizations of character in important ways. Though such an approach still attributes bad character to those with a felonious criminal record, 139 it also acknowledges a convicted felon's ability to act in ways that reflect good character by allowing those applicants with a felony criminal history to rebut the presumption that they boast only undesirable personality traits. 140 Thus, the presumptive disqualification approach seemingly borrows from situationist theory, challenging the tenets of the conventional view of character, and affirming that along with potential character flaws, convicted felons likely also possess commendable traits which are observable in select situations.

For those who endorse a traditional view of character, the presumptive disqualification approach to moral character and fitness determinations overlooks the alleged true nature of convicted felons. Conventionalists might argue that selectively admitting felonious bar applicants jeopardizes the legal profession and the system of justice by ignoring the ingrained character flaws that exist among all convicted felons. 141 They might also commend jurisdictions that systematically banish convicted felons from the deliberation room, claiming that such measures appropriately ally with traditionalist conceptions of character, and are necessary to protect society from the perpetually bad.

But such contentions are void of evidentiary support. Instead, defenders of customary character analysis often cite “common sense” 142 as a means by which to hold fast to their position and *1398 reject contradictory research. 143 Moreover, as Kaye notes, fundamental attribution error, 144 confirmation bias, 145 and misperceptions of consistency 146 likely all play a part in reinforcing the traditionalist viewpoint that “we and those around us bear robust, global character traits.” 147

Alternatively, situationism, which indicates that traditionalist claims are empirically untenable, “derives from a substantial and diverse body of experimental work.” 148 The presumptive disqualification approach to felonious bar applicants furthers the validated situationist assertion that conventional views of character do not accurately portray human nature. 149 Further, the
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presumptive disqualification approach concedes the flaws of the character theory underlying the probity rationale for felon jury exclusion. Thus, by using inconsistent processes for evaluating a convicted felon's suitability for legal roles, a majority of jurisdictions bolster the contention that felon jury exclusion statutes have little to do with character and are simply constructs of unwarranted conjecture and speculation.

V. Questioning Inherent Bias

Legislators and courts also justify felon jury exclusion statutes by asserting that convicted felons uniformly harbor an "inherent[ ] bias[ ] against the government." The "inherent bias rationale[ ]" presumes that a felonious juror, if allowed to serve, would unfairly prejudice the jury in favor of a criminal defendant because of prior negative experiences with the criminal justice system.

Yet, as scholars note, precluding all convicted felons from the adjudicative process likely does little to protect the impartiality of the tribunal, betrays the modern view of the jury as “a body truly representative of the community,” and is illogical in civil litigation between private parties. Still, proponents of these ineffective and overinclusive measures overlook their inherent shortcomings, arguing that “[t]he exclusion of ex-felons from jury service . . . promotes the legitimate state goal of assuring impartiality of the verdict.”

But perhaps the strongest indictment of the inherent bias rationale comes from the legal profession. By simultaneously licensing felonious lawyers while banishing felonious jurors, a majority of jurisdictions suggest that the practice of law does not require neutrality or, in the alternative, that convicted felons have the capacity to act without bias. Yet, lawyers are primarily “officers of the court” and, like jurors, have obligations to society that often require detached analysis and dispassionate assessment. Moreover, jurisdictions that exclude convicted felons from jury service make clear that convicted felons cannot act without bias holding “that felons are generally less trustworthy and responsible than others, and that they just cannot be counted on to be ‘fair.’”

Nonetheless, a majority of jurisdictions--while precluding convicted felons from serving on a jury because of an apparent lack of objectivity--allow convicted felons to practice law, a profession that demands impartiality. Thus, a majority of jurisdictions recognize a convicted felon's ability to remain neutral, undermining their own justification for exiling felonious jurors.

A. The Impartial Lawyer

Today, attorneys are no longer “the only enlightened class not distrusted by the people.” As Justice O'Connor notes, “[f]ew Americans can even recall that our society once sincerely trusted and respected its lawyers.” Rather, society largely views lawyers as combative adversaries, teeming with greed and lacking integrity.

Yet, “[t]wo antagonistic models describe the role of lawyers in our legal system.” While the attorney's role as “loyal and zealous client protector” is “[m]ore familiar to the public,” the attorney also functions as an officer of the court, frequently requiring that he or she act without bias “in a quasi-judicial or quasi-official capacity” when confronting the difficult ethical dilemmas the legal profession presents.
For example, the ABA's Model Rules of Professional Conduct ("the Model Rules") dictate that “a lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” Moreover, the Model Rules also require that “[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” In such situations, because a lawyer's duty as an officer of the court possibly mandates the “subordination of the interests of the client and the lawyer to those of the judicial system and the public,” he or she faces an ethical quandary. To adhere to the Model Rules, a lawyer must put financial welfare and client concerns aside in order to make an impartial determination of what is professionally ethical.

Other instances may also require that a lawyer ignore vested interests. Consider a scenario in which a criminal defendant admits guilt to an attorney of record, forcing the attorney to weigh responsibilities to the client against “the pursuit of truth and justice.” As Michael Asimow and Richard Weisberg contend, in such circumstances, a lawyer might act as a “weak adversarialist[,]” “less concerned with . . . zealous advocacy, protection of client confidences, and procedural justice, and more concerned with the pursuit of substantive justice.” Authorized by the Model Rules, this position allows an attorney to “do less than the lawyer's adversarial best,” and to a degree, subvert responsibilities to the client in favor of obligations to the justice system. Again, this difficult decision forces a lawyer to engage in unbiased deliberation.

Admittedly, some scholars portray an attorney's bifurcated duties as simply two forms of advocacy. Arthur Gross Schaefer and Leland Swenson suggest that the practice of law requires a lawyer to act as an advocate “for the few” and “for the many.” They posit that when acting as an advocate for the few, attorneys “act solely in the interest of the individual client or firm they represent[,]” and when acting as an advocate for the many, attorneys “act as officers of the court, promoting the interests of the legal profession, the legal system, and society as a whole.” Though this model holds that lawyers consistently act as interested representatives when “satisfy[ing] professional duties to their clients and the legal system,” this model also implicitly considers the frequent need for attorneys to act impartially, acknowledging that “[l]awyers are required to behave in ways that are sometimes inconsistent with their beliefs on a daily basis.”

Clearly, the duties of the lawyer require that they regularly act as neutral referees, calling on professional and personal experience in an effort to fulfill an “obligation to aid the administration of justice.” For an attorney, competing occupational obligations require objective analyses informed by the tenets of justice and personal conviction. Thus, like the adjudicative process, the practice of law involves a measure of impartiality.

B. Can Convicted Felons Act Without Bias?

Criticizing the alleged pro-defendant, inherent bias rationale for felon jury exclusion, scholars contend that “[s]uch a notion of universal, unidirectional bias is not particularly plausible.” Further, courts suggest that while some convicted felons might harbor resentments towards the justice system that condemned them to prison, others “may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated.” A convicted felon may also “desire to show others--and himself--that he is now a good citizen . . . lead[ing] him to display an excess of rectitude, both in his deliberations and in his vote.” Additionally, there exist a number of cases in which a felonious juror has rendered a guilty verdict--validating the contention that a convicted felon can overcome a strong bias against the prosecution.
Yet, jurisdictions that justify felon jury exclusion statutes by pointing consistently to the inherent bias rationale all but ignore
the possibility that a convicted felon can deliberate objectively, holding that “[a]t some point, a juror's past experience must
lead to a presumption of bias because of the juror’s inherent knowledge from experience,” and that such a bias always cuts
in favor of a criminal defendant. As the California Supreme Court has stated:

The Legislature could reasonably determine that a person who has suffered the most severe form of
condemnation that can be inflicted by the state--a conviction of felony and punishment therefor--might well
harbor a continuing resentment against “the system” that punished him and an equally unthinking bias in
favor of the defendant on trial, who is seen as a fellow underdog caught in its toils. Because these antisocial
feelings would often be consciously or subconsciously concealed, the Legislature could further conclude
that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in jury selection
proceedings.

Nevertheless, a majority of jurisdictions selectively adhere to the inherent bias rationale by expelling felonious jurors while
admitting felonious lawyers to the bar. Such a framework outwardly concludes, in part, that many “jurors can overcome their
biases, making fair and objective judgments despite their predispositions.” In this way, the majority approach to assessing
the suitability of convicted felons for legal roles weakens the inherent bias rationale to the point of superfluity, suggesting
that inherent bias is but a myth engineered to mask less acceptable purposes for exiling convicted felons from the adjudicative
process.

*1404 VI. Acknowledging Criticisms

Undoubtedly, proponents of felon jury exclusion statutes will contest the assertion that allowing convicted felons to enter the
legal profession undercuts the justifications for felon jury exclusion statutes. Assuredly, criticisms will center on the idea that
the jury is a sacrosanct legal institution that requires increased protection from those who may threaten its integrity. Critics
might also argue that the jury system has no feasible means by which to perform character screenings as rigorous as those
performed by bar examiners in presumptive disqualification jurisdictions. And finally challengers could contend that, unlike
the legal profession, the jury system cannot monitor convicted felons that gain access to the jury box; there are no rules of
professional conduct governing deliberations. Yet while these oppositions to the contextual challenge of felon jury exclusion
have superficial appeal, none is strong enough to justify the consequences of the civic expulsion of an exceedingly large swath
of our population.

A. Twelve Good Men and True: An Outdated Calculus

For decades, a fear of crime and criminals has permeated American society. As David Garland notes, “[w]hat was once regarded
as a localized, situational anxiety . . . has come to be regarded as a major social problem and a characteristic of contemporary
culture.” Today, “a fearful, angry public” drives legislative efforts to protect the populous from “unruly youth, dangerous
predators, and incorrigible career criminals.” In short, “[t]he emotional temperature of policy-making has shifted from cool
to hot,” and it is fear that has served as a catalyst for a departure from more progressive ideologies.

Promulgated to protect the citizenry from those who may threaten the functionality and integrity of the adjudicative process,
felon jury exclusion statutes are attempts to allay fears of those who bear the mark of a felony conviction. But such fears
reflect an characterization of a jury system that no longer exists. Today, a jury trial is a rare occurrence and, when
utilized, often embraces juror bias as a means of enhancing deliberations. Moreover, the principle asset of the modern jury is not its accuracy as a judicial institution, but rather its capacity for educating participants on the workings of democracy. Catering to fears of felonious jurors, proponents of excluding felons from juries cling to obsolete visions of the jury as merely a decision making body composed entirely of those who bring no preconceived notions to the deliberation process, largely ignoring the educative aspects of serving as a juror.

1. The Jury as a Judicial Institution: Working Hard or Hardly Working?

Some commentators opine that “the greatest value of the jury is its ability to decide cases correctly.” However, infusing democratic ideals into the judiciary, the jury provides “insight into the character of American justice.” But “the American jury system is dying out” as “jury trials today are marginalized in both significance and frequency.”

Currently, a jury trial is an uncommon occurrence in the United States. “From 1989 to 1999, the number of civil jury trials declined by twenty-six percent, and the number of criminal trials dropped by twenty-one percent.” As one federal trial judge explains, “[t]oday, our federal criminal justice system is all about plea bargaining. Trials--and thus, juries--are largely extraneous. An accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what was once a constitutional right.” Moreover, civil trials succumb to arbitration and summary judgment at an alarming rate.

In addition to being an infrequent tool for administering justice, the jury trial is widely criticized as an inaccurate method by which to achieve a proper verdict. Though “[t]here has remained a broad conviction among Americans that the jury system is a positive and necessary force in the quest for justice,” the effectiveness of the jury as a vindicator of rights is often the subject of intense scrutiny. Critics of the jury system advance two main substantive contentions: “that the jury is incompetent” and “that the jury is prejudiced.”

a. Incompetent Jurors

Arguments highlighting the incompetence of jurors point out that “the jury, composed, after all, of amateurs, is a decision-making body prone to error.” Judge Jerome Frank opined that “juries apply law that they don't understand to facts that they can't get straight.” Because “jurors do not explain the basis of their decision,” it is often difficult to ascertain whether a jury truly understands a case at bar. Moreover, many times complex litigation ensures that jurors find it increasingly difficult to understand the law at issue, let alone how the law applies to the given facts of a case. Thus, the modern jury system is perhaps void of “practical value in promoting justice.”

b. Prejudiced Jurors

Critics of the jury system also note that jurors too often make decisions by relying on feelings rather than assessing evidence, arguing that jurors “are gullible creatures, too often driven by emotion and too easily motivated by prejudice, anger and pity.” These critics contend that the model jury is “an impartial tribunal, one that is not predisposed to favor a particular outcome,” requiring that a juror act solely as “impartial adjudicator[]” arriving to court a “tabula rasa.” Accordingly, this traditional view of the jury system demands, perhaps unrealistically, that jurors “base their verdicts on an accurate appraisal of the
evidence presented in court while disregarding all facts, information, and personal sources of knowledge not formally admitted into evidence." 226

*1408 But the Supreme Court has refined the requisite characteristics of an impartial tribunal holding that “only ‘representative’ juries are ‘impartial’ juries.” 227 This more enlightened view of the adjudicative process demands that jurors possess “qualities of human nature and varieties of human experience,” 228 thereby acknowledging that “[d]eliberations are considered impartial . . . when group differences are not eliminated but rather invited, embraced, and fairly represented.” 229 Therefore, though still charged with the task of impartially weighing evidence, 230 the juror no longer must “appear in court with a blank slate, neutral and untainted by life experiences.” 231

The Court’s modern vision of the jury values thorough deliberation achieved through partiality. 232 As Jeffrey Abramson explains, “[t]o eliminate potential jurors on the grounds that they will bring the biases of their group into the jury room is . . . to misunderstand the democratic task of the jury, which is nothing else than to represent accurately the diversity of views held in a heterogeneous society.” 233 Hence, “[i]f the jury is balanced to accomplish this representative task, then as a whole it will be impartial, even though no one juror is.” 234

Thus, it is rare that a felonious juror, or any juror, will have an opportunity to deliberate and decide a litigated matter. Moreover, questions abound as to whether the jury system is the optimal means by which to enforce law. A good many jurors may be incompetent and, in keeping with modern conceptualizations of the jury, more than a few will harbor biases. Accordingly, while stopping well short of conceding that the jury system is an ineffective method of administering justice, one can conservatively dismiss the notion that the jury system is the type of sacrosanct institution *1409 many felon jury exclusion proponents claim necessitates the outright eviction of those who have perhaps committed but one legal indiscretion.

2. The Jury as an Educative Force: Overlooking an Invaluable Asset

De Tocqueville argued that “[t]o regard the jury simply as a judicial institution would be taking a very narrow view of the matter.” 235 Accordingly, he asserted that jury service “instill[s] some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.” 236 Yet proponents of felon jury exclusion statutes, while painstakingly chronicling the exalted judicial function of the jury, often overlook the most-valuable aspect of the adjudicative process—the jury's pension for teaching the citizenry through active participation in democracy. 237

Echoing De Tocqueville, Justice Breyer articulated the contemporary concept of active liberty. Active liberty “refers to a sharing of a nation’s sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people.” 238 One of the core principles of active liberty, Justice Breyer notes, is the idea that “the people themselves should participate in government” 239 and that “[p]articipation is most forceful when it is direct.” 240 And as some scholars contend, “[t]he most stunning and successful experiment in direct popular sovereignty in all history is the American jury.” 241

Nonetheless, those who favor record-based juror eligibility requirements seldom note the educative aspect of the adjudicative process when measuring the sanctity of the jury. They rarely consider that “[j]uries teach each individual not to shirk *1410 responsibility for his own acts” 242 and “invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government.” 243 Instead, champions of felon jury exclusion statutes
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allege that the modern jury, because of its revered status, requires protections that are, in some instances, exceedingly severe. Yet given the uncertainty about the functionality of the adjudicative process and the uniform benefits of juror participation, it is clear that the jury necessitates no more protection from convicted felons than does the “great calling.”

B. Voir Dire vs. Moral Character and Fitness Determinations

A second criticism of contextually attacking the justifications for felon jury exclusion statutes will likely highlight the thoroughness of moral character and fitness evaluations and the superficiality of voir dire. At a minimum, critics may allege that voir dire, because of its inherent restraints, cannot equal the assessments of felonious bar applicants made by bar examiners. But such an argument assumes that the flaws of voir dire are markedly more severe than those present in the moral character and fitness process, making current jury selection procedures unsuitable for screening felonious jurors. A closer look at both processes reveals that this assumption lacks support.

1. Voir Dire: Is It That Bad?

The law recognizes voir dire as the only tool for ascertaining the capability and impartiality of potential jurors. For virtually all citizens, voir dire “is a routine part of every trial,” and for attorneys and judges “an opportunity to learn about [jurors’] existing prejudices.” Voir dire can take minutes to months and can involve anything from detailed questions to superficial interrogatories. In some instances, lawyers ask the questions, while in others, only the judge examines the prospective jurors. Thus, voir dire is relatively fluid, often changing to suit the circumstances of the case at bar.

But many critics contend that voir dire is an inadequate procedure for selecting impartial jurors. Kassin and Wrightsman assert that to find objective jurors, both judges and lawyers “must use their opportunity to question jurors for the purposes intended,” and “they must know what they are doing.”Yet attorneys and the court seldom adhere to these two conditions. Lawyers, who have a vested interest in seating jurors who will favor their client's position, rarely use voir dire to empanel a neutral jury. Rather, as one lawyer remarks, “I don't want an impartial jury. I want one that’s going to find in my client's favor.” Moreover, both judges and attorneys most often rely on intuition and stereotypes to whittle down the venire. Thus, critics of voir dire are correct, to a degree, when asserting that “the problem with the jury system is basically a problem of bad jurors.”

Proposals for amending the jury selection process range from the abolition of juries to a more succinct form of voir dire, designed to ensure efficiency and to partially eliminate an attorney's ability to engineer the tribunal. Yet as some scholars contend, such reforms are destined for failure. Any process crafted to forecast human behavior, including impartiality, must account for situational differences and individual characteristics. As Ellsworth and Reifman point out, “[a]n understanding of the situation is a much better predictor of a person's behavior than an understanding of the person. Jury researchers have searched in vain for individual differences--race, gender, class, attitudes, or personality--that reliably predict a person's verdict and have almost always come up empty handed.” Therefore, while voir dire may not be the optimal method for selecting an entirely neutral tribunal, the existing jury system, even with its constraints, is as good as any feasible alternative.

2. Moral Character and Fitness Determinations: Are They That Good?
Many question whether the bar's present system of moral screening is effective. Further, many also question whether the purpose of evaluating an applicant's character actually stems from a desire to preserve and advance the legal profession rather than a need to protect the public and our justice system.

In 1985, Deborah Rhode published an assessment of the moral character and fitness processes in the United States. Based on two years of collected data, Rhode found that moral character and fitness screening procedures nationwide were fraught with drawbacks that potentially hindered their professed goals. Though bar examining authorities expressed great confidence in their systems of evaluation, none had empirically evaluated their procedures for determining the fitness of potential attorneys.

In her research, Rhode discovered that “the most commonly cited problem in the certification process is the inadequacy of time, resources, staff, and sources of information to conduct meaningful character inquiries.” The investigative efforts of some states amount to “a check on residency or a phone call to someone who knows or knows of the applicant” while only “half the states routinely check police records and contact at least some previous employers.” Moreover, though “[a]lmost all jurisdictions demand personal references of varying number . . . [m]ost examiners found employers or personal references were ‘only rarely’ or ‘virtually never’ of assistance.”

In addition, Rhode's study uncovered that seldom were bar applicants denied admission based on a perceived lack of character. For example, “[i]n the forty-one states that could supply 1982 information, bar examiners declined to certify the character of approximately .2% of all eligible applicants, an estimated fifty-odd individuals.” Rhode hypothesizes that such a rate likely stems from the timing of the moral character and fitness determination, which occurs after a law student has invested exorbitant amounts of money and time into a legal career--perhaps fostering bar examiners' “reluctance to withhold certification.”

Yet even with unlimited resources and a concerted willingness to seek out and deny all those with questionable character, bar examiners would likely meet with limited success. As Rhode notes, “[d]ecisionmakers are frequently drawing inferences about how individuals will cope with the pressures and temptations of uncertain future practice contexts based on one or two prior acts committed under vastly different circumstances.” Understandably then, adequately protecting the public from the immoral lawyer by attempting to predict a lifetime of occupational behavior is an almost impossible task.

Thus, assuming that convicted felons somehow threaten legal institutions, the level of protection afforded the legal profession and the jury by their respective screening mechanisms is virtually identical, even when the potential participant is a convicted felon. Though the moral character and fitness determination is not the most effective method for evaluating the fitness of aspiring attorneys, and though the jury selection process often results in error, these flaws stem from the tasks each process must complete.

Bar examiners hope to predict a future lawyer's conduct by merely conducting, at most, a background check and an interview. Similarly, attorneys and judges seek to find jurors who will act impartially, by conducting a period of question and answer. But such expectations of bar examiners and legal authorities are unrealistic. Human beings are complex and react to the situations they confront; personality dispositions do not alone drive behavior. Thus, to condemn an argument against felon jury exclusion statutes on the grounds that voir dire is a less accurate filtering mechanism than the moral character and fitness determination is to mistakenly assume that any cursory process can alone predict a person's actions.
C. The Rules of Professional Conduct: Do They Matter?

A final criticism of contextually attacking the rationales for felon jury exclusion statutes will assuredly rest on the existence and enforcement of the lawyer's rules for professional conduct. While the legal profession can keep an eye on its members in the hope that it might “eliminat[e] the diseased dogs before they inflict their first bite,” the jury system has no such mechanism for control. The rules of professional conduct allows for the contention that licensing felonious lawyers is inherently less risky than seating a felonious juror. But while such an argument presumes that the lawyer's code of conduct is born of noble intentions and effective at regulating attorney conduct, a critical look at the rules of profession conduct tell a different story.

Richard Abel argues that rules of professional conduct can only work if: (1) they clearly state desired behaviors and (2) differ from everyday edicts of morality and law. Yet the legal profession's rules of ethics are not clear and “simply restate the most commonplace morality.” Moreover, the consequences for violating professional rules of conduct are varied and virtually inconsequential. As Abel notes, Study after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.

In addition, some scholars contend that these ethical rules merely exist to safeguard “lawyers' economic monopoly over law-related services.” In this way, ethical rules do not legitimize the profession, but instead serve to “control the markets in which they sell their labor.” For example, Terence Halliday argues that professional regulation helps a profession maintain ultimate control over the marketplace by fostering alignment with government. Specifically, a quid pro quo makes it “unlikely that professions will serve the state without any consideration of cost to themselves,” and that “for the state to profit from professional resources it must sometimes recognize, sometimes guard against, and sometimes appropriate the interests of professions--indeed, press them beyond monopoly.” Accordingly, what results is “an implicit concordat between states and established professions: in exchange for the state's implicit guarantee that the traditional monopoly of the profession will be largely preserved.”

Therefore, while the postulated purposes for the legal profession's rules of conduct involve rhetoric centering on protecting the public and our system of justice, perhaps such noble aspirations are not the only reasons for monitoring lawyers. Though possessing a somewhat conspiratorial quality, deserving of consideration are those theories that cite the preservation and advancement of the legal occupation as justification for rules of professional conduct. Such theories may help explain the continued recognition of commandments that are vastly ineffective.

The rules of professional conduct are an ambiguous guide to behaving as would anyone in a position of trust. Additionally, the rules provide very little disincentive for straying from the path of good conduct. Coupled with perhaps disingenuous origins, the ineffectiveness of the legal profession's conduct code makes arguments based on its capacity to protect unsupportable. Like the moral character and fitness screening, the rules of professional conduct do little to insulate society from attorneys who might engage in unethical behavior. Thus, defending against attacks on felon jury exclusion statutes by spotlighting these ethical mandates is to erroneously ignore the practical defects of all such regulations.
VII. Reintegration and the Legitimacy of the Law

Some reentry scholars question whether prohibiting convicted felons from serving on juries significantly impacts reintegration, even defending felon jury exclusion statutes by differentiating them from other categorical exclusions. Yet other scholars note that the exclusion of convicted felons from jury service is a part of a larger framework of banishment that unfairly marginalizes those with a felonious criminal history and undermines reintegration by delegitimizing the law in the eyes of convicted felons. Specifically, preclusions affecting convicted felons “influence[] both [their] view of the legitimacy of group authority and ultimately [their] obedience to group norms.” Moreover, when such preclusions are procedurally unjust, convicted felons are less likely to view the law as legitimate and, in turn, less likely to voluntarily comply with its mandates.

A. Does Felon Jury Exclusion Really Matter?

Admittedly, few citizens enjoy jury service. Rather, most people view jury service as “a waste of [their] time and taxpayer monies, a burden to be avoided if at all possible, and if not, to be dispensed with as quickly and with as little effort as possible.” Not surprisingly then, many scholars contend that “more immediate factors such as employment and education make more of a difference in rehabilitation and recidivism,” even condoning those legal restrictions that bar convicted felons from juries.

For instance, in his article Invisible Punishment: An Instrument of Social Exclusion, Jeremy Travis offers several methods by which “to constrain the impulse to punish those who violate our laws by diminishing their rights and privileges.” One of Travis’ recommendations is “individualized justice.” This principle is rather straightforward: authorities should tailor collateral sanctions so that they serve a purpose but are not so overinclusive as to make them an additional punishment that creates barriers to readjustment.

Yet, in condemning overinclusive, restrictive legal constructs Travis offers a rather counterintuitive example of a collateral sanction that “may appropriately be automatic.” He notes that “barring convicted felons from jury eligibility automatically may well be reasonable to protect the integrity of criminal trials.” He goes on to argue that “the vast majority of collateral sanctions cannot be justified this way . . . these sanctions should be imposed in ways that tailor the punishment to the circumstances.”

Though for many jury service is an unenviable task, for convicted felons record-based juror eligibility criteria represent yet another form of stigmatization and marginalization. To allege that felon jury exclusion is only a minor consequence of a criminal conviction is to accommodate a privileged perspective. As one reformer explains, “[o]ne barrier may not be that big a deal . . . You can't get housing . . . you can't get ID and no one will hire you. Cumulatively, that sends a signal: You're not wanted.” Thus, for those who bear the mark of a felony conviction, exclusion from jury service clearly matters on several levels.

B. The Importance of Procedural Fairness

To foster compliance with the law, authorities regularly rely on measures of social control. For example, criminal sanctions “seek[] to deter rule breaking by threatening to punish wrongdoing.” Yet empirical evidence suggests that deterrence has only a marginal impact on a citizen’s willingness to obey the law. Nevertheless, lawmakers expend an inordinate amount
of *1419 resources attempting to deter illegal behavior, often ignoring potential alternative schemes by which to facilitate compliance.

Professor Tom Tyler suggests a normatively superior method for cultivating legal obedience. He contends that “the legal system benefits when people voluntarily defer to regulations to some degree and follow them, even when they do not anticipate being caught and punished if they do not.” Thus, authorities can promote law-abiding behavior by moving away from the forced acquiescence characteristic of deterrence and toward a “value-based model” focused on eliciting “voluntary acceptance and cooperation.”

This “self-regulation” approach suggests that “internal motivational forces . . . lead people to undertake voluntary actions,” and that “values shape rule-following.” Accordingly, Tyler theorizes that when citizens view the law as legitimate, they are more likely to follow its directives and that legal procedures impact the perceived legitimacy of the law. Specifically, Tyler asserts that the legitimacy of the law is contingent on: (1) a citizen's “prior views about law and government” and (2) “the use of fair procedures during the experience itself.” Therefore, self-regulation can only succeed if authorities take steps to legitimize the law by employing legal policies that citizens view as procedurally fair, while continuously evaluating these policies to ensure that they continue to portray the law as legitimate.

In the context of recidivism, research specifically addressing procedural justice indicates that citizens who have committed criminal offenses and who have had prior negative experiences with the law are more likely to voluntarily comply with the law if they perceive the law to be legitimate. For example, Gill McIvor assessed the effectiveness of Scottish Drug Courts and found that the “interactions that took place in court between offenders and sentences encouraged increased compliance and supported offenders in their efforts to address their drug use and associated offending.” In another setting, researchers studying the perpetrators of domestic violence discovered that “the manner in which an arrestee is handled plays an important role in reducing the likelihood of recidivating behavior.” Additionally, analyses of graduated sanctions in the probation and parole setting show that “a perception of unfairness may increase noncompliance” with supervision conditions. Thus, evidence suggests that the fairness of procedures impacts even a criminal offender's behavior.

B. Creating Fair Legal Procedures

Several factors influence citizens’ views of the law. Tyler and others have “identified six components of procedural justice: (1) representation, (2) consistency, (3) impartiality, (4) accuracy, (5) correctability, and (6) ethicality.” Moreover, data indicates that “persons attribute legitimacy to legal authorities and voluntarily follow rules out of a sense of duty and obligation when legal authorities treat them fairly.” Concomitantly examining felon jury exclusion statutes and moral character and fitness determinations reveals the procedural justness of an individualized approach to felonious bar applicants. But such an examination also shows how unconditional, record-based juror eligibility statutes and inconsistent schemes for evaluating a convicted felon's suitability for legal roles undermine the fairness and legitimacy of the law.

1. Representation

Citizens perceive the law as fair when it provides them “a forum in which they can tell their story.” As Tyler points out, “people want to have an opportunity to state their case to legal authorities.” Thus, it should come as no surprise that categorical exclusions—like those that preclude convicted felons from jury service—often spark feelings of helplessness and
futility. Conversely, by allowing convicted felons to address their past—as do those jurisdictions that adhere to the presumptive disqualification approach to moral character and fitness determinations—authorities cultivate fairness. In this regard, while felon jury exclusion statutes undermine the representation element of procedural justice, individualized evaluations of felonious bar applicants help to develop the fairness of legal procedures.

2. Consistency

As Paternoster and others note, “consistency in decisionmaking refers to similarity of treatment” and one can assess similarity of treatment across persons or over time. In addition, a person can also evaluate the similarity of treatment across situations or contexts. When doing such an analysis, one would likely view the law as consistent in its decisionmaking when it employs analogous procedures in the same or similar situations or contexts. In the case of a convicted felon’s access to legal roles, the inconsistency that characterizes the majority approach clearly fosters a sense that the law is unfair and procedurally unjust, thus undermining the law’s legitimacy and the likelihood for voluntary compliance by convicted felons.

*1422 3. Impartiality

For citizens who come into contact with legal or quasi-legal processes, “[t]ransparency and openness foster the belief that decisionmaking procedures are neutral.” As Tyler points out, “people react to signs that the authorities with whom they are dealing are neutral . . . making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases.” Along these lines, most jurisdictions publish their moral character and fitness standards. Moreover, the ABA produces an annual report outlining most jurisdictions’ bar application process for those with a felonious criminal history. By contrast, felon jury exclusion statutes are “invisible punishments” justified entirely by speculation and conjecture. Thus, for convicted felons, the presumptive disqualification approach to the moral character and fitness process promotes a far greater sense of the law’s neutrality and fairness than hidden record-based juror eligibility standards that make blanket assumptions about those with a felonious criminal history.

4. Accuracy

People generally view the law as fair when decisions are accurate. The accuracy of a decision largely depends on authorities’ employing procedures that “publicly bring[] the problem to light” and are “based on factual information.” In short, procedures that provide citizens with a sense that authorities “make competent, high-quality decisions . . . are more likely to be viewed as fair.” Individualized moral character and fitness determinations of felonious bar applicants almost always involve a hearing and the consideration of evidence provided by the prospective attorney. Such procedures likely foster the applicant’s perception that the proceedings are fair. Conversely, felon jury exclusion statutes fail to give one a sense that they accurately exclude incompetent jurors. For instance, often courts fail to overturn verdicts rendered by juries that include statutorily ineligible felon-jurors, creating an ambiguity about the accuracy of felon jury exclusion statutes.

5. Correctability

When procedures provide a mechanism for higher review, those subjected to such procedures will more readily view the process as fair. A convicted felon cannot appeal his or her dismissal from a jury that results from a record-based juror eligibility statute. Rather, felon jury exclusion measures are definite and unchallengeable. Yet moral character and fitness determinations are almost always appealable. Most often those applicants denied admission to the bar because of a prior felony conviction have the option of reapplying after a specified period of time or challenging the decision of bar authorities.
through that jurisdiction's appellate system. In this way, bar admission processes promote the perception that they are fair and just while felon jury exclusion statutes undermine the correctability element of procedural justice.

6. Ethicality

Along with an opportunity to state their claims to a neutral tribunal, citizens want to feel that authorities respect their rights. Courteous treatment is an indicator of such respect. As Tyler explains, “people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected . . . [p]eople react favorably to the perception that the authorities are benevolent and caring and are sincerely trying to do what is best for the public.” Yet, as previously outlined, the procedures by which a majority of jurisdictions expel convicted felons from the jury process are callous and embarrassing. Alternatively, by providing a bar applicant with a felony criminal record the opportunity to explain their past indiscretions-- either orally or in writing--jurisdictions that license felonious lawyers preserve an offender's dignity, nurturing the perception that legal procedures are fair and legitimate.

Moreover, when authorities “explain or justify their actions in ways that show an awareness of people's needs,” citizens will view the law as legitimate. Understandably then, when authorities impose inconsistent regulations without justification citizens are more likely to deem the law unfair. In a majority of jurisdictions, bar regulations seemingly conclude that felons are malleable beings, while permanent record-based juror eligibility statutes allege that one with a felonious criminal history is a static deviant. Therefore, the majority approach for regulating a convicted felon's access to the legal profession and the jury box undermines the protectionist justifications for excluding felons from jury service--forcing convicted felons to question the true intentions of the authorities that expel them from the deliberation room, the fairness of felon jury exclusion statutes, and the law generally.

By considering reentry a holistic concept, one avoids the inclination to examine collateral sanctions and discretionary disabilities from an instrumental viewpoint. Instead, as Tyler argues, one must view compliance with the law, and in turn reintegration, normatively stressing “what people regard as just and moral as opposed to what is in their self-interest.” In this light, it is relatively easy to see how policies grounded in blanket assumptions and faulty stereotypes, which do not provide those they impact the opportunity to rebut legal presumptions, help to create, rather than curb, the problem of recidivism. In addition, equally as damaging to reintegration are the inconsistent procedures for regulating access to legal roles, which detract from the law's legitimacy by simultaneously promoting procedural justice and outright injustice.

VIII. Conclusion

By examining the majority approach to evaluating prospective attorneys and potential jurors, the logical flaws in the justifications for felon jury exclusion statutes are evident. Twenty-nine states and the federal court system provide convicted felons the opportunity to demonstrate rehabilitation, but uniformly presume all convicted felons permanently unsuitable for jury service. Thus, the majority approach for screening would-be legal actors is both inconsistent and illogical, prompting an unbiased observer to question the true purposes for felon jury exclusion statutes.

Such a system, though defended by supposition and conjecture, cannot withstand criticisms from its own ranks. While this article highlights the substantive challenges of predicting behavior through standard screening processes, it also notes the superfluity of attempting to protect the public from convicted felons. Those with a felonious criminal history pose no greater risk to the legal profession or the jury than do countless other citizens who may be unfit for legal service. Nevertheless, fear has served as a catalyst for restrictive, overinclusive legal constructs aimed at convicted felons.
Though this article may at time appear to endorse the categorical exclusion of convicted felons from the legal profession, its reliance on Tom Tyler's research indicates otherwise. By conducting an individual assessment of each convicted felon who wishes to productively engage the legal system, jurisdictions adhere to the principals of procedural justice, coloring the law fair and legitimate. Legitimacy leads to voluntary compliance with legal mandates and thus, can potentially curb recidivism.

Perhaps the only plausible attack on criticisms of felon jury exclusion statutes is philosophical, rooted in “theories of social contractarianism and civic republicanism.” There are some who claim that felonious jurors lose the right to participate in government when they depart from the law’s mandates, suggesting that the commission of crime is a conscious choice that represents a rejection of societal values. But criminal responsibility may encompass far more than an individual's intrinsic composition. As noted, experimental research shows that circumstances play a large role in a person's behavior. Nevertheless, those who forward the such arguments for felon jury exclusion statues consider only personal choice when calculating what an offender deserves or does not deserve, ignoring more modern theories of criminality.

I am a licensed attorney and a convicted felon. Thus, I can represent a client in the most grievous of circumstances, but I cannot decide even a minor civil dispute. Though I committed a crime years ago and swore to uphold the United States Constitution when I entered the legal profession, I will never be worthy to serve as an empanelled juror. This incongruity is troubling and seemingly unexplainable. Thus, my hope is that this Article furthers a burgeoning dialogue that addresses the illogicality of precluding millions of Americans from performing an essential civic duty.

*Appendix 1: A Convicted Felon’s Access to the Legal Profession*

As noted, almost all jurisdictions in the United States evaluate the character of a felonious bar applicant on an individualized basis using the presumptive disqualification approach. In those states, applicants with a felony criminal history have an opportunity to rebut the presumption that they lack the requisite character to practice law (the presumptive disqualification approach). Yet, a few select jurisdictions do not assess the moral character of each bar applicant with a felony criminal history. Instead, such states per se disqualify convicted felons from attaining professional licensure as an attorney (the per se approach).

The following list categorizes all United States jurisdictions by the manner in which they evaluate the character of a bar applicant with a felony criminal history. As shown, those jurisdictions that per se disqualify felonious bar applicants do so 1) for a period of years; 2) for the period of the imposed sentence; 3) for life, if the felony criminal history would have led to disbarment in that jurisdiction; 4) for life, if the felony criminal history included certain demarcated offenses; and 5) for life, unless the applicant's civil liberties are restored.

Note that for the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.

<table>
<thead>
<tr>
<th>State</th>
<th>Moral Character &amp; Fitness Determination Approach</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Presumptive Disqualification</td>
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<td>Alaska</td>
<td>Presumptive Disqualification</td>
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<td>Arizona</td>
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<td>Arkansas</td>
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<td>California</td>
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<th>State</th>
<th>Disqualification Status</th>
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<td>Delaware</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>District of Columbia</td>
<td>Presumptive Disqualification</td>
</tr>
<tr>
<td>Florida</td>
<td>Per se Disqualification unless civil rights are restored (non-automatic); then a felony conviction amounts to a Presumptive Disqualification</td>
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<tr>
<td>Georgia</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Hawaii</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Idaho</td>
<td>Per se Disqualification for life for those felony convictions that would otherwise result in disbarment</td>
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<td>Illinois</td>
<td>Presumptive Disqualification</td>
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<td>Indiana</td>
<td>Per se Disqualification for life</td>
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<td>Iowa</td>
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<td>Minnesota</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Mississippi</td>
<td>Per se Disqualification for life for all felonies except manslaughter and violations of the Internal Revenue Code</td>
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<tr>
<td>Missouri</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)</td>
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<td>Montana</td>
<td>Presumptive Disqualification</td>
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<td>Nebraska</td>
<td>Presumptive Disqualification</td>
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<td>New Hampshire</td>
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<td>New Jersey</td>
<td>Presumptive Disqualification (upon completion of sentence)</td>
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<td>New Mexico</td>
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<td>New York</td>
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<td>North Dakota</td>
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<td>Ohio</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence)</td>
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<td>Oklahoma</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Oregon</td>
<td>Per se Disqualification for life for those felony convictions that would otherwise result in disbarment</td>
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<td>Pennsylvania</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Rhode Island</td>
<td>Presumptive Disqualification</td>
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<thead>
<tr>
<th>State</th>
<th>Moral Character &amp; Fitness Determination Approach</th>
<th>Duration of Felon Jury Exclusion</th>
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<tbody>
<tr>
<td>South Carolina</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<tr>
<td>South Dakota</td>
<td>Presumptive Disqualification</td>
<td>During Supervision</td>
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<tr>
<td>Tennessee</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban (repeat offenders) During Supervision</td>
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<tr>
<td>Texas</td>
<td>Presumptive Disqualification (once five years have passed from completion of sentence, or conviction is reversed or pardoned)</td>
<td>Lifetime Ban (grand juries) No Exclusion (petit juries) During Incarceration or Seven Years from Conviction (whichever is longer)</td>
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<tr>
<td>Utah</td>
<td>Presumptive Disqualification (upon completion of sentence)</td>
<td>Lifetime Ban</td>
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<tr>
<td>Vermont</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<tr>
<td>Virginia</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<td>Washington</td>
<td>Presumptive Disqualification</td>
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<td>West Virginia</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<td>Wisconsin</td>
<td>Presumptive Disqualification</td>
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<tr>
<td>Wyoming</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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*1436 Appendix 2: Comparison: A Convicted Felon's Access to the Legal Profession and A Convicted Felon's Access to a Jury

For each jurisdiction in the United States, the following list illustrates 1) the approach taken by bar examiners faced with an applicant who is a convicted felon, and 2) “the duration of felon jury exclusion.” Highlighted are those jurisdictions that allow convicted felons to practice law (those that employ the presumptive disqualification approach or the temporary Per se Disqualification approach), but prohibit convicted felons from ever serving on juries (lifetime ban).
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<tr>
<th>State</th>
<th>Presumptive Disqualification</th>
<th>Lifetime Ban</th>
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<td>Kentucky</td>
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<td>Lifetime Ban</td>
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<tr>
<td>Maine</td>
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<td>No Exclusion</td>
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<td>Maryland</td>
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<td>Lifetime Ban</td>
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<td>Massachusetts</td>
<td>Presumptive Disqualification</td>
<td>During Incarceration or Seven Years from Conviction (whichever is longer) Removable for Cause (for life)</td>
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<td>Michigan</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<tr>
<td>Minnesota</td>
<td>Presumptive Disqualification</td>
<td>During Sentence</td>
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<tr>
<td>Mississippi</td>
<td>Per se Disqualification (for all felonies except manslaughter and violations of the Internal Revenue Code)</td>
<td>Lifetime Ban</td>
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<td>Missouri</td>
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<td>During Supervision</td>
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<td>North Dakota</td>
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<td>During Incarceration</td>
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<td>Ohio</td>
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<td>Oklahoma</td>
<td>Presumptive Disqualification</td>
<td>Lifetime Ban</td>
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<td>Oregon</td>
<td>Per se Disqualification (if felony conviction would otherwise result in disbarment)</td>
<td>During Incarceration Plus Fifteen Years (criminal and grand juries) During Incarceration (civil juries)</td>
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<td>Virginia</td>
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<td>Lifetime Ban</td>
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<td>Washington</td>
<td>Presumptive Disqualification</td>
<td>During Supervision (if committed after July 1984) Lifetime Ban (if committed before July 1984)</td>
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<td>West Virginia</td>
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<td>Wyoming</td>
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<td>Lifetime Ban</td>
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</table>
Footnotes

a1 Practitioner & Ph.D. student, University of California at Irvine; L.L.M., Georgetown University Law Center; J.D., Thomas Jefferson School of Law; M.S., Wagner College; B.A., Gettysburg College. Mr. Binnall is an attorney and a convicted felon who spent over four years in a maximum security prison for a DUI homicide that claimed the life of his best friend--his experiences inform this article.

1 See Appendix 2 (highlighting those jurisdictions that permanently exclude convicted felons from jury service but do not per se exclude convicted felons from the legal profession).

2 See infra Part III.A.2; see also Appendix 1.


4 Scholarship on the exclusion of felons from jury service has remained entirely exclusive from that on the licensing of bar applicants with a felonious criminal record.


6 Id. at 276.

7 See infra Parts II.C, III.B (discussing the justifications for the moral character and fitness determination and jury exclusion statutes).

8 See Appendix 2 (noting that all jurisdictions evaluate the moral character and fitness of bar applicants and statutorily filter-out ineligible jurors).


10 Kalt, supra note 9, at 74.

11 See, e.g., Washington v. State, 75 Ala. 582, 585 (1884) (“The presumption is, that one rendered infamous by conviction of felony ... is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.”).

12 Kalt, supra note 9, at 74.


14 See infra Part III.A.2; see also Appendix 2.

15 See Maureen M. Carr, The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards, 8 Geo. J. Legal Ethics 367, 383-84 (1995) (“The current majority approach of presumptive disqualification attempts to strike a balance among several competing concerns ... allowing a fully rehabilitated individual the opportunity to serve the community in the capacity of his or her choice.”).


17 Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DePaul L. Rev. 661, 661 (2007) (“The findings of this research suggest that Americans generally accept the principles underlying the rule of law and defer to legal authorities when they believe that the authorities are acting in accord with those principles.”).

Tom R. Tyler, Why People Obey the Law 277 (2006) (“[A]uthorities should govern based upon the consent of those that they govern, consent that develops from the experience of fairness when dealing with authorities. This fairness leads to legitimacy, a key precursor of consent and voluntary acceptance.”).


Paternoster et al., supra note 20, at 166 (noting “compliance may depend as much or more on the procedural fairness of sanction delivery as it does on the characteristics of the sanction imposed”).


See, e.g., Kalt, supra note 9, at 69.

Id. at 169-71 app. 2 (suggesting that the practice of felon jury exclusion impacts approximately sixteen million Americans, but noting that “[p]recisely quantifying the reach of felon exclusion is difficult”).

See, e.g., Ted Chiricos, Kelle Barrick & William Bales, The Labeling of Convicted Felons and its Consequences for Recidivism, 45 Criminology 547, 547-49 (2007); see also Stephanie Bontrager, William Bales & Ted Chiricos, Race, Ethnicity, Threat, and the Labeling of Convicted Felons, 43 Criminology 589, 589 (2005) (finding that despite Florida law allowing judges to withhold adjudication of guilt for persons who have been found guilty of a felony, blacks and hispanics are less likely to have adjudication withheld and thereby more likely to be labeled felons).

See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 1 (2003); see also Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 83 (2005); Alec C. Ewald & Marnie Smith, Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench, 29 Just. Sys. J. 145, 145 (2008) (reporting a study in which judges were asked to assess the usefulness and impact of collateral sanctions); Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. Rev. 623, 634-35 (2006) (explaining that collateral consequences result not from the explicit punishment, but rather from the fact that an individual has been convicted).

See, e.g., Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 3 (2006) (discussing statutory restrictions on a convicted felon's ability to vote); see also ABA Section of Criminal Justice et al., ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004); Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (2006); Kalt, supra note 9, at 65-189 (reviewing the practice of statutorily excluding convicted felons from jury service); Steinacker, supra note 13, at 801-28 (examining those legal measures that burden a felon's right to hold public office).

ABA Section of Criminal Justice et al., supra note 27, at 1 (defining a collateral sanction as “a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence”).
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29 Id. (defining a discretionary disqualification as “a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction”).

30 Petersilia, supra note 26, at 106.

31 Id. (quoting Margaret Colgate Love & Susan M. Kuzma, Department of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey 1 (1996)).


33 Id. (“All persons are eligible and qualified to be prospective trial jurors except ... persons who have been convicted of a malfeasance in office or a felony.”) (emphasis added); see also Appendix 2.


35 Id.

36 The author is a convicted felon living in California; he observed the procedures outlined when the Superior Court of San Diego summoned him to jury service.

37 Kalt, supra note 9, at 150 (listing jurisdictions as “life” if they “bar felons unless civil rights have been restored, but have broad restoration provisions”); see also Appendix 2.

38 Kalt, supra note 9, at 150 (noting that “most jurisdictions bar felons from juries for life, but many do not”); see also Appendix 2.

39 Kalt, supra note 9, at 150-58; see also Love, supra note 27 (cataloguing the approaches taken by each state with respect to felon jury service).

40 Kalt, supra note 9, at 150-58.

41 Id. at 158 (noting that the ten states that employ this approach are: Alaska, Idaho, Indiana, Minnesota, North Carolina, North Dakota, Rhode Island, South Dakota, Washington, and Wisconsin); see also Appendix 2.

42 Kalt, supra note 9, at 158 (noting that the three states that employ this approach are: Illinois, Iowa, and Massachusetts); see also Appendix 2.

43 Kalt, supra note 9, at 158 (noting that the five states that employ this approach are: Arizona, Connecticut, District of Columbia, Kansas, and Oregon); see also Appendix 2.

44 Kalt, supra note 9, at 158 (noting that only Colorado and Maine “do not exclude felons as felons from juries at all”); see also Appendix 2.

45 Kalt, supra note 9, at 150 (explaining that this “patchwork” encompasses “standards of different durations, applied to different crimes, and to different kinds of juries”); see also Appendix 2.

46 Kalt, supra note 9, at 104.

47 Id. at 105.

48 Id. at 74.


50 Kalt, supra note 9, at 74.
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Id. at 102.

Id.

Id. at 104.

Id. (Professor Kalt labels this the “taint” argument).

Id. at 102.

Id. at 105.

Id. (“The core of the inherent bias argument is that felons remain adversarial to the government, and will sympathize unduly with any criminal defendant.”).

Id.

See, e.g., Michigan Senate Fiscal Agency, Bill Analysis: Jury Compensation and Qualification: S.B. 1448 & 1452 and H.B. 4551-4553 Enrolled Analysis (2003) [hereinafter Michigan Senate Fiscal Agency], available at http://legislature.mi.gov/documents/2001-2002/billanalysis/Senate/pdf/2001-SFA-1448-E.pdf (stating “[a] person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant”); see also People v. Miller, 759 N.W.2d 850, 873 n.49 (Kelly, J., dissenting) (arguing that felons have some prejudice given that “[o]ne convicted of the same crime charged against a defendant would, at a minimum, be thoroughly familiar with the nature of the crime(s) charged. The convict would know how such crimes are committed, the emotions and feelings associated with the guilt accompanying the criminal act(s), and criminal procedure in general.”).

See Kalt, supra note 9; see also Binnall, supra note 16.

Michigan Senate Fiscal Agency, supra note 59 (stating that seating a felonious juror “is blatantly unfair to the prosecution and the crime victim”).

Kalt supra note 9, at 72 (citing Carter v. Jury Commission, 396 U.S. 320, 332 (1970)).

See Marcus Ratcliff, The Good Character Requirement: A Proposal for a Uniform National Standard, 36 Tulsa L.J. 487, 487 (2000) (characterizing the moral character and fitness determination as “the unknown requirement for admission to the bar” and noting that “[w]hile it is true that most entering law students know that at some point in the future they will be required to prove their knowledge on the bar exam, many of these students do not realize that they will also have to prove the fitness of their character before being admitted to the practice of law”).

See Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirement, ix-x, 3-5 (Erica Moeser & Margaret Fuller Corneille eds., 2009) [hereinafter Nat'l Conference of Bar Exam'rs].


See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 516 (1985) (pointing out that there is a “low incidence of applications denied on character grounds”); see also infra Part V.B.2.

See Scott DeVito, Justice and the Felonious Attorney, 48 Santa Clara L. Rev. 155, 158 (2008) (“Applicants with criminal acts in their past often face a heightened burden of proof of good moral character.”); see also Arnold, supra note 65, at 63 (stating “for students
with records of prior unlawful conduct the application process can become particularly troublesome. Applicants with incidents of unlawful conduct in their past can find the road toward bar admission confusing and unpredictable.”).

68 See, e.g., Comm. of Bar Exam'rs, Office of Admissions, State Bar of Cal., Application for Determination of Moral Character, available at http://calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/adm_app_moral-character_1003.pdf; see also Donald H. Stone, The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study, 15 N. Ill. U. L. Rev. 331, 331 (1995) (presenting the results of a 1995 survey of all but two states conducted “in order to determine the type of questions asked for the purpose of screening out persons who bar committees believed were not morally fit or mentally stable to practice law in their state”).

69 Stone, supra note 68, at 332 (noting that bar examiners often solicit an applicant's “armed forces discharge, marital status, [and] financial condition”).

70 See, e.g., id. at 342 (noting that when an applicant has a felony on their criminal record, a bar examiner normally “seeks details of an applicant's criminal behavior, including: a. a description of the charge; b. the date the charge was made; c. the name, address, and telephone number of each person or entity initiating or bringing the charge; d. the name, address, and telephone number of each attorney you retained to assist you in defending the charge; e. the reason why the charges were brought against you; f. the final disposition of the charge; and, g. copies of the disposition order of the tribunal sufficient to describe the substantive resolution of the proceeding”) (citing Idaho State Bar, Application for the Idaho Bar Examination and Admission to the Idaho State Bar P 19 (2010), available at http:isb.idaho.gov/pdf/admissions/web_be_application.pdf).

71 Carr, supra note 15, at 378 (noting “almost all of the states and the District of Columbia adopted rules guiding bar admission committees in their determination to allow or deny an applicant with a prior felony conviction the opportunity to practice law”).

72 Id. at 374 (describing the per se disqualification approach as “the historical approach, whereby individuals with prior criminal records are permanently disqualified from applying for admission to state bars”).

73 Arnold, supra note 65, at 380 (citing Carr, supra note 15, at 380).

74 See Carr, supra note 15, at 381-83; see also Appendix 1.

75 See Appendix 1. The ten jurisdictions that per se disqualify convicted felons from the bar either permanently or temporarily are: Florida, Idaho, Indiana, Mississippi, Missouri, New Jersey, Ohio, Oregon, Texas, and Utah.

76 Id. The five jurisdictions that effectively per se exclude convicted felons from the bar permanently are: Florida (requires the restoration of civil rights which is non-automatic), Indiana (permanently excluding those convicted of a felony for life), Idaho and Oregon (permanently excluding those convicted of a felony that would otherwise result in disbarment), and Mississippi (permanently excluding those convicted of any felony besides manslaughter and violations of the Internal Revenue Code).

77 Id. The five jurisdictions that per se exclude convicted felons from the bar temporarily are: Missouri, Ohio, and Texas (until five years after completion of sentence), New Jersey and Utah (until completion of sentence).


79 Carr, supra note 15, at 381 (describing this view by stating “some crimes, if unpardoned, remain always as a blot on the applicant's character and prevent admission to the bar”).

80 Id. at 374.

81 See Appendix 1. For the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.
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82 Matthew A. Ritter, The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection Upon Bar Admissions, 39 Cal. W. L. Rev. 1, 15 (2002) (“In the course of its investigation, an ethics committee may invite an applicant to an administrative hearing—purportedly informational in character.”).

83 Arnold, supra note 65, at 87; see also Nat’l Conference of Bar Exam’rs, supra note 64, at viii (“The bar examining authority may appropriately place on the applicant the burden of producing information.”).

84 See In re King, 136 P.3d 878, 889 (Ariz. 2006) (“[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.”) (quoting In re Matthews, 462 A.2d 165, 176 (N.J. 1983)); see also Graniere & McHugh, supra note 78, at 231 (stating “where serious or criminal misconduct is involved, positive inferences about the applicant’s moral character are difficult to draw, and negative character inferences are stronger and more reasonable”) (quoting George L. Blum, Annotation, Criminal Record as Affecting Applicant’s Moral Character for Purposes of Admission to the Bar, 3 A.L.R. 6th 49, 49 (2005)).

85 In re Cason, 294 S.E. 2d 520, 522 (Ga. 1982).

86 Graniere & McHugh, supra note 78, at 236.

87 Id. at 239.

88 Id. at 223; see also Nat’l Conference of Bar Exam’rs, supra note 64, at ix (listing the suggested factors to be used in assessing rehabilitation).

89 Graniere & McHugh, supra note 78, at 223.

90 See Arnold, supra note 65, at 73, 75 (noting critiques of the per se disqualification and the presumptive disqualification frameworks, and stating respectively “[t]he presumption made by the ABA and state bars that prior unlawful conduct by a bar applicant is predictive of future unlawful conduct or misbehavior as a lawyer has been criticized and remains unproven” and “[t]he flexibility for which the presumptive disqualification approach receives support is accompanied by a level of vagueness, which can undermine some of its benefits and leave applicants with a record of unlawful conduct vulnerable to unclear standards and unpredictable outcomes”).

91 Carr, supra note 15, at 388 (citing written response of Alan Ogden, Executive Director, State of Colorado Supreme Court Board of Law Examiners (Jan. 4, 1994)).

92 Carr, supra note 15, at 383.

93 Nat’l Conference of Bar Exam’rs, supra note 64, at vii.

94 Id.

95 Id.

96 Id. at viii-ix.

97 Id. at viii.


99 Id. at 247.

100 Rhode, supra note 66, at 508.

101 Id. at 509 (citing James E. Alderman, Screening for Character and Fitness, B. Examiner, Feb. 1982, at 23, 24; Ruel C. Walker, Texas’ Tests of Character Come Too Late, 3 Tex. B. J. 177 (1940)).

102 Ratcliff, supra note 63, at 492.

104 Nat'l Conference of Bar Exam'rs, supra note 64, at viii.

105 Carr, supra note 15, at 378 (noting that the presumptive disqualification approach show that jurisdictions are “willing to engage in more flexible character screening processes when making decisions about individuals with prior felony convictions”).

106 Kalt, supra note 9, at 74 n.28 (listing those cases in which courts upheld felon jury exclusion based on the probity rationale); see also supra Part II.C.

107 Id. at 104 (noting that the probity rationale centers on the idea that “felons are bad,” and that they either threaten a jury's probity or its “appearance of probity” because of their flawed character).

108 Id. at 102 (describing this view: “[i]f someone is not responsible enough to follow the law, how can they [sic] be responsible enough to decide guilt or innocence?”) (citing State of Oregon Special Election Voters' Pamphlet, Ballot Measure 75, Arguments in Favor (1999)); see also Rector v. State, 659 S.W.2d 163, 173 (Ark. 1983) (stating “exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws”).

109 See Appendix 2.


111 Id.

112 Id. at 2 (summarizing the situationist position and stating “behavior is --contra the old saw about character and destiny--extraordinarily sensitive to variation in circumstance”).


114 Doris, supra note 110, at 18.

115 Id. at 5 (commenting “talk of character is a ‘thick’ discourse, intermingling eva[luative and descriptive elements’”) (citing Bernard Williams, Ethics and the Limits of Philosophy 128-31, 140-45 (1985)).


117 Yankah, supra note 116, at 1028.

118 Doris, supra note 110, at 20.

119 Id. at 20.

120 Id. at 22-23 (defining globalism as a theory that “construe[s] personality as more or less coherent and integrated with reliable, relatively situation-resistant, behavioral implications”).

121 Id. at 23.

122 Id. (discussing consistency and stating “[c]haracter and personality traits are reliably manifested in trait-relevant behavior across a diversity of trait-relevant eliciting conditions that may vary widely in their conduciveness to the manifestation of the trait in question”).

123 Id.
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124 Id. (discussing evaluative integration and stating “[i]n a given character or personality the occurrence of a trait with a particular evaluative valence is probabilistically related to the occurrence of other traits with similar evaluative valences”).

125 Id. at 1 (“This conception of character is both venerable and appealing, but it is also deeply problematic.”).

126 Id. at 6.

127 Id.

128 Id. at 26 (further arguing that conventional conceptualizations of character do not fully explain “the striking variability of behavior with situational variation”).

129 See Kaye, supra note 113, at 618-39 (discussing several experiments where researchers elicited alarming behaviors from unexpected human sources).

130 Id. at 639.

131 Id. (“Because we are so vulnerable to situational influences, our characters cannot be as consistent as we generally imagine they are.”).

132 Id. (“The story of my act shifts from being a story about me to being a story about my surroundings, so that my acts belong, in some significant way, to forces beyond myself.”).

133 Doris, supra note 110, at 24.

134 Id.

135 Id.

136 Id. (noting that the “central theoretical commitments” of situationism “amount to a qualified rejection of globalism”).

137 Kaye, supra note 113, at 646.

138 Doris, supra note 110, at 1 (commenting that such a view holds that “character is destiny”).

139 See supra Part III.A.2. (noting that a felony conviction presumptively disqualifies a felonious bar applicant).

140 Id.

141 Kalt, supra note 9, at 73 n.28 (citing People ex rel. Hannon v. Ryan, 312 N.Y.S.2d 706, 712 (App. Div. 1970) (stating “it would be a strange system, indeed, which permitted those who had been convicted of anti-social and dissolute conduct to serve on its juries”)).

142 Doris, supra note 110, at 12 (“‘[C]ommon sense’ is a keenly felt constraint in psychology, and this has served to put [ ] situationist psychology ... at a certain rhetorical disadvantage, inasmuch as it threatens time-honored notions of personality and character.”).

143 Id. (noting “it is alleged that everyday convictions about personality constrain psychological theorizing”).

144 See Kaye, supra note 113, at 637 (“It has been well-established that we are strongly inclined to explain human acts in terms of character traits or dispositions, even when we have only observed a single act, and even when there are strong reasons to believe that situation had a profound influence on the actor.”) (citing Lee Ross & Richard E. Nisbett, The Person and the Situation 4 (1991)).

145 Kaye, supra note 113, at 637-38 (stating that confirmation bias forces us to “reject information that conflicts with our working models of people, and retain information that supports our working models, such that once we have decided a person is a certain ‘kind’ of person, it is very unlikely that we will question the characterization”) (citing Ross & Nisbett, supra note 144, at 139-44).

146 Id. at 638 (“[W]e are likely to accurately perceive others as acting consistently--but for reasons having nothing to do with any characterological consistency on their part.”).
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147 Id.

148 Doris, supra note 110, at 13 (highlighting that situationist research includes “many naturalistic field studies, dating back to the 1920s”).

149 Id. (noting that if situationism “is empirically supportable, it should be empirically falsifiable” and opining that “given the extent of empirical support,” there is “good reason for believing that falsification is not forthcoming”).

150 Kalt, supra note 9, at 105.

151 Id. at 85.

152 See supra Part II.C.

153 Kalt, supra note 9, at 105 (“[M]any groups have generally strong biases in criminal cases ... in the case of crime victims, the justice system does not presume that they are all incapable of being objective in all trials.”).

154 Smith v. Texas, 311 U.S. 128, 130 (1940); see also Kalt, supra note 9, at 107 (“To the extent that inherent bias among felon jurors leads to legitimate skepticism, the automatic exclusion of felons is less acceptable and smacks of viewpoint discrimination.”).

155 Kalt, supra note 9, at 105 (pointing out that “the inherent bias argument does not explain why felons should be excluded from civil juries in cases where the government is not a party,” and also noting that only Oregon distinguishes between a civil and criminal trial in its felon jury exclusion statute).

156 Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion).


159 See Appendix 2.

160 De Tocqueville, supra note 5, at 269.

161 Sandra Day O'Connor, Address at the University of Oregon Dedication of the William W. Knight Law Center: Professionalism, in 78 Or. L. Rev. 385, 386 (1999).

162 Rennard Strickland & Frank T. Read, The Lawyer Myth: A Defense of the American Legal Profession 3-4 (2008) (“A recent study showed that in the minds of the American public, the term ‘lawyer’ was almost synonymous with ‘courtroom advocate.’”).

163 Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 3-4 (2000) (“Of all the traits that the public dislikes in attorneys, greed is at the top of the list .... About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees.”).

164 Id. at 4 (“The public's other principal complaint about attorneys' character involves integrity .... Only a fifth of those surveyed by the American Bar Association ... felt that lawyers could be described as 'honest and ethical.'”).

165 Gaetke, supra note 157, at 40.


167 Gaetke, supra note 157, at 40 (noting further that this role is also “more comfortable to lawyers”).

168 O'Connor, supra note 161, at 387 (“A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court.”).
169 Gaetke, supra note 157, at 48.
171 Id. at R. 3.3(d).
172 Gaetke, supra note 157, at 48.
173 Daniel Northrop, Note, The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention that the Attorney Draft a Document to be Released to Third Parties: Public Policy Calls for at least the Strictest Application of the Attorney-Client Privilege, 78 Fordham L. Rev. 1481, 1484 (2009) (“[U]ncritical acceptance and support of the attorney-client privilege has allowed for the expansion of the privilege and the denial of competing societal and legal concerns .... [and] a reanalysis of the attorney-client privilege would best serve the interests of justice.”).
174 Michael Asimow & Richard Weisberg, When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature, 18 S. Cal. Interdisc. L.J. 229, 236 (2009) (“[W]eak adversarialism ... foregrounds values such as the truth-finding function of trials, the obligation of candor toward the tribunal, and the need to protect the reputation of truthful witnesses and the interests of other third parties who may be damaged by the litigation.”).
175 Id. at 236.
176 Id. at 237 n.33 (noting that “discretionary provisions allow lawyers wiggle room to act in good faith when they confront difficult and dangerous ethical and moral quandaries”) (citing Bruce A. Green, Criminal Defense Lawyering at the Edge: A Look Back, 36 Hofstra L. Rev. 353, 391-92 (2007)).
177 Asimow & Weisberg, supra note 174, at 236.
178 See id. at 235 (describing the contrasting approach of “strong adversarialism (sometimes referred to as ‘neutral partisanship’)” which “emphasizes the objective of zealous representation and protection of client confidences ... foreground[ing] the client's interests above all other values”).
180 Id. at 466.
181 Id.
182 Id.
183 Id.
184 Id. at 474.
185 Id. at 466.
186 Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925).
187 Kalt, supra note 9, at 106.
189 Id.
190 See, e.g., Boney, 977 F.2d. 624; Anderson v. Commonwealth, 107 S.W.3d 193 (Ky. 2003); People v. Miller, 759 N.W.2d 850 (Mich. 2008).
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191 Miller, 759 N.W.2d at 874.


193 See Appendix 2.


196 Id.

197 Id.

198 Id. at 11.

199 United States v. Boney, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting) (“That a felon has been unwilling to conform his conduct raises doubts about his capacity to honor the juror's oath, and to comply with the trial judge's instructions.”).


201 William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 74 (2006) (“The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government.”).

202 Id.; see also William L. Dwyer, In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy 153 (2002) discussing the popularity of the jury trial in America, and noting that nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States.

203 United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002) (noting specifically that the number of jury trials is declining “more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts--but dying nonetheless”).

204 Young, supra note 201, at 74.

205 Id.

206 Id. at 76.

207 Id. at 77-78 (stating “[t]he Supreme Court ... has interpreted the Federal Arbitration Act to supplant juries with arbitrators whenever possible” and “strong scholarly analyses suggest that trial judges overuse summary judgment to take triable cases away from juries”).

208 Kassin & Wrightsman, supra note 194, at 4 (noting that “juries are viewed simultaneously as partial and impartial, brilliant and stupid, active and passive, compliant and rebellious, conscientious and expedient”).


210 Harry Kalven Jr. & Hans Zeisel, The American Jury 4 (1966) stating that the jury “from its inception...has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism”); see also Kassin & Wrightsman, supra note 194, at 3 (commenting that “scholarly debate over juries can be traced about as far back in history as juries themselves”).

211 Some scholars and citizens also contend that the costs associated with the jury system outweigh its usefulness. See, e.g., Kassin & Wrightsman, supra note 194, at 3 (“Critics maintain that the system is a very costly anachronism, consuming human resources and government expenditures in massive doses, that it is burdensome to those called into service, and that it is largely responsible for congestion and delay in the civil courts.”).
213 Id.
214 Kassin & Wrightsman, supra note 194, at 3; see also Phoebe C. Ellsworth & Alan Reifman, Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions, 6 Psychol. Pub. Pol'y & L. 788, 792 (2000) (“A major theme of popular criticism is that competent, responsible people rarely serve on juries; instead, American juries are made up of incompetent people-- the uneducated, the jobless, the people who pay so little attention to the news that they have never heard of litigants who are major public figures.”).
215 Hans & Vidmar, supra note 212, at 19 (citing Judge Jerome Frank).
216 Id. at 115.
217 See id. (continuing “all [jurors] are required to do is indicate whether the verdict is for or against the plaintiff (or in criminal cases whether the defendant is guilty or not guilty”).
218 See, e.g., Kassin & Wrightsman, supra note 194, at 3-4 (“It is said that the average person is not smart enough or educated enough to understand, much less decide, technically complex civil cases such as antitrust suits.”); see also Hans & Vidmar, supra note 212, at 121 (discussing the average juror's ability to understand jury instructions and commenting “[n]ot surprisingly, given the convoluted language and special legal terms, jurors' comprehension is often very low”).
219 See Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 60 (2d Cir. 1948) (“But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.”).
221 Kassin & Wrightsman, supra note 194, at 4.
222 Id. at 6.
225 See Jeffrey Abramson, We the Jury: The Jury System and the Ideal of Democracy 100 (1994) (“This is a demanding notion of impartiality, requiring jurors to be independent not only from the dictates of others but also from their own opinions and biases.”).
226 Kassin & Wrightsman, supra note 194, at 7-8.
227 Abramson, supra note 225, at 100 (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).
229 Abramson, supra note 225, at 101 (continuing “[t]he jury will achieve the ‘overall’ or ‘diffused’ impartiality that comes from balancing the biases of its members against each other”).
230 Mortimer S. Kadish & Sanford H. Kadish, Discretion to Disobey 66 (1973) (noting that the ideal juror “find[s] the facts on the basis of the evidence presented and ... return[s] a general verdict by applying those facts to the law as given by the judge”).
231 Kassin & Wrightsman, supra note 194, at 6.
232 Peters, 407 U.S. at 503-504 (highlighting that “exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented”).
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233  Abramson, supra note 225, at 101.

234  Id.; see also Hans & Vidmar, supra note 212, at 51 (noting “not only for fact-finding but also for legitimation, a representative jury is desirable”).

235  De Tocqueville, supra note 5, at 272.

236  Id. at 274.

237  Kassin & Wrightsman, supra note 194, at 4 (commenting “[w]ith juries arousing so much ambivalence and controversy, it should come as no surprise to learn that the legal system is often thoroughly confused about how they act and, in turn, how they should be treated”).


239  Id.

240  Id.

241  Young, supra note 201, at 69.

242  De Tocqueville, supra note 5, at 272.

243  Id.

244  In re Applicants for License, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

245  See Paula L. Hannaford-Agor & G. Thomas Munsterman, Ethical Reciprocity: The Obligations of Citizens and Courts to Promote Participation in Jury Service, in Jury Ethics: Jury Conduct and Jury Dynamics 21, 25 (John Kleinig & James P. Levine eds., 2006) (describing voir dire as “the jury selection phase” where “the focus shifts abruptly from general presumptions about individuals’ ethical capacity to intense attention on the individual and his or her ability to be fair and impartial in the context of a specific trial”).

246  Hans & Vidmar, supra note 212, at 67.

247  Id.

248  See id. (noting that voir dire “may be as brief as 20 minutes or as long as 8 hours for an average trial” and that “in the Hillside Strangler trial in Los Angeles,...the voir dire and jury selection took 49 court days”).

249  See id. (commenting “[q]uestions may be wide-ranging or more specifically related to the case”).

250  See id. (“During voir dire, the trial judge and/or the attorneys ask questions of prospective jurors.”).

251  See Ellsworth & Reifman, supra note 214, at 792-93 (“The high-publicity spectacle trials typically involve greatly expanded voir dire, partly because they are high-publicity.”).

252  See Julie E. Howe, An Ethical Framework for Jury Selection: Enhancing Voir Dire Conditions, in Jury Ethics: Jury Conduct and Jury Dynamics 35, 37 (John Kleinig & James P. Levine eds., 2006) (“Improvements in voir dire conditions have been studied and proposed by the legal community including judges, attorneys, trial consultants, and social psychologists.”).

253  Kassin & Wrightsman, supra note 194, at 49.

254  Id.

255  See Ellsworth & Reifman, supra note 214, at 793 (hypothesizing that “bad jurors’ are seated on juries because they are the ones the attorneys and the jury consultants are looking for”).


See id. at 792-94.

See id. at 794-96.

Id. at 795.

See Swisher, supra note 65, at 1072 (commenting that, with regard to moral character and fitness determinations, “[t]he time has come-- belatedly--to forgive and forget this troubling mark on the legal profession's good moral character”); see also Arnold, supra note 65, at 67 (noting “[u]ndeniably, the legal profession ranks low on the public's list of professions that maintains high levels of honesty and integrity”).

Swisher, supra note 65, at 1069 (questioning whether the use of “good moral character” has been “perverted, devalued, and misappropriated for the bar's reputation and self-image”).

See Rhode, supra note 66.

Id. at 503 (describing her methodology noting that her research included “compiled data from bar examining authorities, reported judicial cases, and accredited law schools” from “1982 and 1983”).

Id. at 555 (“Most bar examiners involved in the certification process express confidence in its general effectiveness. About 60%...of respondents engaged in initial character screening in all fifty states identified no problems in the current system. Over half...of the chairmen at the highest review level in selected jurisdictions found the process effective; a quarter were unsure, but only fourteen percent believed that it was ineffective.”).

Id. at 556 (“Despite most bar examiners' confidence in their predictive capacities, there have been no attempts, however primitive, to assess the effectiveness of certification procedures. Not only is there an absence of controlled research, no state bar has examined the records of disciplined or disbarred attorneys to determine what, if anything, in their records as applicants might have foreshadowed later problems. Nor have any studies attempted to examine the careers of candidates denied admission for evidence of subsequent moral lapses. Finally, and perhaps most disturbingly, the courts and examiners involved in certification have failed to confront the large volume of social science research that questions both the consistency and predictability of moral behavior.” (footnote omitted)).

Id. at 512 (footnote omitted).

Id. at 513.

Rhode, supra note 66, at 513.

Id. at 513-14.

Id. at 516 (continuing “[t]he only other empirical data available suggest that this percentage has remained relatively constant over the last quarter century” (footnote omitted)).

Id.
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274  Id. at 560.

275  Id. at 509 (quoting Donald T. Weckstein, Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident, 40 B. Examiner 17, 23 (1971)).

276  Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, in Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader 18, 19-20 (Susan D. Carle ed., 2005) (stating “[i]n order for rules to mold behavior, they must set forth the boundaries of that behavior with clarity” and “[r]ules of professional conduct are likely to make a significant contribution to directing behavior only if they differ from prevailing law and morality”).

277  Id. at 20 (noting “the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless”).

278  Id. (pointing out that the legal profession's rules of professional conduct require adherence to basic principles such as “do your work promptly, stay in communication with your client, do not represent adverse interests, [and] hold client property in trust” (footnotes omitted)).

279  Id.


281  See Abel, supra note 276, at 22 (critically noting that ‘rules of legal ethics are an attempt by elite lawyers to convince themselves that they have resolved their ethical dilemmas...there is little evidence that anyone pays attention to ethical rules beyond the small proportion of lawyers who draft, discuss, and enact them, or those who request ethical opinions’ and that “most lay people know little more than that such rules exist, and those who are aware of the rules are probably skeptical about their contents”).

282  Id. at 21 (“All occupations in a capitalist system seek to control the markets in which they sell their labor. Some occupations organize unions. Others form associations that attempt to secure state support for their control over entry to the market. In other words, they aspire to control the supply of services by controlling the production of and by producers of those services. The justification for control, typically, is that the services require a high level of technical skill and that only those who already possess such skill can determine whether others have acquired it.”).

283  Lawyers' Ethics, supra note 280, at 14 (“Halliday’s theory is that the legal profession's collective organization allows it to bring its special expertise to the service of state power.”).


285  Id.

286  Id.

287  Raymond Paternoster et al., supra note 20, at 165 (commenting “[a] key proposition of this group-value model of procedural justice is that adhering to fair procedures will cement persons’ ties to the social order because it treats them with dignity and worth and certifies their full and valued membership in the group”).


289  Kalt, supra note 9, at 133.


291  Id. at 35.

292  Id.
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293 Id.
294 Id.
295 See James M. Binnall, EG1900 ... The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-
296 Eva. S. Nilsen, Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse, 41 U. C. Davis
297 See Tyler, supra note 22, at 308 (stating “[i]rrespective of the type of case involved, the traditional means of obtaining compliance
is via social control”).
298 Id.
299 See id. at 309 (commenting “it is not surprising that studies which empirically test the deterrence model typically find either that
deterrent effects cannot be reliably detected or that, when they are detected, their magnitude is small”).
300 See id. at 309 (noting “[t]he high costs of deterrence arise because authorities have to create and maintain a credible threat of
punishment for wrongdoing”).
301 See id. at 310 (proposing that the methods used to evaluate a deterrence framework foster its continued existence because such
methods “approach this issue by defining the issue as whether or not deterrence ‘works,’” failing to “consider how strongly deterrence
works” and “compare the effectiveness of deterrence to alternative models and approaches”).
302 Id. at 312.
303 Tyler, supra note 22, at 311.
304 Id. (contending “if [the] goal is simply to achieve compliance with the law, a value-based model is as or more effective than the
deterrence model”).
305 Id. at 311.
306 Id. at 313.
307 Id. at 326.
308 See generally Tyler, supra note 17.
309 Tyler, Casper, & Fisher, supra note 18, at 643, 645 (stating “[t]o the extent that a regime can promote the development of widespread
affective attachment, a cushion of support develops that enables the state to impose substantial burdens on citizens without losing
their allegiance”).
310 Id. (noting “the government can influence the impact of negative outcomes on allegiance by delivering those outcomes through
procedures that citizens will view as fair”).
311 Tyler, supra note 22, at 334 (commenting “it is important to institutionalize mechanisms for evaluating legal authorities in terms of
their legitimacy as well as the consistency of their policies and practices with the principles of procedural justice”).
313 Faye S. Taxman, David Soule, & Adam Gelb, Graduated Sanctions: Stepping into Accountable Systems and Offenders, 79 The
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314  Id. at 187.


316  Paternoster et al., supra note 20, at 167.

317  Tyler, supra note 17, at 664 (continuing by noting that citizens “want to have a ‘voice’ in the decisionmaking process”).

318  Id.

319  Paternoster et al., supra note 20, at 167 (emphasis omitted).

320  Id. (stating that people assess consistency “across persons” by “compare[ing] the treatment they receive with the treatment given other people”).

321  Id. at 167-68 (stating that people assess consistency “across time” by “compare[ing] their current treatment with both their past experiences and how they expect to be treated”).

322  Tyler, supra note 17, at 664.

323  Id.

324  See Appendix 1.

325  See Nat'l Conference of Bar Exam'r's, supra note 64, at 6-9.

326  Travis, supra note 290, at 16; see also Travis, supra note 26, at 64-65 (continuing “[i]n short, this universe of criminal sanctions has been hidden from public view, ignored in our national debate on punishment policy, and generally excluded from research on the life course of ex-offenders or the costs and benefits of the criminal sanction”).

327  Paternoster et al., supra note 20, at 168.

328  Id.

329  Id.

330  See Rhode, supra note 66, at 506 (noting “all judicial denials of admissions must meet minimum due process standards of notice and an opportunity to be heard”).


332  Paternoster et al., supra note 20, at 168 (stating “[i]t is perceived as procedurally fair, authorities must supply some mechanism by which decisions thought to be unfair or incorrect can be made right”).

333  Though no administrative mechanisms allow an excluded felon-juror to challenge record-based juror eligibility requirements, some have unsuccessfully explored constitutional challenges to felon jury exclusion statutes. See generally Binnall, supra note 16 (describing constitutional challenges to felon jury exclusion statutes).

334  See Rhode, supra note 66, at 506-07 n.69.
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335  Id. at 507 (noting, for example, that “[s]ome state courts defer to the bar’s assessments absent an ‘abuse of discretion, arbitrary action, fraud, corruption or oppression’” while “[o]ther jurisdictions will determine applicants’ qualifications de novo or resolve reasonable doubts in their favor”).

336  Paternoster et al., supra note 20, at 168 (stating “[r]espectful treatment by legal authorities is seen to be directly related to perceptions that authorities are moral, legitimate, and are deserving of compliance”).

337  Tyler, supra note 17, at 664.

338  See supra Part II.A. (detailing California's procedures for dismissing felonious jurors).

339  Tyler, supra note 17, at 664.

340  Tyler, supra note 19, at 4 (noting that “people who make instrumental decisions about complying with various laws will have their degree of compliance dictated by their estimate of the likelihood that they will be punished if they do not comply”).

341  See id. at 3-4 (commenting that “[t]his normative commitment can involve personal morality or legitimacy” and “[n]ormative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior”).

342  Id. at 3.

343  Kalt, supra note 9, at 121.

344  See, e.g., Washington v. State, 75 Ala. 582 (1884).

345  The “imposed sentence” refers to any period of incarceration or supervised release (parole or probation).

346  Ala. State Bar, Rules Governing Admission to the Alabama State Bar R. V (2009), available at http:// www.alabar.org/admissions/files/AdmissionRulesRegbooksept2009.pdf (making no mention of felony convictions, but stating “[t]he burden is on the applicant to establish to the reasonable satisfaction of a majority of the said committee that the applicant possesses such character and qualifications as to justify the applicant's admission to the Bar and qualify the applicant to perform the duties of an attorney and counselor at law”).

347  Alaska Court Sys., 2009-2010 Alaska Bar Rules pt. I, R. 2, § 1(d)(1), available at http://www.state.ak.us/courts/bar.htm (noting that “[c]onduct manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission” and listing a series of factors to be considered including “a criminal conviction except minor traffic violations”).

348  Comm. on Examinations of the Supreme Court of Ariz., Rules for Admission of Applicants to the Practice of Law in Arizona R. 36(b)(2)(A) (2005), available at http://www.supreme.state.az.us/admis/pdf/Rules for Admission as of 12-1-05 rev 1006 with ph.pdf (“There shall be a presumption, rebuttable by clear and convincing evidence presented at an informal or formal hearing, that an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony shall be denied admission.”).

349  Ark. Judiciary, Rules Governing Bar Admission R. XIII (2004), available at http://courts.state.ar.us/rules/bar_admission/index.cfm (making no mention of felony convictions, but stating “[t]he practice of law is a privilege,” and “[a]dmission to practice is based upon the grade made on the examination if one is taken, moral qualifications, and mental and emotional stability”).

350  State Bar of Cal., Rules of the State Bar of California tit. 4, div. 1., R. 4.40(A)-(B) (2008), available at http:// calbar.ca.gov/calbar/pdfs/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf (stating that “[a]n applicant must be of good moral character as determined by the Committee,” and that “[t]he applicant has the burden of establishing that he or she is of good moral character” defined as “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process”).

in which “[t]he applicant has been convicted of a felony or a crime of moral turpitude, or any crime involving a breach of fiduciary duty, or accepted a deferred judgment which is pending as to such a charge in any jurisdiction”).

352 Conn. Bar Examining Comm., Regulations of the Connecticut Bar Examining Committee art. VI-11 (2009), available at http://www.jud.state.ct.us/CBEC/regs.htm#VI (noting that a felony conviction “creates a presumption of and may result, in the absence of evidence to the contrary, in a finding of lack of good moral character and/or fitness to practice law”).

353 Supreme Court of the State of Del., Rules of the Board of Examiners of the State of Delaware R. 51-52 (2008), available at http://courts.state.de.us/forms/download.aspx?id=28388 (Delaware requires that all applicants obtain a “preceptor” who must certify that the applicant “is a person of good moral character and reputation,” and must “have sufficient personal knowledge of the applicant's background, or make a reasonable investigation into the applicant's background from independent sources other than the applicant or the applicant's family”).

354 D.C. Court of Appeals, Rules of the District of Columbia Court of Appeals R. 46(d) (2008), available at http://www.dcappeals.gov/dccourts/docs/DCCA_Rules.pdf (“No applicant shall be certified for admission by the Committee until the applicant demonstrates good moral character and general fitness to practice law.”); see In re Manville, 538 A.2d 1128, 1133 n.4 (D.C. 1988) (en banc); In re Polin, 596 A.2d 50, 53 n.4 (D.C. 1991) (each listing factors courts will consider when assessing whether a bar applicant with a felonious criminal history has demonstrated sufficient rehabilitation to enter the legal profession).

355 Fla. Bd. of Bar Exam'rs, Rules of the Supreme Court Relating to Admissions to the Bar R. 2-13.3 (2009), available at http://www.floridabarexam.org/public/main.nsf/rules.html (stating that “[a] person who has been convicted of a felony is not eligible to apply until the person's civil rights have been restored,” which is not an automatic occurrence in Florida, instead it requires an application).

356 Supreme Court of Ga., Rules Governing Admission to the Practice of Law in Georgia pt. A, § 7 (2010), available at http://www.gabaradmissions.org/pdf/admissionrules.pdf (making no mention of a felony conviction, but noting “[i]f, during the investigation of an applicant, information is obtained which raises a question as to the applicant's character or fitness to practice law, the Board may require the applicant to appear, together with his or her counsel if he or she so desires, before the Board or any designated member for an informal conference concerning such information”).

357 Supreme Court of the State of Haw., Rules of the Supreme Court of the State of Hawai’i R. 1.3(c)-(e) (2006), available at http://www.state.hi.us/jud/ctrules/sch.htm#Rule_1.3 (making no mention of felony convictions, but stating “[a] lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them,” and that “[a] record manifesting deficiency in ... respect for the law shall be grounds for denying an application”).


359 Bd. of Admissions to the Bar and the Comm. on Character and Fitness of the Supreme Court of Ill., Rules of Procedure R. 6.4(a) (2007), available at https://www.ibaby.org/static/RulesofProcedure.pdf (making no mention of felony convictions, but stating that unlawful conduct “should be treated as cause for further detailed inquiry before the Committee decides whether the law student registrant or applicant possesses the requisite character and fitness to practice law”).

360 Ind. Bd. of Law Exam'rs, Rules for Admission to the Bar and the Discipline of Attorneys R. 12(2) (2010), available at http://www.in.gov/judiciary/rules/ad_dis/ad_dis.pdf (“Anyone who has been convicted of a felony prima facie shall be deemed lacking the requisite of good moral character.”).

361 Iowa Legislature, Court Rules ch. 31, R. 31.9(1) (2008), available at http://www.legis.state.ia.us/DOCS/ACO/CR/LINC/03-26-2010.chapter.31.pdf (making no mention of felony convictions, but simply stating that “[t]he Iowa board of law examiners shall make an investigation of the moral character and fitness of any applicant and may procure the services of any bar association, agency, organization, or individual qualified to make a moral character or fitness report”).
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363 Ky. Bar Ass’n, Rules of the Supreme Court of Kentucky R. 2.011 (2008), available at http://www.kyoba.org/rules/scr2.011.pdf (making no mention of felony convictions, but stating “[t]he applicant shall have the burden of proving that he or she is possessed of good moral character” and that “good moral character” includes qualities of honesty, fairness, responsibility, knowledge of the laws of the state and the nation and respect for the rights of others and for the judicial process”).

364 La. Supreme Court Comm. on Bar Admissions, Admission Rules R. XVII, § 5(E)(21) (2008), available at http://www.lascba.org/admission_rules.asp (“Conviction or a plea of guilty or ‘no contest’ to any misdemeanor or felony, including juvenile proceedings” “should be considered to be a basis for investigation and inquiry before recommending admission.”).

365 Me. Bd. of Bar Exam’rs, Maine Bar Admission Rules R. 9(a) (2009), available at http://www.mainebarexaminers.org/PDFFiles/MBAR0109.pdf (making no mention of felony convictions, but stating “[e]ach applicant shall produce to the Board satisfactory evidence of good moral character,” and “[t]he attributes of character that are relevant to this determination are those pertinent to the trust placed in lawyers by the public and clients as well as to the requirement that lawyers in this state comply with the Maine Bar Rules”).

366 Court of Appeals of Md., Rules Governing Admission to the Bar of Maryland R. 5(a) (2009), available at http://www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf (making no mention of felony convictions, but noting that “[t]he applicant bears the burden of proving ... good moral character and fitness for the practice of law,” and “[f]ailure or refusal to answer fully and candidly any question set forth in the application or any relevant question asked by a member of the Character Committee, the Board, or the Court is sufficient cause for a finding that the applicant has not met this burden”).

367 Mass. Supreme Judicial Court Bd. of Bar Exam’rs, Rules of the Board of Bar Examiners R. V.1, V.2.2 (2008), available at http://www.mass.gov/bbe/barrules.pdf (stating that “[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of a candidate may constitute a basis for denial of a recommendation for admission,” and “[f]actors such as incarceration, probation, restrictions of parole still in effect, current unsatisfied judgments or unfulfilled sentences, while not determinative, generally are considered to indicate that the rehabilitation process has not been completed.” Additionally, “[t]he candidate shall have the burden to establish by clear and convincing evidence his or her current good character and fitness”).

368 Mich. Bd. of Law Exam'rs, Rules, Statutes and Policy Statements R. 1(B)-1 (2009), available at http://courts.michigan.gov/supremecourt/BdofLawExaminers/BLE Rules, Statutes, and Policy Statements.pdf (making no mention of felony convictions, but defining “good moral character” as “the propensity on the part of the person to serve the public in a fair, honest, and open manner,” and commenting that “[t]he Board [of Law Examiners] considers ‘fair’ to mean legitimately sought, done, given, etc., for example, proper under the rules; courteous; civil; in a fair manner”).

369 Minn. State Bd. of Law Exam'rs, Character and Fitness for Admission to the Bar: A Guide to the Character and Fitness Standards and Investigation of Applicants to the Bar in Minnesota question 8 (2007), available at http://www.ble.state.mn.us/character_and_fitness.html (“There is no type of misconduct that will automatically render an applicant ineligible for admission to the Minnesota Bar. The Board makes a current assessment of character and fitness for each applicant. If an applicant has a history of serious misconduct, an applicant may still be eligible for admission. The applicant must show evidence of rehabilitation and current good character.”).

370 Miss. Bd. of Bar Admissions, Rules Governing Admission to the Mississippi Bar R. VIII, § 6 (1991), available at http://www.mscc.state.ms.us/rules/msrulesofcourt/rules_admission_msbare.pdf (“Every person who has been or shall hereafter be convicted of a felony, in a court of this or any state or a court of the United States, manslaughter or a violation of the Internal Revenue Code excepted, shall be incapable of obtaining a license to practice law.”).

371 Mo. Supreme Court Rules, Rules Governing the Missouri Bar and the Judiciary R. 8.04(a) (2003), available at http://www.courts.mo.gov/page.jsp? id=46 (follow “Rules Governing the Missouri Bar and the Judiciary--Rules 1-18”) (“Any person, whether sentence is imposed or not, who has pleaded guilty or nolo contendere to or been found guilty of any felony of the United
States, this state, any other state or any United States territory is not eligible to apply for admission to the bar of this state until five years after the date of successful completion of any sentence or period of probation as a result of the conviction, plea, or finding of guilt.”).

372 State Bar of Mont., Rules of Procedure of the Commission on Character and Fitness of the Supreme Court of Montana § 4(h) (1998), available at http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6 (“An applicant found guilty of a felony is conclusively presumed not to have present good moral character and fitness. The presumption ceases upon completion of the sentence and/or period of probation.”).

373 Neb. Judicial Branch, Nebraska Supreme Court Rules § 3-103(C) (2008), available at http://www.supremecourt.ne.gov/rules/pdf/Ch3Art1.pdf (stating that “[a] record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission,” and listing, as one of these essential eligibility requirements, “[t]he ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct”).

374 Supreme Court of Nev., Nevada Supreme Court Rules R. 51(1)(d) (2009), available at http://www.leg.state.nv.us/CourtRules/SCR.html (making no mention of felony convictions, but stating that “[a]n applicant for a license to practice as an attorney and counselor at law in this state shall ... [d]emonstrate that the applicant is of good moral character and is willing and able to abide by the high ethical standards required of attorneys and counselors at law”).

375 Supreme Court of the State of N.H., Rules of the Supreme Court of the State of New Hampshire R. 42(5)(a), (j) (2010), available at http://www.courts.state.nh.us/rules/sct/scr-42.htm (making no mention of felony convictions, but stating that “[a]ll persons who desire to be admitted to practice law shall be required to establish their moral character and fitness to the satisfaction of the Standing Committee on Character and Fitness of the Supreme Court of New Hampshire in advance of such admission,” and that “[i]f the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation.” Further, “[t]he committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters”).

376 N.J. Comm. on Character, Regulations Governing the Committee on Character § 202:8(a) (2002), available at http://www.njbarexams.org/commchar/char.htm (“A candidate who is on probation or parole from a sentence for a criminal offense shall not be eligible for consideration by the Committee until the probation or parole has been successfully completed.”).

377 N.M. Bd. of Bar Exam’rs, Rules Governing Admission to the Bar R. 15-103(C)(3)(a) (2008), available at http://www.nmexam.org/rules/rules103.htm (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated as cause for further inquiry before the Board determines whether the applicant possesses the character and fitness to practice law”).

378 N.Y. State Bd. of Law Exam’rs, Rules of the Court/Board of Law Examiners § 520.12(a), (c) (2000), available at http://www.nybarexam.org/Rules/Rules.htm (making no mention of felony convictions, but noting that “[e]very applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness requisite for an attorney and counselor-at-law,” and that “[t]he Appellate Division in each department may adopt for its department such additional procedures for ascertaining the moral character and general fitness of applicants as it may deem proper”).

379 Bd. of Law Exam’rs of the State of N.C., North Carolina Board of Law Examiners Character and Fitness Guidelines (2001), available at http://www.ncble.org (follow “Character & Fitness” hyperlink) (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated as cause for further inquiry before the Board decides whether the applicant possesses the requisite character and fitness to practice law”).

380 N.D. Supreme Court, North Dakota Admission to Practice Rules R. 2(B)(1)(c)(1) (2009), available at http://www.ndcourts.com/rules/Admission/frameset.htm (making no mention of felony convictions, but stating that “[w]hen an applicant’s record of conduct includes inappropriate behavior ... the [State Board of Law Examiners] will make further inquiry before deciding whether the applicant
possesses the good moral character and fitness to practice law required for a positive recommendation,” and noting that inappropriate behavior includes “unlawful conduct”).

381 Supreme Court of Ohio & Ohio Judicial Sys., Supreme Court Rules for the Government of the Bar R. I § 11(D)(5)(a)(i)-(iii) (2009), available at http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1 (“If an applicant has been convicted of a felony under the laws of this state, the laws of the United States, or the laws of another state or territory of the United States, or adjudicated a delinquent child for conduct that, if committed by an adult, would be such a felony, the applicant shall undergo a review by the Board of Commissioners on Character and Fitness in accordance with Section 12 of this rule, and the applicant may be approved for admission only if all of the following apply: (i) More than five years have passed since the applicant was released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained; (ii) The rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon; (iii) The applicant is not disqualified by law from holding an office of public trust.”); see also Supreme Court of Ohio & Ohio Judicial Sys., Summary of Character and Fitness Process in Ohio, Special Provisions for Applicants with Felony Records (2010), available at http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1 (“There is no per se bar to admission for applicants with felony records. However, an applicant who has a felony record must prove full and complete rehabilitation and satisfy special temporal and substantive conditions. The applicant is also subject to additional scrutiny, including a mandatory review by the Board, even if a local Admissions Committee has recommended an unqualified approval of the applicant. Applicants who have been convicted of the most serious kinds of felonies--aggravated murder, murder, attempted murder, or rape--must undergo yet another review by, and receive approval from, the Supreme Court itself.”).

382 Okla. Supreme Court, Rules Governing Admission to the Practice of Law in the State of Oklahoma R. I, § 1 (2009), available at http://www.okbbe.com/docs/rules_governing_admission.pdf (making no mention of felony convictions, but stating “[t]o be admitted to the practice of law in the State of Oklahoma, the applicant ... shall have good moral character, due respect for the law, and fitness to practice law”).

383 Or. State Bd. of Bar Exam'rs & Or. Supreme Court, Rules for Admission of Attorneys R. 3.10 (2009), available at http://www.osbar.org/__docs/rulesregs/admissions.pdf (“An applicant shall not be eligible for admission to the Bar after having been convicted of a crime, the commission of which would have led to disbarment in all the circumstances present, had the person been an Oregon attorney at the time of conviction.”).

384 Pa. Bd. of Law Exam'rs, Pennsylvania Bar Admission Rules R. 203(b)(2) (1999), available at http://www.pabarexam.org/bar_admission_rules/203.htm (making no mention of felony convictions, but stating that “[t]he general requirements for admission to the bar of this Commonwealth are ... absence of prior conduct by the applicant which in the opinion of the Board [of Law Examiners] indicates character and general qualifications (other than scholastic) incompatible with the standards expected to be observed by members of the bar of this Commonwealth”).

385 Judiciary of Rhode Island, Committee on Character and Fitness, http://www.courts.state.ri.us/supreme/bar/characterfitness.htm (last visited Apr. 1, 2010) (“Established by the Supreme Court in 1988, the Committee on Character and Fitness determines the moral fitness of Rhode Island Bar applicants by scrutinizing their finances, legal training, and criminal records, if any. Additionally, applicants must participate in a personal interview. If further review is warranted following the interview, applicants may be referred to the full committee for a hearing. A recommendation is then made to the Supreme Court as to whether or not an applicant should be admitted to the bar or even be allowed to take the bar examination. The Supreme Court may either grant the applicant's request or require the applicant to show cause why the court should grant the request.”).

386 S.C. Judicial Dep't, South Carolina Appellate Court Rules R. 402(c)(2), (4) (2010), available at http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleId=402.0&subRuleID=&ruleType=APP (making no mention of felony convictions, but noting that “[n]o person shall be admitted to the practice of law in South Carolina unless the person ... is of good moral character,” and “has been found qualified by a panel of the Committee on Character and Fitness”).

Determinations in South Dakota, “[u]nlawful conduct, including cases in which the record of arrest or conviction was expunged, with the exception of juvenile arrests and dispositions unless they pertain to a serious felony” “may be cause for further inquiry”).

388 Tenn. Bd. of Law Exam’rs, Tennessee Supreme Court Rules R. 7, art. 6, § 6.01(a) (1992), available at http://www.state.tn.us/lawexaminers/docs/rul7.pdf (“An applicant shall not be admitted if in the judgment of the Board there is reasonable doubt as to that applicant's honesty, respect for the rights of others, and adherence to and obedience to the Constitution and laws of the State and Nation as to justify the conclusion that such applicant is not likely to adhere to the duties and standards of conduct imposed on attorneys in this State. Any conduct which would constitute grounds for discipline if engaged in by an attorney in this State shall be considered by the Board in making its evaluation of the character of an applicant.”).

389 Tex. Bd. of Law Exam'rs, Rules Governing Admission to the Bar of Texas R. IV(d)(2) (2002), available at http://www.ble.state.tx.us/Rules/NewRules/ruleiv.htm (“An individual guilty of a felony under this rule is conclusively deemed not to have present good moral character and fitness and shall not be permitted to file a Declaration of Intention to Study Law or an Application for a period of five years after the completion of the sentence and/or period of probation.”).

390 Utah Office of Bar Admissions, Rules Governing Admission to the Bar R. 14-708(f)(3) (2006), available at http://www.utcourts.gov/resources/rules/ucja/ch14/07%20Admissions/USB14-708.html (“A rebuttable presumption exists against admission of an applicant convicted of a felony offense. For purposes of this rule, a conviction includes entry of a nolo contendre [sic] (no contest) plea. An applicant who has been convicted of a felony offense is not eligible to apply for admission until after the date of completion of any sentence, term of probation or term of parole or supervised release, whichever occurred last. Upon an applicant's eligibility, a formal hearing as set forth in this article before members of the Character and Fitness Committee will be held. Factors to be considered by the Committee include, but are not limited to, the nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of a sentence imposed and demonstration of clearly proven rehabilitation.”).

391 Vt. Bd. of Bar Exam'rs, Rules of Admission to the Bar of the Vermont Supreme Court § 11(b)(1) (2010), available at http://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules8-18-08.pdf (making no mention of felony convictions, but stating that “[t]he purpose of requiring an applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Rules of Professional Conduct. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the state's legitimate interests in protecting prospective clients and the system of justice.”).

392 Va. Bd. of Bar Exam'rs, Character & Fitness Questions: Can a Convicted Felon take the Virginia Bar Exam?, http://www.vbbe.state.va.us/faq/faqcfall.html (“Conviction of a felony is not an absolute bar to taking the Virginia bar exam, but it is a factor which will be considered in determining whether a person can prove by clear and convincing evidence that he/she possesses the requisite good character and fitness to qualify for admission to the Virginia bar. The Board's Character and Fitness Committee of the Board considers the nature of the crime, how long ago it was committed, the punishment, and positive contributions to society since the conviction. A pardon or a restoration of the person's civil rights is certainly a positive factor.”); see also Va. Bd. of Bar Exam'rs, Rules of the Virginia Board of Bar Examiners § III(2)(A) (1993), available at http://www.vbbe.state.va.us/pdf/VBBERules.pdf (making no mention of felony convictions, but noting that “commission or conviction of a crime” “may be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).

393 Wash. Courts, Washington State Court Rules: Admission to Practice Rules R. 24.2(a)(1) (2006), available at http://www.courts.wa.gov/ (follow Court Rules, Rules of General Application, Admission to Practice Rules, 24.2 Factors Considered when Determining Character and Fitness) (making no mention of felony convictions, but stating that “unlawful conduct” “shall be considered by the Admissions staff and Bar Counsel when determining whether an applicant shall be referred to the Character and Fitness Board for a determination of the applicant's character and/or fitness to practice law”).

394 Supreme Court of Appeals of W. Va., Rules for Admission to the Practice of Law in West Virginia R. 5.0, available at http://www.state.wv.us/wvsca/Bd%20of%20Law/lawprac.htm#Rule 5.0. Requirement of good moral character of applicant (“An applicant
who has previously been convicted of a felony or other serious crime carries a heavy burden of persuading the court that he or she presently possesses good moral character sufficient to be invited into the legal community.”) (citing In re Dortch, 486 S.E.2d 311, 320 (W. Va. 1997)).

395 Wis. Supreme Court, Wisconsin Supreme Court Rules: Rules of the Board of Bar Examiners § BA 6.02(a) (2009), available at http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=36673 (making no mention of felony convictions, but stating “unlawful conduct” “should be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).

396 Wy. Judicial Branch, Rules and Procedures Governing Admission to the Practice of Law § IV, R. 401(b)(1) (2010), available at http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=PracticeOfLawAdmission.xml (making no mention of felony convictions, but noting that “unlawful conduct” “may be treated by the Board as cause for non-recommendation or for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law”).

397 See Appendix 1. The information in this column appears in more detail in Appendix 1.

398 Kalt, supra note 9, at 150-57 nn. 376-426. This entire column, and almost all of the terminology that is used to indicate the duration of felon jury exclusion, were taken directly from Brian C. Kalt's article, The Exclusion of Felons from Jury Service (supra note 9). Specifically, I transposed Kalt's “Appendix I.A: Felon Exclusion Statutes” into this chart to make the necessary comparisons.

399 To make the topical jurisdictional data comparable, I maintained a crucial aspect of Kalt's methodology. Certain jurisdictions require the restoration of civil rights prior to allowing a convicted felon to rebut a presumption of flawed character during the moral character and fitness determination process. If the restoration of civil rights is not automatic in such jurisdictions, I listed them as per se disqualifying convicted felons from the practice of law permanently. Likewise, if a jurisdiction requires the restoration of a felon's civil rights as a prerequisite for jury service, but does not restore them automatically, Kalt listed them as banning felons from jury service for life.

73 ALBLR 1379
Overview

All jurisdictions grant discretion to their trial courts to excuse individual from jury service due to hardship. Excusal differs from disqualification in that individuals who do meet the qualification criteria are statutorily prohibited from serving. Likewise, excusal differs from exemption in that the latter provides individuals with a statutory right to decline to serve if summoned. While some statutes are more explicit than others with respect to the degree of the hardship that a juror must demonstrate to be excused from jury service, most jurisdictions recognize three types of hardship: medical hardship, financial hardship, and extreme inconvenience.

Factors that Affect Excusal Rates

Nationally, excusal rates average 9% – roughly one out of every 10 people summoned for jury service – but individual rates range from virtually 0% to more than 20% in some courts. Although community social and demographic factors obviously play a role in excusal rates, the NCSC has found that jury management policies significantly affect these rates. For example, courts that have reduced the length of the term of service to “one day or one trial” greatly minimize the potential hardship associated with jury service, making it feasible for many individuals to serve who would otherwise be excused for financial hardship. See Table 1. Similarly, states and local jurisdictions that provide comparatively more generous juror fees and mileage reimbursements, or that require employers to compensate employees who are summoned to jury service, have lower excusal rates.

<table>
<thead>
<tr>
<th>Juror Fee</th>
<th>Term of Service</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>One Day/One Trial</td>
<td>Longer than One Day/One Trial</td>
</tr>
<tr>
<td>Exceeds National Average</td>
<td>4.1%</td>
<td>8.3%</td>
</tr>
<tr>
<td>Less than National Average</td>
<td>8.1%</td>
<td>9.3%</td>
</tr>
<tr>
<td>Total</td>
<td>6.0%</td>
<td>8.9%</td>
</tr>
</tbody>
</table>

Effective Excusal Policies

Excusal policies that minimize the potential hardship that individuals experience as a result of jury service can significantly reduce excusal rates, increase jury yield, and expand the pool of prospective jurors. Such policies likewise reduce the potential for disproportionate impact on lower-income and minority populations, which improves the demographic representation of the jury pool.

A liberal deferral policy is preferable to outright excusal. If a juror’s request to be excused is based on inconvenience rather than true hardship, the court should defer the juror...
to a more convenient service date. An effective deferral policy reduces jury yield in the short term, but this temporary reduction is cancelled out as previously deferred jurors are returned to the jury pool in future terms. Moreover, most courts report increase jury yields due to the tendency of deferred jurors to appear for service in higher proportions than jurors responding on the first summons date.

Increasingly courts permit jurors to defer service one time as a general policy, but require court approval for subsequent deferrals. Absent extenuating circumstances, deferrals should be for a limited period of time (e.g., not to exceed 6 months) and under no circumstances should exceed a full calendar year. Because the jury yield is higher for deferred jurors compared to jurors reporting in response to the first summons, it is advisable to limit the number of deferrals into a single term. To prevent the possibility of “stealth jurors” deferring into jury panels for high profile cases, it is also advisable to prohibit deferrals for jury panels in notorious trials.

Establish a written excusal policy that articulates clear, objective criteria that jurors must show to demonstrate financial or medical hardship. Although court policies concerning the length of the term of service and juror compensation can minimize the potential hardship for many jurors, at any given time some measurable portion of the population will always have bona fide reason to be excused for hardship. This may be the result of the financial burden associated with loss of income; a lack of transportation or excessive travel to report for jury service; the risk of physical or mental harm to the juror; or the responsibility to care for children or dependent adults.

To be a legitimate hardship, the impact of jury service must involve an unreasonable level of personal sacrifice. Unless the juror is self-employed, it is not sufficient that the juror’s employer be adversely affected by the jury service. If the primary impact of the hardship falls on the juror’s employer, rather than on the juror, the juror’s service should be deferred rather than excused outright.

With respect to financial hardship, the following criteria would likely justify a request to be excused for hardship:

- the juror is employed, but the employer does not compensate employees while on jury service;
- the expected loss of income due to the anticipated length of jury service cannot be recovered after the service is complete;
- the juror has no supplemental financial support (e.g., spouse, parents, or children) or savings that would offset the loss of income; and
- the juror is the primary income earner for the household.

Similarly objective criteria should be established to determine hardship with respect to lack of transportation (e.g., distance exceeds x miles, juror does not own a vehicle or is not licensed to drive, juror cannot borrow a vehicle or get a ride to the courthouse with family or friends, public transportation is not available) or excessive distance (e.g., one-way trip to the courthouse exceeds x miles or x number of hours in transit).

A request to be excused due to medical hardship should include supporting details about the nature of the medical condition and a statement from a licensed health care
practitioner that the person is unable to serve as a juror. Take note that the Americans with Disabilities Act prohibits courts from routinely excusing persons with disabilities from jury service if the court can provide a reasonable accommodation for the disability (e.g., assisted listening devices or sign language interpreters for hearing-impaired jurors).

Responsibility for reviewing and granting excusal requests court can be delegated to a jury manager, court administrator, or clerk of court, provided that jurors have a right to appeal a denied excusal request to a judicial officer.

Addressing Hardship Factors

A number of social and community factors are often correlated with increased excusal rates including local employment rates, the dominant types of employers in the community (e.g., manufacturing, retail, service, financial, public) and their practices with respect to compensation for employees while on jury service, median per capita income, and others. As a practical matter, there is little that courts can do to change social and community factors. However, there are a number of steps that courts can take to minimize the hardship associated with jury service.

Reduced Term of Jury Service

As illustrated in Table 1 above, reducing the length of the term of service – ideally to one day or one trial – is the approach most likely to have a significant impact on excusal rates. The average length of a jury trial is two to three days in most states, which is generally a short enough period that most people would be only minimally inconvenienced by having to serve, even if the service entailed some loss of income during that time. Some courts employ a modified one day or one trial approach in which jurors are “on call” for a longer period of time (e.g., one week, one month), but once they are told to report for service and are impaneled as a trial juror or are dismissed after reporting, they have fulfilled their service requirement. If it is not possible to reduce the actual term of service, the court should adopt a policy to excuse jurors for a portion of their term, rather than grant a complete excusal from service.

For most courts, converting to a one day or one trial term of service requires a slight increase in the number of jurors summoned to compensate for the fact that jurors cannot be recycled to new trials over the longer term of service. The more dramatic the reduction in the term of service (e.g., from two weeks to one day or one trial), the greater the increase in the summoning rate will have to be.

As a practical matter, many courts with longer terms of service tend to have a lower volume of jury trials. For example, in the State-of-the-States Survey of Jury improvement Efforts, the NCSC found that more than half of all courts with a term of service longer than one day or one trial averaged 12 or fewer jury trials per year (one per month). Given these low volumes of jury trials, the modified “on call” term of service is fairly easy to implement with virtually no change in summoning rates.

To obtain an accurate estimate of the new summoning rate, the court should determine: (1) the actual number of jurors needed in an average term based on the number of jury panels sent to courtrooms and the number of jurors assigned to those panels (as compared to the number of jurors reporting during those
(2) summons jurors with an allowance for yield. After making the transition from the longer term of service to the reduced term of service, the court should reexamine the jury yield to determine if the excusal rate has decreased sufficiently to adjust the summoning rate.

**Time and Hardship Screening for Lengthy Trials**

Lengthy trials (e.g., trials exceeding 10 days) pose particular difficulties as few individuals are able to clear their calendar for a full two weeks without significant advance notice. A technique that many courts have found useful is to prescreen jurors for time and financial hardship. Jurors who are not available to serve in a longer trial are returned to the jury pool for consideration in more routine trials.

The prescreening process is conducted on the entire pool of jurors, rather than a preselected panel. Typically the jury manager delegated authority by the trial judge to prescreen jurors using objective criteria. Some courts also require that trial counsel consent to the prescreen process. Screening criteria generally includes the following:

- Employer compensates employees while on jury service for at least as long as the anticipated trial length. If employer does not compensate employees on jury service, loss of income for the duration of the trial will not cause financial hardship;
- Juror has no prepaid vacation or business trips planned during the anticipated trial period;
- Juror has no medical procedures and is not a fulltime student.

The jury manager should keep a careful record of the individuals deemed ineligible for the lengthy trial due to time constraints or financial hardship.

After prescreening the jury pool, the jury manager randomly selects a sufficient number of time/hardship eligible jurors to send to the courtroom for jury selection. Because all of the jurors have been prescreened, the jury panel should be large enough to encompass the number of jurors and alternates, the number of jurors excused for cause, and the number of jurors removed by peremptory challenge. As a result of the prescreening process, the trial judge and attorneys are able to immediately focus on substantive issues related to the trial during voir dire.

**Increased Juror Fees**

In most states, the amount of the juror fee and mileage reimbursement (if any) is established by statute. Although juror fees in most jurisdictions barely reimburse juror for anticipated out-of-pocket expenses and are not intended to compensate for lost income, the amount of the juror fee is actually a significant predictor of excusal rates. In 12 states, however, the jury statute permits local jurisdictions to supplement the jury fee over and above the mandatory state minimum rate. Excusal rates for courts with higher than average juror fees were 25% lower than those with lower than average juror fees.¹ To the extent that local courts have the discretion to increase juror fees, doing so can help reduce excusal fees.

An approach that several states have adopted with respect to juror compensation is a graduated juror fee program in which jurors are paid a reduced fee or no fee on the first day of service and an increased fee (up to $50 per day in some jurisdictions) on the second and subsequent days of service. This approach works extremely well in jurisdictions with a one day or one trial term of service insofar that courts incur relatively few costs for juror fees during jury selection when the largest number of jurors report for service. They are then able to substantially increase the fee for jurors who are actually impaneled as trial jurors. The average juror fee for jurisdictions that pay a flat daily rate is $22 compared to $32 for jurisdictions employing a graduated juror fee approach.

Disclaimer: The guidelines discussed in this document have been prepared by the National Center for State Courts and are intended to reflect the best practices used by courts to increase jury yields and expand the pool of prospective jurors to include individuals who would otherwise be excused due to hardship.
An inevitable part of jury selection is the process of identifying jurors who are able to serve without experiencing substantial hardship that might interfere with the jurors’ ability to pay attention to the trial evidence or deliberate effectively with other jurors. Hardship can take many forms, including physical health, preexisting commitments, or loss of income. In routine trials—that is, trials lasting two to five days—the proportion of jurors excused for hardship tends to be quite modest, typically less than 5 percent of the venire. As the anticipated length of the trial increases, however, the number of jurors who would likely experience substantial hardship, especially financial hardship, tends to increase dramatically. A California study of financial hardship associated with jury service found that one-third of jurors who were employed worked for employers that provided no compensation for jury service.\(^1\) Even employers that did compensate employees typically did so for only a limited period of time—12 percent up to three days, 19 percent for four to five days, and 29 percent for six to ten days. Given that the average juror fee is $22 per day in states that pay a flat rate, and $32 per day in states with a graduated rate, it is easy to imagine that loss of income would be a major concern for many jurors in lengthy trials.

Ten years ago, Arizona took a bold step to address the issue of financial hardship for jurors serving in lengthy trials by creating the Arizona Lengthy Trial Fund (ALTF).\(^2\) The ALTF reimburses jurors impaneled in trials lasting more than five days for lost income up to $300 per day retroactively to the first day of trial. Jurors who are unemployed or who earn less than $40 per day are eligible for a $40-per-day minimum payment, which includes the $12-per-day juror fee. The ALTF is administered by the Administrative Office of the Courts and is funded by a $15 fee on complaints, answers, and motions to intervene in civil cases filed in the superior courts.

From a fiscal perspective, the ALTF is self-sustaining insofar that revenues have consistently exceeded expenditures. In fiscal year 2013, for example, statewide revenues for the ALTF were $800,000, and expenditures for the 869 jurors that received ALTF payments totaled approximately $518,000. The average daily payment for those jurors was $52.33, and the average length of trial was 11.4 days.

The more important question, however, is whether the ALTF makes it possible for jurors who would otherwise be excused for hardship to serve in lengthy trials. I recently had the opportunity to examine data from the superior courts in Maricopa and Pima County that provides a more complete picture of the individuals who are receiving these payments and the likelihood that they could have served without support from the ALTF.

From March 2012 through February 2014, a total of 1,129 people from 327 trials in Maricopa County (approximately 3 per trial), and 368 people in 81 trials in Pima County (approximately 5 per trial), received ALTF payments. Based on the Arizona statute, lengthy trials are defined as trials lasting more than five days, or approximately 21 percent of trials in Maricopa County and 10 percent in Pima County during this period. Just under half (47 percent) of the Maricopa County jurors receiving ALTF payments were retired, and 17 percent were unemployed and eligible to receive the $40 minimum payment ($12 statutory juror fee plus $28 supplemental ALTF payment). Nearly two-thirds of the Pima County jurors (63 percent) received the minimum payment.

For Maricopa County jurors who were employed, the average amount of compensation was $85.13 per day (reimbursing lost income for jurors making approximately $22,000 per year). Ninety percent of Maricopa County jurors (90th percentile) received $116 or less per day in ALTF compensation (reimbursing lost income for jurors making approximately $30,000 or less per year). Only two jurors (less than 0.2 percent) qualified for the maximum benefit of $300 per day.

Although Pima County had a larger proportion of jurors receiving the minimum rate, those who were employed received higher daily compensation. The average daily rate for Pima County jurors was $122.70 per day (reimbursing...
A California study of financial hardship associated with jury service found that one-third of jurors who were employed worked for employers that provided no compensation for jury service.

lost income for jurors making approximately $32,000 per year. Ninety percent of Pima County jurors (90th percentile) received $274 or less per day in ALTF compensation (reimbursing lost income for jurors making approximately $71,000 or less per year). Eleven jurors (3 percent) qualified for the maximum benefit of $300 per day.

In addition to documentation related to the ALTF compensation, Maricopa County collects demographic information about its jurors. The demographic composition of jurors receiving ALTF compensation closely mirrors the demographic composition of the jury-eligible population in Maricopa County with a few exceptions: 1) Women were more likely to receive ALTF compensation than men, which may reflect employer policies concerning compensation for employees serving as trial jurors in occupations dominated by women. There was no difference, however, in the amount of ALTF compensation for men and women. 2) Hispanics were less likely to receive ALTF compensation than would be expected given the percentage of jury-eligible Hispanics in Maricopa County. The percentage of Hispanic ALTF recipients does reflect the appearance rate for Hispanics in the jury pool of the Maricopa Superior Court.

What is clear from these data is that the ALTF enables jurors to serve who would otherwise be unable to participate as trial jurors due to financial hardship. As a result, impaneled juries are considerably more diverse than they would have been if the ALTF were not available as supplemental financial support. Although some of the prospective jurors on the venires were invariably excused due to preexisting commitments or medical hardship, it is likely that the jury selection process was faster, was more efficient, and required smaller venires once jurors were assured that they would not suffer financial hardship if selected as trial jurors on the lengthy trial. The income levels for jurors receiving ALTF compensation illustrates that the ALTF program is being used appropriately to support individuals who would experience financial hardship if required to serve. From a fiscal standpoint, expenditures have consistently been less than originally contemplated based on the formulas established to fund the ALTF program.

As originally proposed, the ALTF was model legislation that was part of the Jury Patriotism Act sponsored by the American Legislative Exchange Council (ALEC).³ Louisiana, Mississippi, and Oklahoma have also enacted the Lengthy Trial Fund portions of the legislation, although those states never implemented the necessary funding mechanisms to support the program. It is clear from Arizona’s experience over the past decade that this program works as it was originally intended and is financially self-sustaining. So now the question becomes what is everyone waiting for?

### ABOUT THE AUTHOR
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### NOTES
2 Ariz. Rev. Stat. 21-222 (2014). Originally, the Lengthy Trial Fund provisions were established to reimburse jurors for lost income in trials lasting more than 10 days retroactively to the sixth day of jury service. After assessing the fiscal impact of the legislation, the Arizona legislative concluded that the revenues for the ALTF were more than sufficient to adjust the eligibility for compensation to jurors serving in trials lasting more than 5 days retroactively to the first day of jury service.
3 The American Legislative Exchange Council works to advance limited government, free markets, and federalism at the state level through a nonpartisan public-private partnership of America’s state legislators, members of the private sector, and the general public.
SHORT, SUMMARY & EXPEDITED

THE EVOLUTION OF CIVIL JURY TRIALS
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THE EVOLUTION OF CIVIL JURY TRIALS

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Since the early 20th century, American courts have struggled to design procedures to provide litigants with speedy, inexpensive, and fair resolutions to civil cases. Many of the court reform efforts of the 20th century focused on the inherent uncertainty that civil litigants face in personal and business affairs due to court delay, excessive litigation expenses, and procedural complexity. Simultaneously, courts struggled to manage rapidly expanding criminal, family, and juvenile caseloads. In 1934, the federal judiciary adopted rules of civil procedure to provide uniformity across the federal courts. Rule 1 defined the rules as intended “to secure the just, speedy, and inexpensive determination of every action and proceeding.” The vast majority of states followed suit by enacting state rules of civil procedure that often mirrored the federal rules verbatim. In subsequent decades, courts experimented with a variety of procedural and administrative reforms including simplified evidentiary requirements for small-claims cases, expanded discovery (including automatic disclosure of witnesses), differentiated caseload management, increased judicial case management, and alternative dispute resolution (ADR) programs.

One such reform—the summary jury trial—was developed in the early 1980s as a way for litigants to obtain an indication of how a jury would likely decide a case, providing a basis for subsequent settlement negotiations. Federal District Court Judge Thomas Lambros, sitting in the Northern District of Ohio, is credited with the original idea for the summary jury trial. In a 1984 article published in Federal Rules Decisions, he described his efforts in 1980 to resolve two personal injury cases using alternative dispute resolution techniques. In spite of numerous attempts, the parties had refused to settle, believing that each could obtain a better outcome from a jury trial. It struck Judge Lambros that if the parties could preview what a jury would do, they would be more likely to settle.

The procedure that Judge Lambros developed was essentially an abbreviated, nonbinding jury trial before a six-person jury selected from a ten-person jury panel. The parties were given up to one hour to present an oral summary of
their respective cases. Although the attorneys did not formally present evidence during the proceeding, all representations about the evidence had to be supported by discovery materials, such as depositions, stipulations, documents, and formal admissions that would otherwise be admissible at trial. Accordingly, Judge Lambros employed this technique only in cases for which discovery was complete and no dispositive motions were pending. The summary jury trial itself was private, and no formal record kept of the proceedings. In spite of this relative informality, Judge Lambros did require that all parties with settlement authority attend the proceeding. The parties were not required to accept the jury’s verdict as a valid, binding decision, and could later opt for a full jury trial if desired. But some attorneys would stipulate that a consensus verdict would be deemed a final determination, permitting the court to enter a judgment on the merits.

Over the four-year period from 1980 to 1984, 88 cases were selected for summary jury trial in the Northern District of Ohio. More than half ultimately settled before the summary jury trial was held, and 92% of the remaining cases settled after the summary jury trial. Judge Lambros estimated that the procedure saved the court more than $73,000 in jury fees alone. The savings to litigants in reduced attorney fees and trial expenses would be considerably more.

In Judge Lambros’s eyes, the summary jury trial was a form of ADR that explicitly incorporated the concept of trial by jury, but eliminated the risk of a binding decision and the expense associated with a lengthy jury trial. He justified the use of the summary jury trial under the authority of Rule 16 of the Rules of Civil Procedure, which states that “the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conference before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case.” But the success of the summary jury trial, according to Judge Lambros, depended on its procedural flexibility. He warned that the rules adopted by the Northern District of Ohio were not absolute rules to be followed in every case, much less in every court. He encouraged other state and federal courts to adapt the summary jury trial format to comport with local circumstances.

Over the next three decades, a number of courts across the country learned of Lambros’s summary jury trial procedure or one of its procedural offspring and implemented some variation in their own jurisdictions in an effort to improve civil case management. Most of these programs share a few basic characteristics. For example, they are designed specifically for factually and legally straightforward cases involving lower-value damage awards. Because the facts and law are
relatively simple, these cases require less discovery and are trial-ready in a much shorter period of time compared to other civil cases. Moreover, the lack of factual complexity means that live expert testimony is usually not required to explain the nuances of the evidence to the jury. Assuming no serious disputes about evidentiary authenticity or foundation, the parties can stipulate to the admission of documentary evidence to support their respective positions at trial. The procedures developed to manage summary jury trial programs generally offer an earlier trial date, a truncated pretrial process, simplified trial procedures, or some combination thereof.

A close look at these courts, however, reveals that although the details of these programs may be superficially similar to Lambros’s procedure, in many instances they were designed to address very different problems than the unreasonable litigant expectations identified by Judge Lambros. Some courts found that a modified summary jury trial procedure provided solutions to such myriad problems as trial-calendaring obstacles, disproportionately high litigation costs associated with jury trials (especially expert witness fees), dissatisfaction with mandatory ADR programs, and inconsistent pretrial management associated with the use of master calendars for civil cases.

These courts also introduced a variety of modifications to Lambros’s basic procedure. For example, some courts view their program as one of several ADR tracks, while others view it as a legitimate jury trial. In some courts, a regularly appointed or elected trial judge presides over the summary jury trial; other rules authorize a magistrate, judge pro tempore, or even an experienced member of the local bar to supervise the proceeding. The size of the jury ranges from as few as four to as many as eight jurors. Some court rules expedite the trial date for cases assigned to the program, but the trial procedures themselves are identical to those employed for a regular civil jury trial. Other rules mandate an abbreviated trial, placing restrictions on the number of live witnesses or the form of expert evidence. Some programs result in a binding, enforceable verdict as compared to the advisory verdict rendered in Lambros’s procedure. Finally, some programs permit the litigants to appeal an adverse verdict while others severely restrict the right to appeal. Even the name of the program differs from court to court: summary jury trial, short trial, expedited jury trial, etc.

This monograph examines the development, evolution, and operation of summary jury trial programs in six jurisdictions. In four of these jurisdictions—Charleston County, South Carolina; New York; Maricopa County, Arizona; and Clark County, Nevada—the programs have
been in operation for a decade or more. These were chosen largely due to their longevity, which provides a solid track record for assessing their respective advantages and disadvantages. The programs in the remaining two jurisdictions (Multnomah County, Oregon, and California) have been implemented more recently. In addition to addressing perennial concerns about uncertainty, delay, and expense, these programs also focus on emerging concerns in civil case processing, such as ensuring access to the courts for lower-value cases and countering rapidly deteriorating attorney trial skills due to underuse in the contemporary civil justice system.

The respective programs are described as case studies based on interviews that NCSC project staff conducted with trial judges, attorneys, and court staff during a series of site visits in 2011. Where possible, the NCSC staff also observed one or more summary jury trials in those courts. Each case study describes the institutional and
procedural structure of the program and, if available, objective information about the number of cases assigned to these programs and their respective outcomes. Because these programs developed in response to different problems and with different institutional constraints, the case studies also include descriptions of those factors and the impact they have had on program operations. At the end of each case study is a brief section with references and resources that includes contact information for the program supervisors or liaisons; citations to authorizing statutes and court rules; and model motions, orders, and forms employed in those programs. The concluding chapter of the monograph discusses lessons to be learned from these six programs for courts that may be interested in developing similar programs.

Some explanation about the terminology employed in this monograph is in order. State courts often use different terms to describe the same thing. For example, all of the case studies in this monograph describe programs implemented in the trial courts of general jurisdiction in their respective states. Because they are general jurisdiction courts, they manage a variety of case types—criminal, civil, family, and sometimes probate and traffic. But the names of those courts differ from state to state. New York State refers to its general jurisdiction trial court as the “supreme court.” Arizona and California call them “superior courts.” Oregon and South Carolina call them “circuit courts,” while Nevada has the “district court.” Out of respect for the local culture in each of these sites, this monograph employs the local terminology in the case studies. Readers who superimpose their own institutional terminology may mistakenly understand these programs to be housed within limited jurisdiction courts, or perhaps even appellate courts. The use of local terminology applies as well to other potentially confusing references, including those for trial judges, court dockets and calendars, and court staff, including clerks of court, commissioners, and court administrators. To the extent that a site employs local terminology in a way that might be easily confused, the case studies include clarifying footnotes or parenthetical descriptions.
### South Carolina 9th Judicial Circuit Summary Jury Trial Program

Originated in Charleston County in the 1980s. First modeled on the federal summary jury trial procedure and designed to adjudicate uninsured motorist and small claims cases. Highest summary jury trial volume is in Charleston County, with limited use in Berkeley and Dorchester counties. Statewide expansion is currently under consideration.

- 6-person jury is selected from a 10-person panel. Verdicts must be unanimous. Parties have 2 peremptory challenges each.
- Experienced trial lawyers, often with mediation training, serve as “special referees.”
- No formal rules on procedures. Binding decision. Special referee meets with parties 7-10 days before trial to rule on evidence and arguments. Trial is not recorded, no appeal.

### Maricopa County (Arizona) Superior Court Short Trial Program

Implemented in 1997 by Judge Stanley Kaufman in consultation with Civil Bench/Bar Committee to address dissatisfaction with mandatory arbitration program for cases valued at less than $50,000.

- 4-person jury is selected from a 10-person panel. Verdict requires 3/4 agreement. Parties have 3 peremptory challenges each.
- Judge pro tempore oversees trial only; cases remain on superior court judges’ docket for all pretrial management including appointment of arbitrator and/or judge pro tempore.
- Parties have 2 hours each to present case; only 1 live witness testifies; all other evidence admitted as deposition summaries, documentary evidence in trial notebook. No appeal except for fraud.

### New York State Summary Jury Trial Program: Bronx County

Originated in Chautauqua County by Judge Gerace in 1998. The program spread to surrounding areas, then to Bronx and other New York City burroughs, and is now nearly statewide. The New York State Office of Court Administration appointed a statewide coordinator in 2006.

- 6-to 8-person jury is selected from a 16-to-18-person jury panel. Verdict requires 5/6 agreement. Parties have 2 peremptories each.
- 2.5 dedicated judges assigned to summary jury trial docket. Judges facilitate and rule during trial, court attorney supervises pretrial and voir dire.
- Parties have 30 minutes for voir dire (court attorney oversees), judge 15-minute opening, charges on law 20 minutes, 10-minute openings, presentation in 1 hour (includes cross), 10 minute rebuttal; no more than 2 live/video witnesses, medical witnesses limited to reports; 10-to-15-minute closings. Primarily binding decisions (not in upstate), no appeal. Judgment not recorded.
### Nevada 8th Judicial District (Clark County) Short Trial Program

Implemented statewide in 2000 to address cost of litigation in lower-value cases, the length of time to bring cases to trial. Procedure established an alternative to mandatory arbitration or as trial de novo following appeal from arbitration. Non-arbitration cases can stipulate to short trial procedures.

- 4-person jury is selected from a 12-person panel. Verdict requires 3/4 agreement. Parties have 2 peremptory challenges each.
- Judge pro tempore oversees all pretrial management and trial activities.
- Parties have 15 minutes of voir dire; 3 hours each to present case; jury verdict is binding, enforceable judgment, but can be appealed to Nevada Supreme Court; short trial rules strongly encourage expert evidence by written report. Jurors given trial notebook with key documentary evidence.

### Multnomah County, Oregon Expedited Civil Jury Trial Program

Implemented statewide May 2010. Originated as a parallel effort by the Oregon ABOTA and a Special Committee of the Multnomah County Circuit Court to address the implications of vanishing trials for legal practice. The Multnomah County Circuit Court was also concerned about problems associated with master calendar for civil cases. Multnomah County was first to implement the ECJT. The first trial was held in August 2010.

- 6-person jury. Verdict requires 5/6 agreement.
- ECJT trials are assigned to a circuit court judge for all pretrial management and trial proceedings.
- All trial procedures same as for regular jury trials, although shorter voir dire due to reduced panel size. Parties are encouraged, but not required, to minimize live witness testimony. No time limits. No limits on appeal.

### California Expedited Jury Trial Program

The Expedited Jury Trials Act, California Rules of Court and Expedited Jury Trial Information Sheet became effective January 2011. The procedure was developed by the Small Claims Working Group composed of members of the Judicial Council’s Civil and Small Claims Advisory Committee.

- 8-person jury, no alternates. Verdict requires 3/4 agreement. Parties have 3 peremptory challenges each.
- Judicial officers assigned by presiding judge; may be temporary judge appointed by court, but not someone requested by the parties.
- Parties and judge have 15 minutes voir dire; 3 hours each side for presentation of case (witnesses, evidence, arguments). Parties can agree to many modifications, e.g., evidentiary issues, timing of filing documents, fewer jurors needed for verdict, time for voir dire, allocation of time per side. Verdict is binding; very limited appeals or post-trial motions.
Charleston County’s Summary Jury Trial Program: A Flexible Alternative to Resolve Disputes

The summary jury trial (SJT) is a creative compromise among the local civil bar, the judges of the Ninth Circuit, and the Clerk of Court to augment the supply of a scarce judicial resource (time) with knowledgeable local attorneys to serve as temporary judges in civil trials in exchange for the use of relatively abundant court resources (courtrooms and jurors) with which to try cases. Thus far, the SJT program has been remarkably successful in Charleston County, so much so that there are proposals to expand the SJT model statewide to more effectively use judicial resources and reduce existing backlogs. The challenge of expanding the program statewide depends on either replicating the same conditions seen in Charleston County in other jurisdictions or providing sufficient flexibility in the program’s procedures to address each jurisdiction’s unique conditions. This case study is based on interviews with judges, lawyers, the clerk of court, and South Carolina’s Chief Justice Jean Hoefer Toal, along with observations of an SJT conducted in August 2011 during a visit to Charleston County in the Ninth Judicial Circuit. It describes the program’s history and current operational procedures. It then discusses the proposal by the chief justice to expand the program statewide.

1 There is some dispute about how best to refer to the program. Traditionally, the program was modeled after the federal “summary jury trial,” and as such, the name has transferred. Proponents of the term “summary jury trial” argue that if the alternative term, “fast track jury trial” were used, litigants who opted for this program may believe that the case is set on a separate or faster track to reach a trial date, thereby conferring special treatment, which is not necessarily true. On the other hand, proponents of the term “fast track jury trial” are concerned that using the term “summary jury trial” may be confused with the limited jurisdiction magistrates court, referred to as “summary court.” For the purposes of this publication, we will refer hereinafter to the program as the summary jury trial (SJT).

2 The NCSC team observed a SJT that was recreated from a previously held SJT. The attorneys presented the actual case facts; stand-in actors presented the testimony of the actual witnesses. The attorneys and SJT judge reenacted the procedures as used in the original SJT.

3 The description of the SJT is based on the experiences of Charleston County. Variations in local practice are noted where applicable, but the NCSC did not observe or interview anyone outside of Charleston County during its site visit.
South Carolina

Program History

The circuit court in Charleston County, South Carolina hears both criminal and civil cases. Civil disputes are heard by the civil branch of the Circuit Court, the Court of Common Pleas. Although there is no jurisdictional minimum for the court of common pleas, the limited jurisdiction court, the magistrates court, has a maximum limit of $7,500. The SJT is voluntary for civil litigants who file claims in the court of common pleas. While the SJT has been used for a wide range of cases, nearly half of those utilizing the SJT option are parties in motor vehicle disputes. Motor vehicle trials comprise nearly half of the court’s civil jury trials; in the last five years the percentage of automobile jury trials in the Court of Common Pleas ranged from a low of 43% in 2009 to a high of 63% in 2008.

The SJT was first used in Charleston County by attorneys and judges who had exposure to this practice in the federal courts. SJTs have been held primarily in the Ninth Circuit (Charleston and Berkeley counties), with some limited use in the First Circuit (Dorchester, Orangeburg, and Calhoun counties). It is undocumented as to when the first trial was held (~mid-1980s), but the trials were originally nonbinding, as modeled after the federal court program.

The federal model, used as a basis for the summary jury trial in Charleston County, was defined by four key features: (1) trials are short, (2) relaxed rules of evidence apply, (3) litigants avoid costly expert witness fees with fewer live witnesses testifying, and (4) the verdict is nonbinding. The federal model was largely an adaptation used by federal courts in South Carolina based on Judge Lambros’s program. It was used as a mandatory case management technique, requiring parties to submit to compulsory SJTs before trying a case to a jury.7 The current program, as used in the Court of Common Pleas in Charleston County, diverges from the federal model in two ways: (1) it is an attorney-controlled program in which entry into the program is by mutual consent, and (2) the verdict is now binding rather than an advisory opinion on which to base subsequent settlement negotiations.

The original adaptation of the federal model into the Ninth Circuit Court occurred in a very informal manner. Several mock jury trials were held in which attorneys paid the jurors directly for their time. Verdicts were originally treated as an advisory decision. However, as the use of this technique evolved and gathered traction among the local bar, the clerk of court and Judge Vick Rawl advocated for and secured the use of binding summary jury verdicts, particularly if the trials used court facilities, but also as a way to clear the court’s calendar, allowing circuit court judges to hear other cases. As Chief Justice Toal puts it, “it is a big safety valve for backlog issues.” Moreover, it is a compelling argument to convince attorneys who saw the federal model as an ineffective use of resources only to arrive at an advisory decision that this was a viable option for resolving disputes.

Judge Rawl and Judge Daniel Pieper, along with the clerk of court, Julie Armstrong, and members of the bar, such as Sam Clawson, Paul Gibson, and Matt Story, all had a hand in shaping the procedures for the Ninth Circuit’s program. Judge Pieper was the primary judicial force behind the SJT and facilitated its development. The clerk of court and Judge Pieper held a bench and bar meeting to acquaint the bar with the SJT, present it as a viable and inexpensive option to resolve cases, and actively solicit any concerns or questions they may have.

SJT Procedures

In Charleston, the SJT is primarily an attorney-controlled program that encourages the resolution of legal issues. The SJT program operates about midway along a continuum from mediation and arbitration on one end to the traditional jury trial on the other. While some other programs described in this monograph underwent development formally by a stakeholder-planning group, this program developed more organically; it was not specifically designed to address any one problem. Instead, the SJT has evolved, primarily by members of the local bar, as a means to work around unsatisfactory options along the dispute resolution continuum.

Traditional arbitration has a reputation among some lawyers as enforcing too much rigidity and resulting in unsatisfactory awards. As support for that opinion, court data indicate that approximately 90 percent of all cases diverted to ADR return to the court docket. According to members of the bar, arbitrators will often try to please both parties, rendering a decision that is unfavorable to both.

On the other hand, jury trials in South Carolina’s circuit court are assigned to a rolling docket. Rule 40 of the South Carolina Rules of Civil Procedure dictate that when a case is placed on the jury trial roster, it can be called for
Trial after 30 days. Depending on the number of judges sitting during the term of court (~20 cases assigned per judge per court term), the case is subject to be called at anytime during the assigned term (typically a one-week period). However, all other cases that appear on the jury trial roster, not necessarily restricted to those assigned that week, are also subject to be called with only a 24-hour notice. The certainty of knowing the trial date is, therefore, subject to whether other cases scheduled for that week’s term of court settle or file for a continuance. This presents a challenge to attorneys who must, on short notice, manage client and witness schedules. The SJT affords attorneys a clear benefit—a date certain for trial.

All SJTs are held before a special referee, who is jointly selected and hired by the attorneys in the case; the parties usually split the fee of approximately $1,000 equally. Pursuant to §14-11-60 and South Carolina Rules of Civil Procedure 39 (see Contacts and References: Charleston County Summary Jury Trial), the parties agree to try the case through an SJT before a special referee, hereinafter referred to as the “SJT judge.” The presiding circuit court judge, upon agreement by the parties, may in any case appoint an SJT judge who has all the powers of a master-in-equity and thereby has authority to rule in the case as if he or she were a sitting circuit court judge. Typically, the SJT judges are practicing attorneys, well-respected among the members of the local bar, certified in mediation, and have an active legal practice in the community. To communicate their role to the jurors at trial, some SJT judges ceremoniously put on the judge’s robe in the presence of the jurors as they explain their responsibilities in presiding over the trial before them.

The SJT affords the parties a much-welcomed method of pretrial management that is largely absent in non-SJT cases. Seven to ten days before the trial date, the attorneys meet with the SJT judge to agree on the expectations for the trial. At this planning session, the parties also discuss any evidentiary rulings that are at issue and agree to the charges that will be given to the jurors, minimizing surprises at trial. The South Carolina civil trial docket management otherwise rarely affords this opportunity.

One substantial benefit of hosting SJTs in Charleston is the availability of courtrooms, primarily as a result of a new courthouse constructed following Hurricane Hugo, which hit South Carolina in 1989. SJTs are held in a regular courtroom of the circuit court. The attorneys in the case coordinate with the SJT judge to select a date, contact the court, and request the use of a courtroom. Once this occurs, the case is officially removed from the court’s jury trial docket.

Jurors who serve on an SJT are selected by a circuit court judge from the same pool as all civil juries. On Mondays, six jurors are selected from a ten-member panel, with two peremptory
challenges allowed per party. In South Carolina, the procedure for all jury trials is to use a bifurcated jury selection process. A circuit court judge conducts voir dire for all trials scheduled for the week. The case is then assigned to another circuit court judge who presides over the trial. This process, as applied to the SJT, allows attorneys in the case to propose voir dire questions to the circuit court judge assigned to oversee jury selection. The circuit court judge usually completes jury selection in approximately ten minutes per case. Once jurors are selected, they are briefed on their responsibilities and directed to report to the assigned courtroom for the SJT.

Jury service is for one week or the length of a trial. As such, jurors who serve on an SJT are afforded a comparatively short length of service. After completing jury service, jurors receive an exemption from further jury service for three years. Jurors are compensated at $10 a day, along with reimbursement for mileage.

Trials are held in courtrooms, and are open to the public. Typically, trials last no more than one day, occasionally continuing on to a second day. The day begins at 9:00 AM with a break for lunch around 12:30. The case is usually submitted to the jury by 2:30 or 3:00 PM. On average, jury deliberations last two hours. Trials are not scheduled for Fridays to avoid the potential for a weekend interruption.

SJT offers attorneys greater flexibility in the presentation of evidence, which translates into potential costs savings. There are no specific time limits enforced on the parties, but the attorneys generally agree to a condensed presentation of evidence. Part of the condensed evidence includes the use of video testimony or depositions, when needed, which drastically reduces the cost of experts; expert witnesses for SJTs typically do not testify live in court. The parties routinely agree to exceptions to the South Carolina Rules of Evidence that are specified in a Consent Order that the parties submit to a sitting circuit court judge. With the exception of these agreed-upon changes stated in the Consent Order, the SJT judge will conduct the trial in accordance with the South Carolina Rules of Evidence. However, no clerk or reporter is present as there is no formal record of the proceedings and no appeal.

While the unanimous six-person jury decision is binding on the parties, the court does not have the power to enforce the judgment. During interviews with the participants, however, no circumstances arose in which enforcement was at issue. A copy of the verdict may be placed in the case file, but there is no requirement or formal judgment entered into the case management system. Currently, the clerk’s office in Charleston County manually tracks all SJTs.

8 Steven Croley, Summary Jury Trials in Charleston County, South Carolina, Loy. L.A. L. Rev. at 1618-19 (2008). Croley reported observations to the contrary. Interviews and observations by NCSC revealed that this is incorrect or, at minimum, is no longer private as described by Croley.

9 An exception was noted by interviewees that Berkeley County records the verdict as a judgment that must be satisfied.
Jurors are not afforded the opportunity to take notes during the trial. In fact, jurors are specifically asked not to take notes. Despite widespread acceptance of this practice (over two-thirds of both state and federal courts permit notetaking) the need in a shortened, summary trial may be less consequential as compared to the need in a lengthier jury trial. Moreover, the summarized materials are provided to the jurors for purposes of deliberation, and jurors are permitted to ask questions, in writing, through the bailiff during deliberations.

As stated previously, most SJTs are simple automobile torts. Although the program is designed for a wide range of disputes, some Charleston attorneys believe SJTs are best suited for motor vehicle claims or cases in which liability is not at issue. Yet others advocate that the SJT has been successfully used in more complex cases; in one case, the reported damage award was $600,000.

Program Benefits

The consensus opinion in Charleston among its users is that the SJT benefits all; as one attorney said, “Both sides win in this process—quicker, cheaper, and with certainty.” The benefits extend to the litigants, the attorneys, the court, and even the jurors. The SJT judges and attorneys interviewed in Charleston agreed that the only one who loses with a SJT is possibly the expert, who is not afforded a witness fee to appear in court.

From the litigant’s perspective, the parties are given their “day in court” without the costs associated with a full trial. This method affords the parties a chance to tell their story to a jury that decides the case. Another benefit to litigants is the possibility of receiving payment more expeditiously. Virtually all parties enter into a high/low agreement when opting for an SJT. While the low can vary depending on the negotiated agreement between the parties, the high is typically the insurance policy limit. As an incentive for the plaintiff to agree to the high/low, the plaintiff may be able to secure a disbursement of the agreed low figure upon entering into the agreement.

By far the most compelling benefit of the SJT from the attorneys’ perspective is the trial date certainty. Charleston attorneys, considering the unpredictability inherent in the rolling docket system, applaud the benefits enjoyed by having a trial date scheduled with certainty. Logistically, this facilitates the attorneys’ ability to predictably schedule witnesses and clients. Attorneys also suggest that having the option of a SJT, similar to the litigant’s benefit of having their day in court, allows efforts during discovery to be meaningful, as attorneys are able to make use of what was gathered in deposition. Additionally, attorneys praise the SJT as an opportunity for younger

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attorneys to gain trial experience. The decline in trial rates nationwide has contributed to a lack of trial experience by new attorneys. Overall, the SJT provides attorneys with yet another mechanism to move difficult cases (or difficult clients, who may have reached an impasse in settlement negotiations) along.

Similarly, the court is encouraged by the program’s ability to procure progression toward resolution in difficult cases. When parties opt for an SJT, this frees circuit court judges to try other cases and maximizes the use of judicial resources. Ultimately, the court is able to redistribute resources where there is the greatest need. It maximizes judicial resources and reduces backlog. For example, jurors and courtrooms are an available resource, judge time is more limited. When civil cases are diverted to a SJT, judges can shift their time and attention to other issues, such as the criminal case backlog. This bolsters the court’s capacity to resolve disputes and serve the public.

Jurors also share in the program’s benefits. Juror exit interviews suggest that SJT jurors feel the process is smoother and attorneys are better prepared. A common complaint of jurors nationwide is that their time is not respected. As anecdotal testament to improved juror satisfaction with SJTs, one juror approached an SJT judge at a local establishment and shared his unique perspective after having served on both a regular jury trial and an SJT. This juror interpreted the lack of objections, interruptions in the presentation of evidence, and the minimal sidebars in the SJT as admirable preparation by the attorneys and enhanced organizational skills by the SJT judge.

Challenges of Statewide Expansion

Undoubtedly as a result of the previously described benefits, the SJT has caught the attention of Chief Justice Toal, who plans to promote the program as a feasible dispute resolution alternative statewide. She is currently reviewing requests submitted to the South Carolina Supreme Court to expand the program to Horry and Beaufort counties.

The SJT, while it serves a clear benefit to those who choose it as well as to the court and the jurors, has several challenges to be a viable statewide option for resolving civil disputes in South Carolina. The court will need to consider attorney comfort with use of relaxed rules of evidence, the level of attorney preparation necessary to accommodate summary presentation of evidence, the availability of additional resources in the case of program expansion, and necessary efforts to market the program, all with an earnest consideration of the local culture, including specific jurisdictional needs.
SJT attorneys admit that while the day of trial is relatively smooth and efficient, an SJT can require as much, if not more, preparation than a traditional jury trial. A key benefit of the program is its flexibility. However, that advantage may also work to its detriment, in the perspective of some attorneys, as it requires experience to understand how best to negotiate relaxed use of the evidentiary rules. In effect, there is less predictability for newer, less experienced attorneys.

While South Carolina boasts of very short voir dire times, the timing as to when the jury is selected varies by preference of the judge assigned for that term. Some judges will select the SJT panel first; others will exhaust the selection of all of the common pleas panels before the SJT panel is selected, which requires the SJT attorneys to be present and prepared to begin the SJT, though generally no later than midday, depending on the selection judge’s practices. Either way, other courts will have to consider how best to implement jury selection practices for SJTs.

While Charleston is blessed with available courtrooms, other courthouses around the state will have to consider the availability of courtrooms or other suitable facilities in which to conduct the trial. The availability of human resources, both jurors and court personnel, is another consideration. For example, in Charleston County, the courtrooms access secure areas for circuit court judges that require a deputy marshal to be present when courtrooms are in use. As a result, use of courthouse facilities may also require staffing of specific court personnel.

In considering statewide expansion, Chief Justice Toal, and the South Carolina Supreme Court, may adopt a rule for mandatory arbitration and provide the SJT as an opt-out alternative. The Chief described it as “a carrot and stick approach.” Without adding additional judgeships, attorneys from across the state must be trained in the necessary procedures to facilitate the program’s expansion. In October of 2011, the Supreme Court passed a rule that requires all attorneys to be listed in a statewide database. This database will enable statewide coordination, through the administrative office of the courts, to maintain a roster of potential SJT judges.

The case management system does not currently provide a disposition code for tracking SJTs. Thus, statewide coordination would necessitate a data collection system using this code so that the clerks of court can manage and predict trends in the use of SJTs. Staff from the Charleston County Clerk of Court’s office agreed data tracking was needed; they graciously shared data collected manually that tracks the number of civil trials (both SJTs and circuit court jury trials) held in Charleston County in the past five years. These data reveal a slight downward trend in the number of SJTs, despite an upward trend in civil filings generally (see Figures 1 and 2).
An expansion of the program to other courts across South Carolina will require a concerted marketing effort. For one, Chief Justice Toal indicated the need for someone to serve as a statewide coordinator, overseeing the program. Moreover, a marketing effort requires that the plaintiff and defense bars both embrace the SJT. Repeat defendants, such as insurance carriers, as well as the plaintiff’s bar, will need to believe that the program offers a fair process – one that is not perceived as advantageous to one side or the other. In the recent past, Charleston attorneys traveled out of state to speak about the Charleston SJT. Their presentation to a mixed group of attorneys was initially met with resistance. Yet, when the audience heard about the program from an attorney who has tried cases before a summary jury (i.e., a plaintiff’s attorney speaking to the plaintiff’s bar and a defense attorney speaking directly to the defense bar) the message was more readily received and the SJT was seen as a legitimate method of resolving a case.

Attorneys who actively use the program in Charleston County suggest that replicating Charleston’s SJT model elsewhere without institutional credibility will not be fully embraced by members of the bar in other communities. Certainly, garnering the support of state leadership, such as the chief justice, the administrative office of the courts, and the clerks of court, is not only advisable, but necessary. Yet even with support of state-level leadership, the implementation in each circuit must be thoughtful with respect to the local legal culture and case-processing needs of the jurisdiction.
It is incumbent upon a jurisdiction adopting the SJT to plan for flexibility with which to tailor the program to address the needs and challenges of that particular jurisdiction. Wholesale adoption of the procedures without strategic planning runs the risk of introducing pitfalls and challenges where previously none existed.

**Contacts and References: Charleston County Summary Jury Trial Program**

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**Relevant Statutes/Rules**

S.C. Code Ann. §14-11-60 (La. Co-op. 1976): In case of a vacancy in the office of master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all of the powers of a master-in-equity. The special referee must be compensated by the parties involved in the action.

Per consent order appointing special summary jury trial judge per S.C. Code Ann. §14-11-60 and by South Carolina Rule of Civil Procedure 39 gives permission to the parties to try a case in a jury trial before a special referee.
WHEREAS, counsel has agreed to allow __________ to serve as a special master in the Summary Jury Trial proceedings; and

ORDERED, ADJUDGED AND DECREED that __________ is to serve as a special master for the purpose of the binding Summary Jury Trial and he shall have the authority to rule on all matters with regard to procedures and evidence as if he/she was a sitting Circuit Court Judge, subject to the Order Granting a Summary Jury Trial.

AND IT IS SO ORDERED this _____ day of ____________________, 2012, at ____________________, South Carolina.

Chief Administrative Judge

I SO MOVE:      WE CONSENT:

By: _________________________     By: _________________________

Attorney for Defendant          Attorney for Plaintiff
WHEREAS, the parties have a dispute with regard to the value of this case; and

WHEREAS, the parties wish to seek a Summary Jury Trial in order to assist in establishing a binding settlement value in this case\(^1\); and

WHEREAS, the parties have agreed to bear their own cost, regardless of the jury verdict; and

WHEREAS, the parties agree that the Defendant admits to simple negligence, and that the only issues to be decided by the Summary Trial Jury are proximate cause and actual damages, and

WHEREAS, the parties wish to simulate, as close as possible, a jury trial as to the issues of proximate cause and actual damages only; and

WHEREAS, the parties have agreed to allow the admission of medical records, reports, bills, Affidavits, depositions and video depositions in lieu of live testimony, telephonic or video depositions, and

WHEREAS, each party agrees to provide the other party with copies of all such

\(^{1}\) The parties have agreed that the jury verdict will be binding, subject to the terms and conditions of a letter of agreement, signed by counsel, to be disclosed only after a verdict has been rendered.
medical records, reports, bills, Affidavits, depositions, video depositions, telephonic or video depositions and any other documents upon which either party intends to rely and/or introduce into evidence at least fourteen (14) days prior to the scheduled Summary Jury Trial; and

WHEREAS, the parties agree that any reply Affidavits or documents to be introduced in reply to the other party's case shall be presented to the other party at least three (3) days prior to the date scheduled for the Summary Jury Trial. It is therefore,

ORDERED, ADJUDGED AND DECREED that Charleston County may make available a courtroom facility and not more than ten (10) jurors from the jury venire for that week so that the parties may select a jury of six (6) to hear the case. It is furthermore,

ORDERED, ADJUDGED AND DECREED that a special master is to be appointed by the Chief Administrative Judge with consent of both parties for the purpose of the binding Summary Jury Trial and he/she shall have the authority to rule on all matters with regard to procedures and evidence as if he/she was a sitting Circuit Court Judge, subject to this Order. It is furthermore,

ORDERED, ADJUDGED AND DECREED that the procedures outlined hereinabove concerning the use of medical records, reports, bills, Affidavits, depositions, video depositions, or video depositions and other documentary evidence shall be utilized at the Summary Jury Trial and the procedures for providing those documents to opposing parties are hereby adopted as a part of this order. It is furthermore,
ORDERED, ADJUDGED AND DECREED that the parties shall be entitled to utilize the subpoena power authorized by the South Carolina Rules of Civil Procedure to compel attendance of witnesses, if necessary, at the Summary Jury Trial. AND IT IS SO ORDERED this _____ day of __________________, 2012, at ________________, South Carolina.

Chief Administrative Judge

I SO MOVE: \hspace{1cm} WE CONSENT: 

By: ______________________\hspace{1cm} By: ______________________

Attorney for Defendant\hspace{1cm} Attorney for Plaintiff
The short trial program in the Maricopa County Superior Court originated in discussions by the court’s Civil Study Committee, a bench-bar committee composed of experienced civil trial attorneys who meet periodically with the presiding civil judge and other judges assigned to the Civil Division to discuss problems and concerns. A frequent topic during the mid-1990s was dissatisfaction by both the plaintiff and defense bars with the court’s mandatory arbitration program for cases valued at $50,000 or less. Under local court rules governing the mandatory arbitration program, all attorneys licensed by the state of Arizona with four or more years in practice and a professional mailing address in Maricopa County were required to serve as arbitration hearing officers for cases assigned to mandatory arbitration. It did not matter that the attorney may have had little or no experience in arbitration proceedings or interest in civil litigation generally. The court did not provide training for arbitrators, and compensation for this service was a negligible $75 per hearing day, so most lawyers had little financial incentive to spend time preparing for and conducting the arbitration hearing or drafting a decision. As a result, plaintiffs’ attorneys complained of unwarranted arbitration decisions for defendants while defense attorneys complained of unreasonably high arbitration awards for plaintiffs. For both sides of the civil bar, the only upside to the mandatory arbitration program was the fact that arbitration decisions were nonbinding and litigants could appeal an adverse decision and request a trial de novo in the superior court.

Under the leadership of Judge Stanley Kaufman (ret.), who was presiding judge of the Civil Division at the time, the committee implemented the short trial program in 1997 as an alternative for civil litigants who wanted
to appeal an unsatisfactory arbitration decision or bypass mandatory arbitration altogether. The program grew consistently from a few dozen trials per year in the late 1990s to more than one hundred in 2002, but then the local civil bar seemed to lose interest. The numbers of short trials dwindled to 50 or fewer per year in 2003 and 2004, and averaged only 18 per year from 2005 through 2009. Only 9 short trials were conducted each year in 2010 and 2011. This case study examines the rise and fall of the short trial program and the factors that have contributed to its demise in the Maricopa County Superior Court.

General Description of the Short Trial Program

The short trial program in the Maricopa County Superior Court allows civil litigants to opt for a streamlined jury trial as an alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision. Short trial procedures are also available to litigants in cases that are not subject to mandatory arbitration. Both parties in a civil case must stipulate to participation in the program by filing a notice in the superior court. Upon receipt of the motion for short trial, the judge presiding over the case refers it to the ADR Coordinator to schedule a trial date and select a judge pro tempore to preside over the short trial. Short trials are generally scheduled within 90 days of the referral. Judges pro tempore serve pro bono. Qualifications for judges pro tempore are the same as those for superior court judges—namely, that they be attorneys licensed to practice in Arizona, in good standing, and with a minimum of five years of practice experience. Currently 40 judges pro tempore have volunteered to preside over short trials.

11 There has been a gradual change in case management practices in the Civil Division in recent years. Rather than setting the trial date at a preliminary case management conference, many judges assigned to the Civil Division now defer setting cases for trial until all discovery and dispositive motions are complete. Only one or two trials are scheduled each week. As a result, jury trials are now being set two to three years into the future.

12 Judges pro tempore work in all areas of the court; those judges assigned to the Civil Division regularly conduct settlement conferences as part of routine pretrial case management.
Under the short trial rules, the parties select a four-person jury from a panel of ten prospective jurors (civil jury trials in the Superior Court usually have 8 jurors). The parties are allocated three peremptory challenges each. If one or more jurors are excused for cause, the number of peremptory challenges is reduced accordingly, and the first four qualified jurors are impaneled. The trial procedures permit the parties up to two hours each to present their case; however, they are restricted to only one live witness. All other evidence is admitted as documentary evidence in a trial notebook given to jurors as soon as the jury is sworn and the trial begins. The time and live-witness restrictions are intended to minimize litigation costs. During the trial, jurors are allowed all of the decision-making aids available to jurors in civil cases in the superior court: they are permitted to take notes, to submit written questions to witnesses, and to discuss the evidence among themselves before final deliberations. In addition to the evidence presented at trial, the trial notebooks contain the final jury instructions.

After the evidentiary portion of the trial is complete and the trial attorneys have made their closing arguments, the jury retires to deliberate. Three of the four jurors must agree to render a valid verdict. Once they have done so, the verdict is binding on the parties. If the trial was an appeal from an unsatisfactory arbitration decision, the verdict for the prevailing party at trial must better the arbitration decision by at least 23%, or the losing party at trial can collect reasonable attorneys’ fees and expert witness fees. No appeal from the verdict is permitted except for fraud. To date, no appeal from a short trial has been documented.

Most short trial cases are lower-value personal-injury cases, especially automobile torts involving soft-tissue injuries. In the past two years, only two trials involved claims other than personal-injury automobile torts; both were breach-of-contract cases. In many short trial cases, liability is conceded and the damage award is subject to a high-low agreement. The plaintiff win rate has averaged 88% over the past two years, but the vast majority of awards were less than $8,000. Only three of the short trials were appeals from an arbitration decision; in the remaining cases, the litigants had opted out of mandatory arbitration altogether. The trials themselves are conducted in any available courtroom in the superior court building.

**Evolution of the Short Trial Program**

The short trial program began on a fairly optimistic note. Originally designed as a mechanism for litigants to avoid the unpredictability of mandatory arbitration or appeal from an unfavorable arbitration decision, it offered a solution for longstanding complaints.

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13 Rule 77(f).
about that program. For those who opted out of mandatory arbitration altogether, it also avoided the possibility of incurring expenses for reasonable attorneys’ fees and expert witness fees if the short trial verdict did not improve the arbitrator’s decision by at least 10%. Although trial delay was not perceived as a serious problem at that time, litigants also believed that they could get a trial date faster under the short trial program than in the superior court. Anecdotal reports suggest that local insurance carriers, who were generally skeptical about whether arbitration awards reflected the same amount of damages that juries would award, were largely enthusiastic about the opportunity to develop a representative sample of jury awards on which to base settlement negotiations. Once the program was in place, it received a great deal of publicity and support from Judge Kaufman and judges assigned to the civil bench. As a result, the short trial program enjoyed a great deal of popularity during its early years, reaching a peak of 108 short trials in 2002 (see Figure 3).

Beginning in 2003, however, the number of short trials dropped off precipitously due to a variety of factors. Anecdotal reports suggest that arbitration awards gradually became more aligned with civil jury awards. This significantly diminished incentives for both plaintiff and defense counsel to appeal from arbitration judgments, especially given the risk of paying attorneys’ fees and expert witness fees to the opposing party if the appellant failed to improve the award by at least 10%. In 2007 the arbitration appeal penalty was increased to 23%, further reducing incentives to appeal from mandatory arbitration.

In addition to the strong likelihood that a jury verdict would not differ enough from an arbitrator’s decision to make it economically worthwhile to appeal, increasing numbers of civil trial attorneys began to question whether it made sense to seek a jury trial given the increased time and effort involved in preparing for and conducting a jury trial. Preparation for an arbitration hearing generally required only an hour or two, and the hearing itself rarely took more than a couple of hours, at most. Jury trials, on the other hand, required a great deal of preparation—intellectually, emotionally, and logistically—and would likely consume an entire day. In essence, the perceived benefits of a jury trial were considerably less than the combination of increased costs and increased risk of an adverse outcome, even if a litigant were simply considering the choice of opting out of mandatory arbitration in favor of a short trial.

14 In 2007 the arbitration appeal penalty was increased to 23%.
Procedural restrictions on short trials were widely viewed as additional barriers. Some attorneys expressed concern that the limits on the number of live witnesses and time constraints interfered with their ability to present a compelling argument for their clients. They believed that live testimony by witnesses, especially expert witnesses, was critical to witness credibility. Moreover, two hours was insufficient time in which to present all of the supporting documentation in the trial notebook; attorneys were doubtful that jurors took the time during deliberations to review documents that were not specifically referenced during trial. Litigants with meritorious cases could always choose a regular jury trial before an eight-person jury with no time or witness restrictions.

The inability to appeal an adverse verdict for any reason other than fraud also made the short trial option much less palatable than waiting for a full jury trial in the superior court. As one judge pro tempore noted, the only advantage of the short trial program for many plaintiff lawyers is that it offers a convenient forum in which to get rid of “dog cases” or appease an unreasonable client without appearing to abandon the client entirely.

Finally, in 2003, Judge Kaufman retired and the short trial program lost its most enthusiastic champion on the trial bench. Although many of the trial judges viewed the short trial program in a positive light, none stepped in to take Judge Kaufman’s place to continue marketing the short trial benefits to the trial bar. Because the program lacked strong judicial support, the short trial program lost its institutional stature and became “just another” optional ADR track.

Current Pros and Cons of the Short Trial Program

In spite of its relative lack of popularity, some trial attorneys continue to support the short trial program. One frequent participant in the Short Trial program prefers the short trial format to regular jury trials because she believes she can present evidence more clearly and persuasively than most witnesses can, especially expert witnesses. She also noted that, compared to superior court judges, judges pro tempore are less likely to interfere with stipulations by trial counsel concerning the contents of the trial notebooks, jury instructions, and other matters. “A good judge pro tem,” she noted, “understands that this is the attorneys’ trial and gets out of the way.”

Trial lawyers did have some positive comments about the current short trial program, particularly the opportunity to gain jury trial experience in relatively low-value cases. One attorney noted that a whole generation of younger lawyers has largely missed out on this experience, and there is a growing need to replace the generation of experienced trial
lawyers as they retire. Some experienced lawyers will occasionally do short trials to keep their skills sharp. Others pursue short trials solely for professional development, especially to secure a certified specialist designation or other professional imprimatur. As one attorney noted, jury trial experience can be an extremely valuable commodity for advertising purposes.

Judges pro tempore are also extremely positive about the short trial program. They view short trials as a great learning experience, an impressive addition to their professional credentials, and an opportunity to perform judicial tasks that are different from and much more exciting than conducting settlement conferences and other routine case management activities regularly assigned to judges pro tempore in the Civil Division. As a result, the number of judges pro tempore who are willing to preside in short trials greatly exceeds the number of trials held each year.

Most of the superior court judges view the short trial program as a useful, but underutilized, tool. Several expressed puzzlement as to why the program was not more popular and noted that they often suggest that attorneys in less-complex cases consider a short trial, or at least some variation on the short trial rules. They note that opting for a short trial will generally allow the case to go to trial faster, especially since most of the judges assigned to the Civil Division now set only one to two cases for trial each week and only after discovery and dispositive motions are complete.

Conclusions

The alleged problems associated with mandatory arbitration in the mid-1990s that led to the creation of the short trial program appear to have resolved themselves. The Lodestar Dispute Resolution Program at the Arizona State University College of Law evaluated court-connected arbitration programs in 2005 and found that most Arizona attorneys held favorable opinions of mandatory arbitration. Although Maricopa County attorneys had somewhat lower opinions than their counterparts in Pima County (Tucson), the researchers attributed this to differences in the composition of survey respondents in the respective counties, rather than differences in the arbitration programs themselves. One particularly telling finding from the evaluation was that appeals from arbitration awards in Maricopa County comprised 22% of cases in which an arbitration decision was filed, which was the same or considerably less than appeal rates in most other counties throughout Arizona.

In the meantime, appeals from arbitration decisions resulted in only two short trials in the past two years compared to 35 bench trials and 27 non-short trial jury trials. Short trials are

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16 Id. at III.C.7. Gila County had the lowest appeal rate at 17% of arbitration decisions filed; other counties in Arizona had appeal rates ranging from 22% (Pima County) to 46% (Yavapai County).
obviously not the preferred option to appeal an adverse arbitration decision. The requirement that the outcome of an appeal from mandatory arbitration must be at least 23% more favorable than the arbitration decision likely plays a role in the relatively low appeal arbitration rates overall.

Additional restrictions on trial presentation time, number of live witnesses, and subsequent appeals are also plausible explanations for the short trial’s lack of popularity both as an arbitration appeal option and as an opt-out of arbitration. There was no evidence that a short trial provided litigants with a significantly earlier trial date.

Combined with the loss of strong judicial support for the program since Judge Kaufman’s retirement, short trials are viewed, at best, as just another ADR option and, by some, as a second-tier level of justice for civil litigants. Unless some future change to civil case management practices, or to the short trial program itself, improves the relative attractiveness of the short trial to other litigation strategies, it is likely to become an interesting footnote in the history of the superior court, but will not have a transformative or long-lasting effect on civil litigation there.

References and Resources: Maricopa County Superior Court Short Trial Program

Contact

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Description of ADR Programs

Short Trial FAQs

Short Trial Program Bench Book (March 21, 2011)
The Bronx County summary jury trial (SJT) program began as a local pilot program in Chautauqua County, New York in 1998 under the guidance of Justice Joseph Gerace. Justice Gerace published extensively about his experience with the SJT and its advantages and was influential in the spread of the program to other counties in the Eighth Judicial District. Justice Gerace’s public relations efforts brought the program to the attention of the New York Office of Court Administration (OCA), which ultimately directed expansion of the program to each of the state’s twelve judicial districts in 2006.

Recognizing that the Chautauqua SJT model would not necessarily be embraced in different jurisdictions, each with their own unique mix of needs, the OCA permitted a great deal of local flexibility in implementation of the SJT program. Local courts could modify the Chautauqua model to address local aspects of civil jury trial practice, such as length of time to trial, presentation of evidence, and resolution of case backlog. This approach also provided an opportunity to create a program that takes into account local legal culture and facilitates buy-in from the local bar.

A key feature of the expansion of the SJT across New York is the addition of a statewide coordinator. Justice Lucindo Suarez, who has experience overseeing SJTs, holds this position and is responsible for education and outreach efforts to increase awareness of the program and to support local implementation efforts. Another responsibility of the statewide coordinator is collecting case-level data and statewide information and statistics about the aggregate use of the program.

The NCSC visited the Bronx County Supreme Court, Twelfth Judicial District, to learn more about the SJT program. NCSC staff met with the statewide coordinator, observed an SJT, and met court representatives and attorneys who have experience with the Bronx County program. It is clear that the SJT is recognized as a dispute resolution method that provides
valuable benefits: courts can reduce caseloads and maximize judicial resources; attorneys can resolve cases that suffer from impasse; clients have their day in court; and jurors can fulfill their jury service in as little as one day. The case study that follows offers an implementation model for states that seek to expand an SJT program into local jurisdictions with diverse needs.

Program History

The SJT program began in Chautauqua County as a pilot under Justice Joseph Gerace in 1998. In Gerace’s initial pilot program, SJTs offered a nonbinding option to resolve legal disputes. Under this program, the Eighth Judicial District has resolved more than 475 cases since 2000. Justice Gerace authored materials citing the use of SJTs based on the commentary of attorneys and judges, and the program spread to other localities in upstate New York, first to Erie and Niagara counties in the same judicial district as Chautauqua, and then to Albany in the Third and Putnam in the Ninth Judicial District, among others.20

Believing that the program permitted sufficient flexibility to have value in other judicial districts, and bolstered by the program’s successes in the Third, Eighth and Ninth districts, the OCA directed the expansion of the program to all of the state’s 12 judicial districts. As its appointed Statewide Coordinator, Justice Suarez notes, the OCA implemented statewide rules with an awareness “that the particular characteristics of the populace, and of the Bench and Bar in each judicial district, may warrant variations

of the rules.” It was with this acknowledgment that the first major down-state metropolitan judicial district, Bronx County in the Twelfth District, implemented a pilot program in 2006. The Twelfth District provided OCA with an opportunity to test its belief that the SJT program was amenable to the needs of large metropolitan courts.

There are seven common SJT rules and procedures in the statewide program: (1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding; (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes. Although these are the most common features of the program, each jurisdiction may amend these rules to address their own court’s needs.

Then Bronx County Administrative Judge Barry Salman, working together with the Bronx Bar Association and armed with the practical guidance of Justice Gerace, endeavored to implement the SJT in the Twelfth Judicial District. Before the expansion of the SJT program, the Bronx offered a shortened, non-jury trial option where the only contested issue was liability; since the issues in an SJT are similarly limited, familiarity with one of the primary elements of an SJT program already existed. Despite this familiarity, the bar initially resisted the idea of an SJT because the non-jury trial program was presented as mandatory, the decision was nonbinding, and attorneys would lose one of the perceived advantages of jury trials, specifically, the ability to develop extensive rapport with the jury.

To address the bar’s concerns, a committee of eight members from the local bar was formed to establish the structure of the program as it would apply to the Bronx. Efforts were undertaken to convince the bar of the program’s merits; to assure repeat clients, such as insurance companies, that the program could be of benefit to their cases; to establish procedural rules; and to prepare a logistical plan to accommodate program needs, such as courtroom facilities. Open dialogue about the proposed rules was created, and when issues arose, they were addressed either through rule revisions or education efforts, such as continuing legal education (CLE) programs. The resulting program was one that achieved buy-in from the local bar and was perceived as sufficiently

22 Modifications to the standard rules of evidence are made upon agreement by the attorneys. As a result, attorneys have great flexibility in determining how evidence is presented to the jury.
23 Central New York Women’s Bar Association, supra n. 17.
24 This is still an ADR program available to Bronx County litigants.
flexible to fit the needs of the local legal culture. The primary difference between the Chautauqua model and the Bronx model is that the Bronx elected to make all SJTs binding. To begin the metropolitan pilot in the summer of 2006, Justice Gerace tried ten cases within a ten-day period to demonstrate how SJTs are conducted. From September 2006 to June 2007, the Bronx SJT program boasted of 69 verdicts in 73 court days. Since the statewide debut of the program in 2006, over 1,200 SJTs have been conducted.

**Program Summary**

The Bronx County program provides a one-day jury trial that streamlines the trial process by reducing the number of jurors and live witnesses. Trials are overseen by trial judges assigned exclusively to the SJT docket. Restrictions are placed on the total amount of time allotted for trial, including jury selection, opening and closing arguments, and presentation of evidence. There is no record of the proceedings, and no appeal from the verdict. All verdicts are binding. The SJT is best suited to cases involving relatively straightforward evidentiary matters. Before jury selection, the SJT process is explained to the jury panel. There is an incentive for jurors to serve on an SJT, as their service is completed in one day and is credited for six years. However, because there are no appeals, and no record is created, it is incumbent upon the jurors to focus carefully on the task at hand. Attorneys report that jurors remain engaged during the process and, overall, report positive experiences serving as a juror.

To promote program legitimacy and obtain local buy-in, the Bronx County administrative judge consulted the bar to identify potential judges to preside over SJTs. Participating attorneys suggest they are most comfortable with dedicated SJT judges because these individuals have an opportunity to become familiar with the rules and to enforce them consistently from case to case. Heeding this guidance, several judges were selected as dedicated SJT judges; as of the summer of 2011, the Bronx assigned 2.5 full-time equivalent judges to the SJT docket. SJT calendars are scheduled on an alternating-day rotation (e.g., Monday and Wednesday, or Tuesday and Thursday) to permit one day for carryover in the unusual circumstance that additional time is necessary to conclude a case or for the jury to reach a verdict.

In the Bronx, SJT verdicts are heard before a jury of not fewer than six and not more than eight jurors. Jury panels of approximately 18 are sent to the courtroom for voir dire. Depending on the presiding judge, jury selection is typically attorney controlled and lasts approximately 30 minutes for each side. As a result, attorneys may question jurors under the supervision of the court attorney, a role that is similar to that of a law clerk in most jurisdictions. Jurors who are challenged for cause are dismissed immediately; peremptory challenges, two per side, are overseen by the judge, court attorney, and court clerk in judicial chambers by agreement of the parties. If a case has multiple defendants, peremptory challenges are shared or split among them. The SJT results in a dramatic reduction in the amount of time it takes to seat the jury because the time allotted for voir dire
is strictly enforced. Additionally, as a result of the shortened time for trial, hardship excuses are virtually nonexistent. Rather than the typical one-half to one full day of jury selection, juries are seated in less than an hour.

The court is committed to streamlining external constraints to ensure that a one-day time frame is possible. As such, when Justice Salman first implemented the program, he made arrangements to ensure that the panel was delivered to the courtroom by 9:30 AM, rather than late morning or early afternoon, which is common for a traditional jury trial. He also made arrangements with the OCA to provide lunches for jurors to reduce the time required for lunch breaks.\(^{25}\)

A key component of the SJT procedures is strict adherence to time limits. The clerk monitors the time, divided as 30 minutes for each party to conduct jury selection; 10 minutes of opening statements; one hour for presentation of evidence, including cross-examination; and 10 minutes of closing, with rebuttal available to the plaintiff, if reserved. Evidence packets are prepared and exchanged between the parties two weeks in advance. Attorneys report that due to the strict time limits, it is necessary to prepare carefully for a fairly intense day—this means that there is no time savings in attorney pretrial preparation. However, because evidence packets are exchanged between the parties in advance, there are also no surprises at trial, and attorneys are able to fully prepare for their cases ahead of time.

Based on input from the local bar, SJTs also exploit the benefits of simplified procedures. Because the standard rules of procedure are relaxed, judges primarily serve as facilitators to keep trials moving. Attorneys work out many of the issues beforehand by exchanging evidentiary packets at the pretrial conference, which is overseen by the court attorney. The parties may request that the SJT judge oversee the pretrial conference. However, due to the cooperative spirit among the local bar that is reflected in the nature of the SJT program, such requests are rare. The court attorney, therefore, plays a very prominent role in processing and managing the case. Damages caps are often worked out between the parties and high/low agreements are commonly used, although jurors are unaware of their existence. The high dollar amount is virtually always set as the insurance policy limit. These high/low agreements are very important because they assist attorneys with managing client expectations.

One of the significant benefits afforded the litigants is cost savings based on the summary presentation of evidence. The SJT rules limit the use of live witnesses, typically to two per side.\(^{26}\) As a result, it is routine for attorneys to stipulate to the introduction of police reports and other documentary evidence, such as depositions or medical records, for publication in lieu of witness testimony. Only basic objections, such as relevance, leading, and hearsay, are permitted in open court; non-routine objections are handled

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\(^{25}\) Due to economic cuts, lunches for SJT jurors were discontinued during the summer of 2011. The court is considering several options to reinstate lunches for these jurors.

\(^{26}\) The time limits imposed through the Bronx County Summary Jury Trial Rules and Procedures make it impractical to call more than two live witnesses to provide testimony.
as a sidebar as, with no appeal, there is no reason to preserve them on the record. For these reasons, defense litigants, most often insurance companies, favor the program; it provides an opportunity to resolve low-value cases without significant litigation expense.

Perhaps the most significant change to the Bronx program from the Chautauqua pilot is that all SJTs are binding in the Bronx. This change occurred as a result of input from the local bar. As a result, the clerk records the SJT verdict and submits a data collection form that records basic information about the case. The court does not enforce payment of the judgment; rather, the verdict is treated as a stipulation between the parties. This process is similar to an out-of-court settlement agreement. Attorneys report that because of these procedures, it is necessary to carefully prepare their clients and to achieve full buy-in for the process, as no appeals are allowed, and the court does not enforce the verdict.

Repeat players in SJTs, typically representing insurance companies, report that a variety of case types are appropriate for the program, including cases with litigants who have been unwilling to settle. Other suitable cases include low-dollar-value cases and those that include soft-tissue injuries, involve automobile torts, or rely upon an insurance policy with a damages cap. Participants suggest that the process is best used for claims of premises liability, intentional torts, certain types of malpractice, general liability, and commercial liability including slip-and-fall cases. In complex cases, the process is encouraged for damages-only claims. Cases in which the parties wish to distill the trial to the core issues, or that turn on a question of fact or credibility, were also suggested as good potential candidates. On the other hand, cases that involve complex injuries or multiple plaintiffs or defendants were not recommended for the program. This is primarily due to the complexity of issues involved and length of time necessary to accommodate adequate presentation of evidence by the parties.

**Program Observations**

The SJT program is viewed as a benefit to all involved. A key advantage for attorneys is the opportunity to be creative and to gain greater control over the conduct of the proceeding via agreements reached during the pretrial conference. SJTs provide attorneys with another valuable tool for case resolution and negotiation. From the judge’s perspective, SJTs provide an opportunity to demonstrate to jurors that their service and time is valued, further enhancing public trust and confidence in the courts. From the court’s perspective, SJTs reduce caseload backlog. Based on statewide statistics collected by Justice Suarez, the use of SJTs has ebbed and flowed over the last several years (see Figure 4). The highest volume of SJTs has been in the Twelfth (Bronx), Eleventh (Queens), Second (Brooklyn), and Tenth (Nassau and Suffolk) Judicial Districts, and where it originated, the Eighth Judicial District. The Second and Eleventh Districts have seen a steady rise in the number of SJTs over the last several years. For some
districts, the low volume of SJTs is explained by lower caseloads in rural areas; in others, the SJT program has only recently been implemented.

Justice Salman reviewed the statistics collected on this program and was surprised to realize the trials were resulting in a nearly 50/50 split rate for plaintiff/defense wins. In his view, this provides credibility that the SJT is not just a defense tactic. As this example illustrates, the statewide data collected on this program provides justification for why it is important to document these outcomes. Moreover, monitoring the types of cases that contribute to backlog and seeking opportunities to engage and resolve these cases through an SJT will maximize its utility.

The data that Justice Suarez, the statewide coordinator, has collected are extensive. See Summary Jury Trial Data Collection Form in References and Resources: Bronx County

### Figure 4. Number of Summary Jury Trials, by District and Year

<table>
<thead>
<tr>
<th>District</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
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<td>200</td>
<td>100</td>
<td>200</td>
<td>100</td>
</tr>
<tr>
<td>11th District</td>
<td>100</td>
<td>200</td>
<td>100</td>
<td>200</td>
</tr>
<tr>
<td>10th District</td>
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<td>100</td>
<td>50</td>
<td>100</td>
</tr>
<tr>
<td>8th District</td>
<td>0</td>
<td>70</td>
<td>35</td>
<td>100</td>
</tr>
<tr>
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</tr>
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<td>9th District</td>
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<td>40</td>
<td>20</td>
<td>100</td>
</tr>
</tbody>
</table>

Note: The First, Third, Fourth, Fifth, Sixth, Seventh and Thirteenth Judicial Districts were excluded from the figure as they reported less than 30 SJTs cumulatively over the four-year period.
preparing marketing materials; presenting educational presentations at CLE sessions; networking with other courts, judges, and bar associations interested in the program; responding to questions and concerns of both attorneys and judges; and generally serving as a program advocate. Marketing involves a significant amount of travel, including presenting the SJT program to other interested states. Justice Suarez sums up the position as follows: “I am not an administrator; I am not a supervisor; I am a coordinator—I suggest.” Justice Suarez notes the importance of having an advocate for the program who is willing to meet with individuals personally; he says it is “important to press the flesh” to understand the issues and concerns a trial court is experiencing that make the SJT an appealing option. Although there are a variety of benefits derived from having a statewide coordinator to oversee the use of SJTs, Justice Suarez also suggests that he “should be the first and last coordinator;” his perception is that the program will ultimately become an accepted part of civil practice and procedure within New York.

The SJT is often compared to the traditional jury trial and alternative dispute resolution (ADR). Overall, it has been embraced as another valuable method for resolving disputes. The participants note that even in a large metropolitan area, there is an increased emphasis on cooperation between the parties that does not exist in the other methods of case resolution. This appears partly to be a characteristic of the types of cases that are tried in the SJT program; many of these cases would be settled before trial if the parties could agree upon the value of the case. The SJT provides the parties an opportunity to resolve cases where they have come to an impasse in negotiations. Comparatively, the SJT program is more flexible, due to relaxed rules of evidence, and results in a significant costs savings to the parties. It is described by those who use it as an effective tool for negotiation, yet it still provides the parties with an opportunity to tell their story—a significant benefit from the litigant’s perspective.

Challenges and Conclusions

Despite the accolades and previously described benefits, the SJT program is not without challenges. For one, management of staff overtime and budget cuts due to the tight economic times has significantly affected the program. For example, the court no longer provides lunch to the jurors. Therefore, jurors need time to leave the courthouse to obtain lunch and undergo security screening upon reentering the building. Given the shortened time frame of the SJT, this change in procedure costs valuable trial time and could result in a second day of trial. Compounding this issue is that court officers need sufficient time to clock out of the building before the end of their shift. This means that court facilities must be secured by a certain time during the day, limiting the length of time jurors can deliberate.

A further challenge arose in one case, which reflects the necessity for attorneys to actively manage client expectations during an SJT. In this instance,
the party did not accept the jury’s verdict. Since the program is voluntary and the parties are responsible for enforcement of any judgment, party satisfaction is key to the successful continuance of the program. Attorneys have recognized this risk and now routinely ask clients to sign a consent form before entering the program. Related to party satisfaction, if a party wishes to leave the program, there is currently no authority for the judge to remove the case from the program and to return it to the trial docket. Finally, participants report that the rules and procedures for SJTs are not uniform among the jurisdictions, requiring attorneys who practice in multiple jurisdictions to become familiar with multiple sets of SJT procedures. This is a necessary trade-off for a program that maximizes flexibility in implementation to match local jurisdiction needs.

Overall, participants indicate satisfaction with the SJT. There are, however, some minor changes that program participants have recommended to improve the SJT experience. Some suggestions include making the pretrial conference forms more concise; broadening the scope of the program so that it continues to grow; and providing additional resources to the program. Assigning dedicated judges and courtrooms, providing jurors with lunches rather than risking the cost incurred from a two-day trial, and supporting statewide data-collection efforts were among those listed by participants as a priority for the success of the program. Such a commitment bodes well for the long-term sustainability of the Bronx County SJT, but also favors the efforts necessary to expand the program to other courts in New York.

References and Resources: Bronx County Summary Jury Trial Program

Contact
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Bronx County Summary Jury Trial Rules

Bronx County Summary Jury Trial Rules
Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Office of Court Research, Rm. 975, 25 Beaver St., New York, NY 10004; Fax: 212-428-2987, phone: 212-428-2990. Attention: Antoinette Coleman, acoleman@courts.state.ny.us

1. INDEX NUMBER: ____________________ 2. CASE NAME: ________________________________________________
3. COUNTY: ________________ 4. COURT: Supreme  NYC Civil Court  County  City/District
5. CASE TYPE: Commercial  Tort  Motor Vehicle  Other:_________________________________
6. NUMBER OF ATTORNEYS: Plaintiff(s)  Defendant(s)
7. JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT: 8. SJT DATE:  
9. ISSUES: Liability only  Damages only  Liability and damages  10. WAS SJT: Binding  Non-binding
11. INSURANCE CARRIER(S): ______________________________________ 11a. Policy Limit(s) $ _______________
12. IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE: $___________ High $___________ Low  None
13. DID THE CASE SETTLE? Yes  No
13a. When? Before SJT  During SJT  After SJT
13b. What was the settlement amount? $___________ Don’t know  Not applicable

THE PROCEEDINGS
14. WHO PRESIDED OVER THE SUMMARY JURY TRIAL? Judge  JHO
15. HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?  
16. HOW MUCH TIME (IN MINUTES) WAS ALLOCATED FOR VOIR DIRE?
   
   |   |   |   |   |   |
   | Judge | 20 | 30 | 40 | more than 40 |
   | Plaintiff(s) | 5 | 10 | 15 | more than 15 |
   | Defendant(s) | 5 | 10 | 15 | more than 15 |

17. HOW MUCH TIME (IN MINUTES) WAS ALLOCATED FOR...
   ... opening statements?
   
   |   |   |   |   |   |
   | Judge | 20 | 30 | 40 | more than 40 |
   | Plaintiff(s) | 5 | 10 | 15 | more than 15 |
   | Defendant(s) | 5 | 10 | 15 | more than 15 |

   ... case presentation?
   
   |   |   |   |   |   |
   | Plaintiff(s) | 30 or less | 40 | 50 | 60 or more |
   | Defendant(s) | 30 or less | 40 | 50 | 60 or more |

   ... closing statements?
   
   |   |   |   |   |   |
   | Judge | 20 | 30 | 40 | more than 40 |
   | Plaintiff(s) | 5 | 10 | 15 | more than 15 |
   | Defendant(s) | 5 | 10 | 15 | more than 15 |

18. HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...
   
   |   |   |   |   |   |
   | Plaintiff(s) | 0 | 1 | 2 | more than 2 |
   | Defendant(s) | 0 | 1 | 2 | more than 2 |

19. HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...
   
   |   |   |   |   |   |
   | Plaintiff(s) | 0 | 1 | 2 | more than 2 |
   | Defendant(s) | 0 | 1 | 2 | more than 2 |

20. WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY? Yes  No

THE VERDICT
21. FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE? 30 or less  40  50  60 or more
22. VERDICT: Plaintiff  Defendant  Split  Hung
23. DAMAGES AWARDED: $ ___________  Settled before deliberations

WHO COMPLETED THIS FORM?

NAME: _________________________________________ PHONE NUMBER: ____________________ DATE: ____________________
**Summary Jury Trial Program**

**An Introduction to the Summary Jury Trial**
A summary jury trial (SJT) is a one-day jury trial that combines the flexibility and cost-effectiveness of arbitration with the structure of a conventional trial. Participation in an SJT is voluntary.

In binding summary jury trials, damages can be floored and capped on a high/low basis and the right to appeal or move against the verdict can be limited or waived. Parties have successfully used the verdict in non-binding SJT's as a settlement guide to predict how an actual jury would determine damages or resolve a contested issue.

The arbitration-like format allows parties to try the case or resolve particular issues without investing time and money to summon myriad experts, doctors and other witnesses.

**Conducting the Summary Jury Trial**
Most SJT's are structured like a traditional trial, though attorneys and judges may fashion the process to fit the needs of a given case.

The typical summary jury trial begins with jury selection and is followed by an introduction from the court that explains what will occur and how it differs from a conventional trial. Each side's attorney then has 10 minutes to deliver an opening statement. Then, the plaintiff presents his or her evidence, after which the defendant presents its evidence.

Absent an agreement to the contrary, courts require parties to introduce their evidence within one hour, and each side is permitted to call at most two witnesses, who are subject to cross-examination.

The rules of evidence are relaxed but not abrogated. Affidavits, medical and hospital reports, depositions, police reports, and other experts' reports may be read into evidence. Portions of video depositions may be played for the jury in lieu of actual appearances. Attorneys may display reports, charts, photos or diagrams, and witnesses can appear via videoconference.

After all of the evidence has been introduced, each attorney gives a 10- to 15-minute closing argument, and the SJT judge then charges the jury and sends jurors off to deliberate. The majority of juries deliberate less than 90 minutes before rendering their verdicts.

In non-binding SJT's, the judge and attorneys may question the jurors on their impressions and rationales, which often leads to settlement.

**Cases Suitable for Summary Jury Trial**
In general, any case that can be presented to and understood by a jury in a day is suitable for a binding SJT. Slip-and-fall and no-fault cases are appropriate for a summary jury trial, as are property damage claims.

A binding summary jury trial can often provide finality in less time and with less cost than a motion for summary judgment, especially in cases where the primary issue in dispute is whether the plaintiff’s injury is a "serious injury" as that term is defined in Insurance Law § 5102(d).

**Benefits of the Summary Jury Trial**

<table>
<thead>
<tr>
<th>Attorneys benefit because:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Attorneys need not invest the time required to conduct a full trial.</td>
</tr>
<tr>
<td>• In non-binding summary jury trials, the panel's advisory verdict can serve as a &quot;reality check&quot; to a client who is reluctant to settle.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Clients benefit because:</th>
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</thead>
<tbody>
<tr>
<td>• Summary jury trials give clients their day in court.</td>
</tr>
<tr>
<td>• Binding summary jury trials are not appealable and thus afford clients finality.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Courts benefit because:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Summary jury trials reduce court calendars resulting in shorter periods for other cases to be scheduled for trial.</td>
</tr>
<tr>
<td>• The benefits of summary jury trials allow better use of limited judicial resources.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Jurors benefit because:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Participating as panelists in a summary jury trial allows citizens to fulfill their jury service in one day.</td>
</tr>
<tr>
<td>• Unlike in conventional trials, jurors in an SJT can provide attorneys with immediate, specific feedback.</td>
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</tbody>
</table>

Cases where the damages sought are less than $200,000 are particularly amenable because the costs of pursuing litigation likely outweigh the potential benefits to the plaintiff and his or her attorney. The SJT is also well suited in liability- or damages-only cases as well as cases where there is limited insurance coverage or when the parties are firm on demands and offers and willingly submit the case on a high/low basis.

All large-damage and small-damage cases in which a jury's advisory verdict has the potential of helping the parties reach settlement—even complex cases with potentially large damages—are suitable. In complex cases, parties may submit one or more key factual issues to the jury for resolution, which often leads the parties to settlement.
**SUMMARY JURY TRIAL PROGRAM**

**Courts' Experience with the Summary Jury Trial**

Since 2000, New York's Eighth Judicial District has resolved over 475 cases through binding and non-binding summary jury trials without the necessity of a traditional trial. The lawsuits involved automobile collisions, slip-and-fall injuries, medical malpractice claims, contract disputes, wrongful timber cutting allegations, and injuries from dog bites.

Since 2006, the SJT Program's statewide debut, over 1200 SJTs have been conducted. The distribution between plaintiff and defendant verdicts reflect the distribution of conventional trials of the judicial district.

Summary jury trials have been used in federal district courts and by at least 17 states' courts. They have resolved a variety of commercial disputes, negligence and medical malpractice actions, products liability suits, and anti-trust and fraud cases.

**The Summary Jury Trial is Flexible**

**Scope of Discovery:** If the parties consider submitting their case to an SJT when the case is filed, then they are free to determine—by agreement—the scope of discovery and the timing of the trial. They can set the SJT to be held on a date certain and, in turn, try the case within weeks or months of the filing of a Note of Issue.

**Finality:** If local court rule permits them to do so, parties may negotiate whether the jury's determination will be binding or non-binding.

**Introduction of Evidence:** Parties can stipulate to affidavits in lieu of appearances of expert witnesses and other witnesses. They can also agree to submit medical reports instead of live testimony. Attorneys can negotiate whether they will introduce ex parte deposition videos or transcripts.

**Hi/Low Ranges:** The parties can also agree to a range of possible damages. If the verdict is below the minimum amount in the range, then the plaintiff is awarded that minimum amount; likewise, if the verdict exceeds the maximum amount in that range, then the plaintiff is awarded that maximum amount.

**Confidentiality:** In cases where the parties submit their dispute to a non-binding summary jury trial, the parties can decide whether the results of the proceeding will be publicized or remain confidential. This can be an important consideration for cases where the outcome is likely to impact the broader community.

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For more information about SUMMARY JURY TRIALS
please contact:

Hon. Lucindo Suarez
Statewide Coordinating Judge for Summary Jury Trials
Bronx County Supreme Court
851 Grand Concourse, Room 821
Bronx, NY 10451
Phone: (718) 618-1456
E-mail: summary_jury_trial@nycourts.gov
or
Lsuarez@nycourts.gov

[July, 2010]
INDEX NO.

TO TRANSFER ACTION
TO SUMMARY JURY
TRIAL (SJT) PROGRAM

IT IS HEREBY STIPULATED AND AGREED that the parties to this action, by their respective attorneys, voluntarily agree to the transfer of this matter for final disposition to the Summary Jury Trial Program (SJT), subject to the Rules of the SJT Program. The signatories to this Agreement represent that they have the authority of their respective clients and/or insurance carriers to enter into this agreement.

Attorney for Plaintiff(s)
Print Name: ____________________________
Phone Number: ____________________________
E-Mail: ____________________________
Signature: ____________________________

Attorney for Defendant(s)
Print Name: ____________________________
Phone Number: ____________________________
E-Mail: ____________________________
Signature: ____________________________

Dated: ____________________________
In 2000 the Board of Governors of the Nevada State Bar created a statewide commission to investigate ways to address chronic complaints about the length of time needed for civil cases to come to trial in the Nevada District Courts, as well as disproportionately high costs associated with litigating lower-value cases. The Short Trial Commission was chaired by attorney William Turner and comprised 14 highly experienced civil trial lawyers representing both the plaintiff and defense bar, insurance carriers, and the Nevada trial and appellate bench. The commission focused on the concept of the summary jury trial as a supplement or alternative to the existing mandatory arbitration procedures as a potential solution. The commission’s recommendations were submitted to the Supreme Court of Nevada and subsequently adopted statewide in 2000.
The short trial program became a mandatory component of the ADR programs in Nevada’s Eighth and Second judicial district courts, which serve the state’s two most populous communities in Clark County (Las Vegas) and Washoe County (Reno). The program was permitted throughout the rest of the state, but only the district courts in the First and Ninth judicial districts (Carson/Storey and Douglas counties) ultimately implemented the program. This case study focuses primarily on how the program developed, evolved over time, and currently operates in the Eighth Judicial District of Nevada, which has the highest volume of both civil case filings and short trials in the state.\(^{27}\)

**Program Background**

The impetus for the development of the short trial program in Nevada was grounded in two ongoing concerns by the Nevada civil bar. The first concern was the length of time involved in bringing a case to trial. According to several members of the commission, civil cases in the mid- and late 1990s typically took up to four years to come to trial in the Eighth Judicial District Court due to high caseloads. Civil caseloads were lower in other areas of the state, so the amount of time to bring a case to trial was generally shorter, typically only a year or so. Because civil case filings in the Eighth Judicial District comprised more than three-quarters of the statewide civil filings, the corresponding trial delays made the need for effective remedies that much more imperative.

The civil bar also perceived the rising costs of litigation as a growing barrier to access to justice, especially in lower-value cases. For example, expenses associated with hiring an expert witness to testify in a typical personal-injury trial typically ranged from $2,500 to $5,000 per expert. Combined with attorneys’ fees and court costs, litigation expenses often dwarfed the potential damages that a jury might award, forcing some litigants to settle regardless of the merits of their case or possibly even forgo filing a claim at all.

Under the Nevada Arbitration Rules at that time, cases in the Eighth Judicial District in which the probable damages were $40,000 or less were subject to nonbinding arbitration. The Office of the ADR Commissioner administered the mandatory arbitration program, identifying cases that were eligible for the program, ensuring that prospective arbitrators were qualified, appointing arbitrators by random assignment if the parties had not stipulated to the appointment of a specific arbitrator, and ensuring that the arbitration decisions were properly recorded in the case files. The program itself was remarkably successful insofar that an average of 71% of the cases that entered the program were settled or dismissed.\(^{28}\) Litigants who were dissatisfied with

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\(^{27}\) According to the 2010 Annual Report of the Nevada Supreme Court, civil filings from the Eighth Judicial District Court comprised 77% of the state’s civil filings and requests for a trial de novo following mandatory arbitration comprised 90% of the statewide requests for a trial de novo.

\(^{28}\) Annual Reports of the Nevada Judiciary (2000-2011).
the arbitrator’s decision could request a trial de novo in the district court. In the 29% of cases that did so, however, the mandatory arbitration requirement amounted to yet another procedural delay in scheduling a trial date and added additional litigation expenses.

Ultimately, the commission submitted its report and recommendations in the form of an ADKT to the Nevada Supreme Court to establish a “Short Trial Program” in which parties in cases assigned to mandatory arbitration could either opt out of the mandatory arbitration and have their case resolved in an abbreviated and streamlined jury or bench trial or request a trial de novo following mandatory arbitration in a short trial proceeding. The short trial program was authorized by the Nevada legislature, and rules governing its operation were enacted by the Nevada Supreme Court as a pilot program in 2000. The administrative costs of the program were included in the operational budget for the mandatory arbitration program and funded through a $5 fee included in the filing fee for both the plaintiff’s complaint and the defendant’s answer. The first short trial was held in the Eighth Judicial District Court on June 7, 2002. Between 2002 and 2004, the Eighth Judicial District held a total of 97 short trials.

General Procedures Governing Short Trials in Nevada

Under the Nevada Short Trial Rules, parties electing this option have their cases scheduled for trial within 240 days of their stipulation into the program. The ADR commissioner assigns the case to a judge pro tempore, who is responsible for all pretrial management decisions including additional discovery and pretrial motions, as well as for presiding over the trial itself. The trial may be by jury or to the bench.

If the parties elect a short jury trial, a four-person jury is selected from a panel of 12 prospective jurors. The parties have 15 minutes each to conduct voir dire, after which time they may remove two prospective jurors by peremptory strike in addition to any jurors struck for cause. After all challenges for cause and peremptory challenges have been exercised, the first four jurors remaining on the randomized jury list are impaneled as jurors. The parties are then allocated three hours each to present their case, including opening statements, direct and cross-examination of witnesses, introduction of documentary evidence, and closing statements. The judge pro tempore advises the jurors of

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29 ADKT refers to matters submitted to the “Administrative Docket” of the Nevada Supreme Court.
31 N.S.T.R. 3.
32 By stipulation, the parties can have a six-person or eight-person jury, in which case the respective jury panels are comprised of 14 or 16 prospective jurors.
33 With permission of the presiding judge, the parties may conduct voir dire for up to 20 minutes each. N.S.T.R. 23.
34 N.S.T.R. 23.
the applicable law governing the case using instructions from the Nevada Pattern Civil Jury Instruction Booklet, and then sends the jurors to deliberate. A minimum of three of the four jurors are required to agree to render a valid verdict. There is no time limit on deliberations, but thus far all trials have concluded within one day. The verdict rendered by a jury in the short trial program results in a binding, enforceable judgment. As originally implemented, the Short Trial Rules provided extremely limited grounds for appeal, but those restrictions have since been lifted, and parties may now appeal a short trial verdict to the Nevada Supreme Court according to the procedures governing appeals of all civil cases.

To aid juror comprehension of trial evidence, the parties are required to prepare a trial notebook for jurors containing all reports and documentary evidence, including photographs, medical records, billing records, and a copy of any previous arbitration awards. Unless a party specifically objects before trial, all documentary evidence in the trial notebook is deemed admitted without requiring live witness testimony concerning its authenticity or foundation. The short trial rules strongly encourage parties to present expert evidence through a written expert report rather than by live expert testimony. Jurors are permitted to take notes and to submit written questions to witnesses, as is the case for jurors serving in all civil jury trials in Nevada.

The time limits imposed on the parties under the short trial rules are designed to minimize litigation costs. In addition, one provision of the short trial rules places a cap of $3,000 on the amount of attorney fees and a cap of $500 per expert on the amount of expert witness fees that can be recovered by a party. Unless ordered otherwise by the judge pro tempore, the parties are jointly responsible for the $1,500 fee for the judge pro tempore and up to $250 in reimbursable expenses. Jury fees of $160 are paid by the party demanding the jury.

A striking characteristic of the Nevada short trial program has been the willingness of the Nevada Supreme Court to review the short trial rules and seek statutory or rule amendments in response to problems or concerns as they arose. January 2005 saw the most significant changes to the program since its inception. These included an increase to the amount-in-controversy requirement for cases eligible for mandatory arbitration from $40,000 to $50,000, reflecting the effect of inflation on the value of these cases. The Nevada Supreme Court also made the short trial program mandatory for parties requesting a trial de novo following mandatory arbitration; until that time, the short trial program had been a voluntary program that parties could choose to pursue rather than wait for a trial before a

58 N.S.T.R. 26 (“A judgment arising out of the short trial program may not exceed $50,000 per plaintiff exclusive of attorney’s fees, costs and prejudgment interest, unless otherwise stipulated to by the parties. Jurors shall not be notified of this limitation.”).
59 N.S.T.R. 33.
60 N.S.T.R. 18.
61 N.S.T.R. 16.
district court judge. After the 2005 amendments, parties could remove their case back to the district court docket only by paying a $1,000 “opt out” fee.47 As a result, the number of short trials scheduled in the Eighth Judicial District jumped dramatically from less than 20% of the requested trials de novo in 2005 to more than 80% in 2006 through 2010, with similar increases in the number of short trials actually held (see Figure 5). Finally, the restrictions on appeals from short trials were lifted so that parties could appeal an adverse judgment to the Nevada Supreme Court according to the same rules as regular civil cases.48 In 2008, the Nevada Supreme Court amended the short trial rules to require approval of a district court judge before a short trial judgment becomes final.49

Figure 5: Stipulations to Short Trial Program and Trials Held, 2001-2010

The short trial program in the Eighth Judicial District is administered by the Office of the ADR Commissioner, which maintains a list of qualified judges pro tempore, oversees training for those judges, assigns judges for cases that opt into the short trial program, schedules the trial date and courtroom location, and ensures that the final judgment is properly recorded in the case files. All of the ADR programs, including the short trial program, are funded through a $15 civil case filing fee on complaints and an additional $15 civil case filing fee on answers. In 2005 the Clark County Board of Commissioners increased the filing fee from $5 each for complaints and answers, which made the ADR Office financially self-sustaining. District court operations are entirely funded through local tax revenues. Consequently, the programs administered by the ADR commissioner receive strong support from the local Board of Commissioners insofar that they reduce the number of jury trials that would otherwise be conducted by district court judges at local taxpayer expense.50

Under the rules governing the short trial program, judges pro tempore must be active members of the State Bar of Nevada, have a

47 N.S.T.R. 5.
48 N.S.T.R. 33.
49 N.S.T.R. 3(d)(4).
50 The Eighth Judicial District Court estimates that the cost of a jury trial in the district court is approximately $2,500 per day for an average of 2 to 3 days.
minimum of ten years of civil trial experience or its equivalent, and fulfill at least three hours of accredited continuing legal education on short trial procedures each year.\textsuperscript{51} Topics covered in the training sessions can vary from year to year, but typically focus on recent rule changes, case law, and policies concerning the short trial program, and evidentiary and ethical issues that are unique to short trials. The current judge pro tempore list includes approximately 100 names of local civil trial attorneys. Judges pro tempore are generally assigned six to seven short trial cases each year, but approximately 80% of these cases ultimately settle before trial, ostensibly due to the relative speed and certainty of the trial date.

For the past several years, the Eighth Judicial District Court has conducted more than 100 short trials per year, the overwhelming majority (98%) of which are appeals from mandatory arbitration decisions.\textsuperscript{52} Typically, only 20% of litigants opt for a bench trial rather than a jury trial. In addition to trials de novo following mandatory arbitration, a small handful of non-mandatory arbitration cases stipulate to participation in the short trial program rather than wait for a regular jury trial before a district court judge.\textsuperscript{53} Most short trial cases involve personal injury and property damage claims, usually resulting from automobile accidents in which liability has been admitted and a high/low agreement is in place. It is unusual for cases involving contracts or more serious tort claims to opt into the short trial program, but a small handful have been tried over the past ten years that the program has been in operation.

Once the parties have stipulated to participate in the short trial program, the ADR commissioner schedules a trial date within 240 days, reviews the availability of judges pro tempore for that date, and sends the parties the names of three prospective judges with instructions to either stipulate to the assignment of a specific judge from the complete list of judges pro tempore or to strike no more than one name from the three that were randomly selected.\textsuperscript{54} At the program’s inception, most parties stipulated to the assignment of a specific judge pro tempore, but since the short trial program became mandatory in 2005, it is more common for the judge to be selected from among the judges remaining on the proposed list submitted to the parties.

Once assigned to a short trial case, judges pro tempore enjoy all the powers and authority of district court judges except with respect to the final judgment, which must be submitted to a district court judge for approval.\textsuperscript{55} Under the existing Short Trial Rules, the parties must submit a pretrial memorandum to the judge pro tempore that includes a brief statement of the claims and defenses; a complete list of witnesses,

\begin{itemize}
  \item \textsuperscript{51} N.S.T.R. 3(c).
  \item \textsuperscript{52} The number of short trials exceeds the number of civil jury trials conducted in the district courts.
  \item \textsuperscript{53} The ADR commissioner predicts that the number of cases not eligible for mandatory arbitration may be because many of the newly elected district court judges had experience in the STP as litigators and as pro tem judges. They understand the program and are highly supportive of it.
  \item \textsuperscript{54} N.S.T.R. 3.
\end{itemize}
including rebuttal and impeachment witnesses; and a description of their expected testimony, a list of exhibits, and any other matters to be resolved at the pretrial conference. The pretrial conference must take place at least ten days before the scheduled trial, during which the judge pro tempore may rule on any motions, including motions in limine. According to several of the more experienced judges pro tempore, it is imperative that all disputes and questions related to the short trial proceedings be settled during the pretrial conferences as there is too little time and insufficient access to technology resources such as copiers or printers on the day of trial. Most judges pro tempore use a detailed short trial checklist to ensure that all possible questions and contingencies have been addressed. The short trial rules have an extraordinarily strict continuance policy and settlements must be reported to the court no later than two days before the scheduled trial date. It is extremely unusual for a short trial to be cancelled or continued on the trial date.

Short trials are scheduled on Thursdays and Fridays, subject to district courtroom availability. Currently, 32 district court judges share 23 courtrooms in the Regional Justice Center in downtown Las Vegas, so courtroom availability has become increasingly limited. Thus far in 2011, two short trials had to be continued to a future date because no courtroom was available on the scheduled trial date. In a typical short trial, the judge, lawyers, parties, and live witnesses, report to the designated courtroom no later than 8:00 am to set up the courtroom and resolve any last-minute problems. The jury panel is available to be picked up from the jury assembly room by 8:30 am, and voir dire is generally concluded and the jurors impaneled and sworn by 9:30 am. As in non-STP civil jury trials, jurors may take notes and submit written questions to witnesses. Jurors are also provided a notebook containing all of the documentary evidence to be provided at trial, including expert witness reports and copies of medical invoices and any previous arbitration decision. Most trials conclude by mid-afternoon, and jury deliberations typically take 20 to 30 minutes, although some have lasted as long as two hours. By all accounts, the jurors are quite happy to learn that the expected length of their jury service will be one day and that serving as a trial juror on a short trial will complete their jury service requirement. One of the former judges pro tempore noted the importance of emphasizing to jurors that in spite of the lower values, these are serious cases and the outcomes are very important to the litigants. No one interviewed during the site visit suggested that jurors take their task any less seriously in short trials compared to other jury trials in the district court.

55 N.S.T.R. 3(d).
57 N.S.T.R. 10.
58 N.S.T.R. 11.
59 According to records kept by the ADR commissioner, this has happened only 17 times since the inception of the program through October 2011.
60 Bench trials may be conducted off-premises at the convenience of the parties, which avoids the problem of courtroom availability.
61 A number of judges pro tempore who were interviewed during the site visit reported that jurors do submit a lot of questions in these cases. They noted that it was unclear if this trend reflects younger, more inquisitive jurors, or attorneys’ trial presentation skills.
62 According to several experienced trial attorneys and pro tempore judges, a common approach in opening statements involves describing the contents of the trial notebook to the jurors in detail.
63 The Eighth Judicial District Court employs a one-day/one-trial term of service.
After the short trial has concluded, the judge pro tempore issues a recommended final judgment, which typically is a recitation of the jury’s verdict. Although the parties may object to the recommendation, the final judgment is almost universally approved by the district court judge. In fact, there is only one known instance in which a district court judge rejected a recommended final judgment submitted by a judge pro tempore following a short trial. Ironically, that trial was a bench trial, rather than a jury trial.

The ADR commissioner keeps detailed records of both arbitration awards and short trial verdicts, including comparisons between the two. Arbitrators and juries agree on liability nearly two-thirds of the time, which is not surprising given that the defendants often concede liability. For cases in which the jury ultimately disagrees with the arbitrator’s decision, jury verdicts for the defendant outnumber those for the plaintiff by a ratio of almost 2 to 1. With respect to damage awards, short trial juries also appear to be less plaintiff oriented than arbitrators. A review of 111 short trial jury awards in 2010 found that jury awards were less than the arbitrator’s award in 54% of the cases, more than the arbitrator’s award in 18% of the cases, and were the same as the arbitrator’s award in 5% of the cases. In the remaining cases, 2% stipulated to participation in the short trial program without going through mandatory arbitration, and 21% were non-arbitration cases from the district court that elected a short trial proceeding.

Since the short trial program has been in place, there have been relatively few appeals from short trial judgments. Only one involved a challenge to the Nevada Short Trial Rules rather than to the validity of the underlying verdict. In Zamora v. Price, the plaintiff argued that requiring that the trial notebooks include a copy of any previous arbitration decision violated his right under the Nevada Constitution to a jury trial. Because the jury instructions specifically advised jurors that they were not obligated to follow the arbitrator’s decision, or even to give it any weight whatsoever, the Nevada Supreme Court determined that the inclusion of the arbitration decision in the trial notebook did not infringe on the jury’s fact-finding duty in such a way that it would significantly burden the right to a jury trial. Given that juries concur with the arbitrators’ decisions in only 5% of the cases, it seems that jurors regularly exercise their discretion to ignore the arbitration decision.

64 There is no formal reporting of the trial proceedings unless a party or both parties request and agree to pay for the court reporter’s services. N.S.T.R. 20.
65 A search of the LEXIS database found only two cases involving appeals from short trials.
67 Id. at 494. Zamora’s appeal also included an equal-protection claim that cases exceeding $50,000 amount in controversy were not subject to the evidentiary requirement that previous arbitration awards be disclosed to the jury. The Nevada Supreme Court held that “having cases with an amount in controversy below a threshold amount subject to mandatory nonbinding arbitration, and having the arbitration award introduced at a subsequent new trial, is rationally related to a legitimate governmental interest, and therefore, no equal protection clause violation exists.” Id. at 496.
Reported Advantages and Disadvantages of the Short Trial Program

Overall, the consensus among all of the key stakeholders in the short trial program is that it meets its intended objectives very effectively. It delivers a much faster trial date—typically within six months of the short trial program stipulation compared to up to four years for a regular civil jury trial in the district court. The shorter time frame and the restrictions on attorneys’ fees and expert witness fees limit the amount of financial exposure for litigants. The use of judges pro tempore to preside over short trials and the tighter restrictions on continuances ensure greater certainty that the trial will actually go forward on the date scheduled. Unlike an arbitration award that parties may either accept or reject, the short trial results in a valid jury verdict and an enforceable final judgment. The short trial experience may also satisfy litigants’ desire for “their day in court” in ways that an arbitration hearing would be unlikely to do. Finally, the administration of the short trial program by the ADR commissioner relieves the district court judges of routine case management for a sizable portion of their civil dockets, permitting them to concentrate on more complex cases requiring more individual attention. Short trial jurors receive the same compensation as jurors serving in other district court trials, and by all accounts are treated as or more respectfully in terms of effective use of their time and respect for their diligence. In exit questionnaires, the jurors themselves report that they were quite satisfied with their service.

In addition to effective and efficient case disposition, several experienced trial attorneys and judges pro tempore described the educational benefit of the short trial program, especially for younger lawyers who may lack opportunities to try comparatively low-risk cases to a jury. One judge pro tempore explained that the time constraints on presenting a case make short trials even more rigorous than regular jury trials. Trial lawyers must be more prepared and more focused on essential trial issues. Another district court judge, who was a frequent judge pro tempore and experienced trial lawyer before being elected to the district court bench, claimed that he liked to do short trials both to keep his trial skills sharp for higher-value cases and to experiment with new trial techniques in lower-risk cases.

68 During an assessment of jury operations in the Eighth Judicial District Court in 2008, the NCSC found that only 64% of jury panels that were scheduled for trial actually began jury selection that day. The majority of the cancelled panels were called off due to day-of-trial settlement or plea agreements and nearly one-fourth of the trials were continued to a future date. As a result, more than one-third of the jurors who reported for service never left the jury assembly room. Paula L. Hannaford-Agor, Assessment of Jury Operations and Procedures for High Profile and Lengthy Trials in the Eighth Judicial District Court of Nevada: Final Report 9 (Sept. 11, 2008). During the site visit for the Short Trial Program, informal discussions with the Jury Manager for the Eighth Judicial District Court confirmed that poor juror utilization due to day-of-trial cancellations has not improved significantly in the past three years.

69 The use of short trials as an appropriate venue to experiment with different trial techniques may also be spilling over to the district court bench. According to anecdotal reports, some district court judges have begun advocating the use of trial notebooks in non-short trial civil jury trials, citing improvements in juror comprehension and satisfaction.
The short trial program has received significant public acclaim as well. In 2004 it won the National Achievement Award from the National Association of Counties, which recognizes innovative programs that contribute to and enhance county government in the United States. In 2006 it won first place in the 15th Annual Better Government Competition sponsored by the Shamie Center for Restructuring Government at the Pioneer Institute for Public Policy Research.

In terms of disadvantages, the most significant seemed to be the ongoing issue of courtroom availability. The ADR commissioner reported that the demand for short trials greatly exceeds available space in which to conduct the trials, and he has lobbied hard for dedicated courtrooms for short trials to prevent the risk and uncertainty of continuances. He did not, however, foresee a remedy for courtroom shortages in the near future. Related complaints were expressed by several judges pro tempore about the lack of logistical support, especially access to printers, copiers, and other routine administrative resources, during short trials. One judge pro tempore noted that even the best pretrial management cannot anticipate every possible contingency that may arise during trial, and it is unreasonable to force unnecessary delays during trial for the judge pro tempore or parties to make changes in written jury instructions or to make copies of an exhibit that was unintentionally omitted from the trial notebook. Although some district court judges are fairly generous with judges pro tempore about access to these types of resources in chambers, there is some ongoing tension about the use of their courtrooms during district court dark periods. With the exception of the limited amount of time allocated for voir dire, no specific complaints were expressed concerning the trial procedures themselves.

It was not clear from the interviews with key stakeholders in the short trial program that short trials offer a distinct advantage for either plaintiffs or defendants. Recent statistics suggest that short trial juries are less generous to plaintiffs, awarding lower damage awards than those received in arbitration or even rendering verdicts for defendants on liability when the arbitrator had decided in favor of the plaintiff, which would suggest that short trials are a pro-defendant venue. On the other hand, anecdotal reports from stakeholders who have been involved in short trials since their inception suggest that the direction and differential between arbitration awards and jury verdicts have shifted periodically over the past decade, indicating that perhaps the current statistics reflect only temporary characteristics of the jury pool or even the pool of arbitrators. Regardless of plaintiff concerns about the comparative miserliness of short trial juries, there were also complaints on the defense side that scheduling the short trial date within six months is too fast, especially for defendants who view a relative delay in trial as a strategic advantage in settlement negotiations.
Because the limitations on attorneys' fees and expert witness fees are unique to the Nevada short trial program, interviews with key stakeholders focused on the impact of this feature on litigant and attorney satisfaction. Because most cases adjudicated by short trial involve contingency-fees arrangements for the plaintiffs, the general consensus among stakeholders was that this feature had little detrimental impact on attorneys and a fairly significant upside for the plaintiffs.

Under a contingency-fee arrangement, plaintiff attorneys typically only recover costs from plaintiffs if the jury returns a defense verdict in a short trial. The costs associated with unsuccessful cases are thus already accounted for in the general operating costs of the attorney's law firm. In the event of a successful suit, on the other hand, the fee agreement takes precedence over the short trial rules, permitting the attorney to recover the agreed-upon percentage of the award as the fee from the plaintiff, although the $3,000 attorneys' fee limit could be recovered from the defendant to offset the amount owed by the plaintiff.

It was generally agreed that the restrictions on the amount of attorneys' fees are likely to be more detrimental to the defense, particular in cases that require greater expenditures for retained counsel and expert witnesses to contest liability. Defense attorneys for many of these trials, however, are salaried attorneys for the insurance carriers, which would reduce the potential expenses incurred for attorneys' fees. There have been sporadic proposals to increase the cap on attorneys' fees, and at least one challenge that the $3,000 cap should be applied per party, rather than per side, but thus far concerns that litigation costs be minimized to the greatest degree possible have kept those proposals at bay.

Looking Forward

To date, the amendments adopted by the Nevada Supreme Court have tended to make the short trial program stronger and more legitimate over time, garnering significant support by key stakeholders. The Nevada Supreme Court recently adopted two additional changes to the short trial program.

The first provided a mechanism for the local district courts to eliminate the $1,000 “opt-out” fee, allowing parties that appeal a mandatory arbitration decision to bypass the short trial option and have their cases sent back to the district court for a trial de novo. While the proposal was pending before the Nevada Supreme Court, proponents argued that it was unfair to impose an additional $1,000 expense on parties who want a full jury trial before a district court judge and without the procedural restrictions set forth in the Short Trial Rules. That they would have to wait three to four years for that trial, rather than six months for a short trial, should be a factor for parties to take into consideration in deciding which option to elect, rather than being coerced into a short trial in lieu of a $1,000 fee. Opponents of the change,
on the other hand, argued that eliminating the opt-out fee would undermine the legitimacy of the short trial program by making it appear to be a second-class, albeit faster, alternative to a trial de novo before a district court judge. It would also provide a means for parties seeking delay for strategic reasons to achieve that objective while further overloading district court calendars at taxpayer expense. Siding strongly with the opponents of the change, the Eighth Judicial District Court has not availed itself of the opportunity to eliminate the “opt out” fee.

The second proposal was much less controversial. Those changes simply provided additional clarification about what constitutes a “final judgment” under the Nevada Short Trial Rules, provided rules governing objections to the judge pro tempore’s recommended judgment, and amended the rules concerning the payment of juror fees and costs to align with those applicable for civil cases in district court.70

References and Resources: Nevada Short Trial Program

Contact
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Relevant Statutes/Rules
Description of Short Trial Program

General Information
Nevada Short Trial Rules, List of Judges Pro Tempore, and Forms

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70 Those revisions were adopted on February 8, 2012. N.S.T.R. 5(a) provides an exception to the opt-out provision if local court rules have been adopted requiring the opt-out fee. To date, the Eight Judicial District Court has retained its opt-out fee.
In May 2010, the Oregon Supreme Court enacted Uniform Trial Court Rule (UTCR) 5.150, which authorized the Oregon Circuit Courts to permit civil litigants to resolve their cases with an expedited civil jury trial (ECJT) before a six-person jury. The rule specified that litigants who chose this procedure were exempt from mandatory arbitration, but it also imposed additional requirements that are not applicable to litigants seeking a jury trial under the standard civil process in Oregon. Two key conditions for ECJTs are holding the trial within four months of the parties’ stipulation to participate and pretrial disclosure of expert witness reports.

Five judges assigned to the Civil Case Management Committee of the Multnomah County Circuit Court had worked for adoption of the new rule and immediately seized the opportunity to implement the ECJT program. They viewed the ECJT as a suitable vehicle not only to provide litigants with speedier trials, but also to implement a number of related reforms to civil case processing including closer and more consistent pretrial management. Another major objective of the Multnomah County ECJT program was to provide younger, less-experienced lawyers the opportunity to try cases before juries in a relatively low-risk environment.

The first ECJT was held in May 2011 and by the end of 2011 a total of 8 cases had been scheduled for trial. For this case study, the NCSC interviewed the trial judges who developed and oversee the ECJT program in the Multnomah County Circuit Court and a number of the attorneys who participated in ECJT trials during its first year of operation. While it is too soon to make definitive judgments about the program’s success, it is clear that the way Rule 5.150 was implemented in the Multnomah County Circuit Court addresses a number of civil-case-processing concerns identified by the local civil bar. It is not clear, however, that the program is ideally suited as a training opportunity for young lawyers given the local legal culture and prevailing expectations about how civil cases should be litigated.
Effective May 2010, Chief Justice Paul J. De Muniz of the Oregon Supreme Court implemented Rule 5.150 of the Oregon Uniform Trial Court Rules (UTCR). The initial impetus for the rule was based on the chief justice’s concerns about the fairness of arbitration decisions and the costs imposed on litigants by extended civil litigation. The new rule authorized the Oregon judicial districts to designate a civil case as “expedited” provided that the parties to the case submitted a joint motion to seek the designation and the judicial district had adequate staff, judges, and courtrooms to manage expedited cases. Under UTCR 5.150, if the presiding judge of the judicial district grants the motion, the case becomes exempt from mandatory arbitration or other forms of alternative dispute resolution, and a date for a trial before a six-person jury is scheduled within four months of the order. Rule 5.150 also provides a default order for the schedule and scope of discovery if the parties fail to include a discovery agreement. Six counties in Oregon initially indicated their intent to implement ECJTs.

At about the same time that the Oregon Supreme Court was developing Rule 5.150, trial judges and attorneys in the Multnomah County Circuit Court were investigating the “vanishing civil trials” phenomenon. In late 2009, the presiding judge’s ADR/Vanishing Civil Jury Trial Committee issued a report, *The Vanishing Civil Jury Trial in Multnomah County*, which found a 30% decline in the number of jury trials since 2001. The report described findings of a survey of 450 trial lawyers and a series of focus groups with experienced trial attorneys and arbitrators about court- and litigation-related factors that discourage jury trials. The survey and focus group participants complained that the court’s master calendar system for civil cases resulted in delayed and inconsistent rulings on pretrial motions because trial judges were unfamiliar with the cases or less experienced with civil litigation generally. There was also a widespread perception that trials rarely began on the scheduled trial date due to the local practice of scheduling trial dates in the “regular course” before a case was given a “date certain” to commence trial.71 Mandatory arbitration was another focus of criticism because it increased...
the costs and the procedural complexity of civil litigation. Because mandatory arbitration was nonbinding, many lawyers viewed the process as simply “another bump in the road” after which one side or the other would appeal after “discovering” the opponent’s experts during the hearing. Some lawyers avoided the entire process by intentionally inflating the amount of damages sought in the complaint to make cases ineligible for mandatory arbitration. Other litigation-related factors discouraging jury trials included expert witness expenses, the “all or nothing” risk associated with jury verdicts, the inherent uncertainty of jury trials for risk-averse clients, and the stress involved in preparing for and trying cases to juries. The report specifically recommended that the Multnomah County Circuit Court implement the ECJT rule that was under consideration by the Oregon Supreme Court at that time.

Two additional factors contributed to the decline of civil jury trials: the unification of the Oregon district and circuit courts in 1998, and the increasing refusal of clients to agree to underwrite the ongoing legal education of junior-level attorneys. The former district courts, which had jurisdiction over civil cases up to $10,000 in value, permitted lawyers to bring lower-value cases to trial before a six-person jury. Litigants could appeal an unsatisfactory verdict to the Court of Appeals. Many experienced trial lawyers and judges in Oregon explained that they first obtained experience with jury trials in the former district courts. Since the late 1990s, civil litigants have increasingly refused to pay the cost of having junior lawyers sit as second chair in jury trials in the circuit court. As a result, younger lawyers lost access to two traditional training grounds for jury trial experience. According to one senior trial attorney who worked on the development of Rule 5.150, the intent of using six-person juries for ECJT trials was to restore the functional option of the district court experience that had served the experienced trial bench and bar so well in the past.

The ECJT Program in Multnomah County Circuit Court

Rule 5.150 provides a basic procedural structure for expedited civil cases. The rule requires the parties to file a joint motion to designate the case as an expedited case. The presiding judge of the judicial district (or designee) has sole authority to decide the motion. If the presiding judge grants the motion, the case is exempt from mandatory arbitration or other court ADR programs. The trial date must be set within four months of the order granting the expedited designation. All expedited civil jury trials must employ a six-person jury. The parties may design their own discovery plan, which is filed with the court. If they decline to do so, Rule 5.150 provides a default discovery plan, including mandatory discovery of the names, addresses,

72 UTCR Rule 5.150(1).
73 UTCR Rule 5.150(2).
74 UTCR Rule 5.150(2)(a).
75 UTCR Rule 5.150(2)(b).
76 UTCR Rule 5.150(7).
77 UTCR Rule 5.150(3).
and telephone numbers of all lay witnesses other than those to be used for impeachment purposes; all copies of unprivileged documents and access to tangible things that will be used to support the parties’ claims or defenses; and copies of all discoverable insurance agreements and policies.\(^7\) After the parties have requested an ECJT designation, the default discovery plan also provides that the parties can take no more than two depositions; serve no more than one set of requests for production and one set of requests for admission; serve all discovery requests no later than 60 days before the trial date; and complete all discovery no later than 21 days before trial.\(^7\) Parties are also prohibited from filing pretrial motions without prior leave of court.\(^8\)

In spite of the detail provided in the default discovery plan, Rule 5.150 leaves a great deal of the operational implementation to the discretion of the local judicial districts. The Civil Case Management Committee used this flexibility in Rule 5.150 to simultaneously address some of the concerns raised in the Vanishing Trials report. Cases designated as expedited under Rule 5.150, for example, are removed from the court’s master calendar and assigned to one of the five judges on the committee for all pretrial management purposes.\(^9\) During the initial case management conference with the parties, which is held within ten days of the expedited designation order, the trial judge sets the trial date no later than four months from the date of the designation order.\(^\)\(^2\)

Although Rule 5.150 provides that parties may not file pretrial motions without leave of court, the Multnomah County judges agreed to make themselves available to the lawyers to answer questions, clarify orders, and help resolve pretrial disputes as necessary.

Other than establishing the jury as a six-person panel, ECJT trials are typically conducted much like any other civil jury trial. There are no explicit restrictions on the length of the trial, the number of witnesses, or the form of evidence presented (e.g., live witness testimony versus trial exhibits). The parties can stipulate to various restrictions (and the rules implicitly encourage the parties to discuss them), but these agreements must be filed with the court at least 14 days before trial. The parties may also stipulate to try the case in a non-traditional manner (e.g., with or without voir dire by court and counsel, presenting statements of stipulated facts to be interpreted by live expert testimony, etc.). At least five of the six jurors must agree on the verdict to render it valid (compared to 9 of 12 jurors in a 12-person jury). Following the trial, both parties have the right to appeal an adverse verdict to the Oregon Court of Appeals.

\(^7\) UTCR Rule 5.150(4)(a).
\(^8\) UTCR Rule 5.150(4)(b)-(f).
\(^9\) UTCR Rule 5.150(5).
\(^1\) “Expedited Civil Jury Trials In Multnomah County.”
\(^2\) Id.
Trials under the ECJT Program

The first ECJT was held in August 2010. As of November 2011, the Multnomah County ECJT program had scheduled eight cases, most of which were personal-injury cases. This was a considerably slower start than anticipated by the Multnomah County trial bench, which had dedicated considerable time and effort to publicizing the availability of the program. Another surprise was that most of the requests for ECJT designation were filed by fairly experienced trial attorneys, rather than the more junior attorneys that the program was designed to attract. All but one of the attorneys interviewed during the NCSC site visit reported that they would participate in the program again if an appropriate case presented itself.

Both plaintiff and defense attorneys expressed similar views about the types of cases they believed appropriate for the ECJT program: simple (ideally single-issue, either liability or damages) cases involving lower monetary value (less than $50,000) in which any medical treatment that the plaintiff received had been completed. They explained that scheduling the trial date within four months of the designation order was unreasonable for more complex cases because such cases normally involve more time for discovery and more time for settlement negotiations. Cases subject to Oregon Revised Statute 20.080 also were identified as offering particularly strong incentives for both the plaintiff and defense to participate in the ECJT. Under ORS 20.080, the plaintiff’s attorney can recover reasonable attorney’s fees for cases valued $7,500 or less if the plaintiff prevails at trial provided that the defendant received a written demand for payment of the claim before the case was filed in court. The defendant in ORS 20.080 cases has every incentive to opt for a speedy trial and restricted discovery to limit the potential exposure to a large award of attorneys’ fees. The plaintiff, on the other hand, has an incentive to obtain a speedy resolution with minimal investment in discovery costs that might otherwise eclipse the plaintiff’s eventual damage award.

The opportunity to avoid mandatory arbitration was another key selling point for the attorneys that participated in the early ECJT trials. As the Vanishing Trials study found, most civil trial attorneys in Multnomah County simply plead damages in excess of $50,000 if they wish to avoid mandatory arbitration, but for plaintiffs this procedural sleight-of-hand also removes the availability of ORS 20.080 attorney’s fees for very low-value cases. The exemption from mandatory arbitration allows the plaintiff to bypass the “split the baby” approach that characterizes many of the arbitration awards as well as the additional costs involved in preparing for, participating in, and then appealing the arbitration hearing.

83 In contrast, Multnomah County’s ECJT judges panel views the program as open to cases of any value. At least one trial involved a prayer for damages in excess of $100,000. Cases are subject to mandatory arbitration if damages are pled in the amount of $50,000 or less.

84 One the other hand, some plaintiff attorneys may be less inclined to seek prompt resolution of ORS 20.080 cases because delay may provide for increased attorneys’ fees.
Several attorneys noted their appreciation about having immediate access to the trial judge, if necessary to resolve pretrial disputes, which is considerably sooner than the estimated six weeks to obtain a decision on a pretrial motion for cases assigned to the court’s regular civil docket. One attorney did point out an inherent irony concerning judicial accessibility in ECJT cases—namely, that pretrial access to judges is more often necessary in more complex cases, for which an ECJT designation would not normally be filed. All of the attorneys reported great confidence in the expertise of the ECJT judges and believed that a significant part of the program’s attraction is that these five judges are overseeing its operation and appeared committed to its success.

The attorneys had mixed opinions about the ECJT trials themselves. Several attorneys noted that jury selection involved less time with a six-person jury compared to a twelve-person jury, but the trial length was not appreciably shorter than would otherwise be expected for a regular civil jury trial. Some attorneys said that using a six-person jury made the trial feel less formal and evoked a more relaxed trial presentation style. But the downside to the smaller jury was a less demographically diverse panel and the potential for a disproportionate impact of any outlier jurors on the verdict. Some attorneys believed that the ECJT trial was considerably less expensive than a regular jury trial, but others said that the costs were about the same. Because the ECJT rules are relatively flexible with respect to trial presentations, lower costs are likely to reflect the efficiencies stipulated to during the final pretrial conference, rather than anything inherent in the ECJT program.

The only major disadvantages expressed by the attorneys dealt with the ECJT’s short and relatively inflexible deadlines. One attorney reported that once he had found both an appropriate case and a willing opposing counsel to participate in the ECJT, he had to wait more than two months to file the ECJT designation motion because they had mutually agreed on a trial date that was more than six months into the future. On one hand, this was an advantage because it gave both sides additional time to work up the case. But on the other hand, the trial itself did not take place appreciably earlier than it would have if they had simply decided to pursue the case as a regular jury trial.

Another attorney noted a logistically cumbersome issue related to the difference in disclosure deadlines between procedures for the ECJT procedures and mandatory arbitration. He explained that he routinely tries lower-value personal-injury claims, and his entire office management is set up with automated tickler alerts based on mandatory arbitration deadlines. The ECJT cases had to be manually adjusted and required much closer attention to ensure compliance with the rules.

85 In early 2012, Judge David Rees joined the Civil Case Management Committee, becoming the sixth judge participating in the ECJT Program.
Another attorney complained about the limited time frame between completing discovery and finalizing the trial stipulations. He recounted his experience in which he had submitted a request for admission to the opposing counsel toward the end of the discovery period. The opposing counsel declined the request for admission, forcing the attorney into a last-minute scramble to secure expert evidence to support his claim that medical treatment for the plaintiff was necessary. He would have been at a great disadvantage at trial had he already finalized the trial witness list.

That attorney’s experience reflects a unique aspect of the Oregon legal culture in which expert evidence is not discoverable, which has tended to create a culture of “trial by ambush.” The ECJT rules require that the attorneys disclose their live witness and trial exhibit list, including expert witnesses and expert reports, no later than 14 days before the trial date—a dramatic departure from routine practice for most attorneys. The one attorney who said he would not participate in the ECJT program in the future explained that he had fallen into the trap of stipulating to certain facts at the final pretrial conference, leaving him unable to respond with additional evidence when he learned that his opposing counsel intended to introduce unexpected expert evidence.

Both this attorney and several others noted that the 14-day expert witness disclosure rule in the ECJT program elevates the importance of having a well-established working relationship with the opposing counsel so that both sides feel confident that the other will not engage in last-minute tricks. In the alternative, the attorney must have sufficient “street smarts” to anticipate and avoid getting trapped into stipulations that would put him or her at a strategic disadvantage. Ironically, although the ECJT program was designed to make jury trials more accessible to younger, less experienced lawyers, this unique legal culture makes it unlikely that most young lawyers will have either established working relationships with opposing counsel or the requisite “street smarts” to react effectively.

“We Built It. Why Haven’t They Come?”

The major disappointment expressed by the Multnomah County trial bench concerning the ECJT program was the unexpectedly slow start for motions for an expedited designation. The ECJT program had been heavily advertised in local legal periodicals, CLE programs, and local civil bar association meetings. The ECJT judges gave presentations about the ECJT program at many of these meetings and CLE programs. The initial expectation was that the court would be trying in excess of 50 ECJT trials each year. That only 8 cases had been scheduled for trial in the first 18 months of the program, one of which ultimately settled before the scheduled trial date, fell far below expectations. The attorneys interviewed during the NCSC site visit offered
the explanation that the ECJT needed to establish more of a track record for fair outcomes and decreased costs before large numbers of civil attorneys would be willing to sign on. Several of the attorneys mentioned that they had asked the opposing counsel in a number of cases about filing an expedited designation motion before they found one willing to go forward.

The “newness” factor may be an inevitable challenge for courts implementing innovative programs, especially those that are essentially voluntary. Moreover, the ECJT program is specifically geared toward increasing the number of civil jury trials. Even under the best of circumstances, only a very small proportion of cases would opt into the program. In Multnomah County as elsewhere across the country, the vast majority of cases will continue to settle or be otherwise disposed by non-trial means. One attorney highlighted this point, stating that he would not want to expend the time and energy to convince first his client and then the opposing counsel to participate in the ECJT if the facts of the case suggested that it would most likely settle in the long run. This dynamic leaves a considerably smaller sample of cases to consider.

The same attorney implicitly raised a second obstacle to widespread use of the ECJT. A substantial number of attorneys in the Vanishing Trials study reported that the inherent “winner take all” nature of jury trials and risk-averse clients were significant factors that discourage jury trials. Understandably, clients are unlikely to be convinced to use the ECJT program simply for its educational value to their attorneys. Part of the challenge that attorneys have is convincing their clients that the ECJT offers a better opportunity for a fair outcome at a reasonable price, especially compared to settlement negotiations or an arbitration hearing. More risk-averse clients will require substantially more convincing until the ECJT achieves at least the perception, if not the reality, of a critical mass of successful jury trials. To the extent that all jury trials invariably have at least one loser—and even the winner may not always feel that he or she has won enough to compensate for the time and expense of a jury trial—that critical mass may be slow in accumulating.

Within law firms, a related obstacle for younger lawyers may be the challenge of convincing supervising attorneys to allow them to try the case under the ECJT program. More experienced attorneys are more likely to have the discretion to experiment with innovative programs. Indeed, almost all of the ECJT trials conducted as of November 2011 had been undertaken by fairly seasoned trial attorneys. One, who was in-house counsel for a large institutional client, also observed that he enjoyed considerably more discretion to decide whether to try a case and, if so, the best litigation strategy to employ, than attorneys working in retained defense firms who had more people looking over their shoulders and second-guessing their decisions.
Further complicating the task of securing agreement among all of the key decision makers is the fact that the civil bar now includes a full generation of lawyers that has practiced civil litigation without the implicit assumption that some small, but significant, portion of their cases would ultimately be decided by a jury. Most lawyers in practice today are much more familiar and comfortable with arbitration and other ADR techniques than with trying cases before either a judge or a jury. Many have never developed the necessary skills to do so and may not see an investment in acquiring those skills, either for themselves or for their junior attorneys, as cost-effective in the contemporary legal market. At least one of the more junior attorneys interviewed during the NCSC site visit admitted that his enthusiasm for acquiring effective trial skills is somewhat unusual among his peers; he envisioned his future professional career as part of a fairly elite cadre of lawyers who specialize in effective jury trial practice. A number of other lawyers echoed this viewpoint. They noted that the older, more experienced attorneys in their firms no longer want to dedicate a large amount of effort in trying small cases. Much of the enthusiasm for the ECJT program among the younger cohort of lawyers was the opportunity to acquire the professional skills to replace the older lawyers as they retire. They viewed the ECJT program as providing training to make them a valuable commodity to their law firms and to secure their professional future.

Conclusions

The ECJT reflects a savvy decision on the part of the Multnomah County trial bench to accomplish a number of case management objectives by introducing a fairly straightforward procedure for a speedier trial for lower-value cases. Their implementation of the ECJT program allocated cases for individual case management among a fairly small group of trial judges with extensive experience in civil litigation. All of the judges offered attorneys participating in the ECJT more immediate access to resolve pretrial issues. These steps were designed specifically to address the court management-related problems identified in the Vanishing Trials study, especially the inconsistent pretrial decision-making associated with the court’s civil master calendar. Their collective efforts to publicize the ECJT program to the local civil bar also sent a strong message that these judges are committed to making the program work effectively. These various efforts appear to have met with approval from most of the attorneys who have participated in ECJT trials.

Ironically, the most significant complaint about the program may be the introduction of a particular reform—namely, required disclosure of expert witnesses and evidence at least 14 days before trial—that was not previously identified as a problem by the practicing bar. In fact, it appears from the comments expressed by the
attorneys that the absence of expert discovery is well accepted in conventional legal practice in Oregon and even viewed as an advantage insofar that it provides the maximum degree of strategic flexibility while minimizing costs. The introduction of a very different cultural norm may take some time for Multnomah County attorneys to appreciate, if they ever do. The ECJT program also provides a catch-22 in terms of the intended participant pool. The program’s designers viewed the ECJT as a reintroduction of the district court model in which a large portion of the more experienced trial lawyers in Multnomah County originally cut their teeth. But the change in culture associated with early disclosure of expert evidence provides pitfalls that younger attorneys may be ill-equipped to avoid.

The ECJT has had a slower initiation period than many originally anticipated, but those expectations may have been unrealistic. Although most reviews of the first several ECJT trials have been fairly positive, a long-term concerted effort may be necessary to build sufficient trust in the ECJT program as a fair and cost-effective option for litigants, as well as a valuable training ground for those attorneys interested in obtaining jury trial experience.
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

Plaintiff
v.
Defendant

Case No. ______________________

MOTION FOR AN EXPEDITED CIVIL JURY CASE DESIGNATION

(1) The parties move the court for an order designating this case as an expedited civil jury case and exempting or removing it from mandatory arbitration, pursuant to ORS 36.405(2)(a) and (b), and from all court rules requiring mediation, arbitration, and other forms of alternative dispute resolution.

(2) Each party agrees:

   (a) To fully comply with any agreements set forth in section (4) of this motion as to the scope, nature, and timing of discovery, or, if there are no such agreements, to fully comply with the requirements of UTCR 5.150(4).

   (b) That all discovery will be completed by ______ (which must be no later than 21 days before the trial date).

(3) The parties agree: (Check one)

   _____ To conduct discovery in accordance with section (4) of this motion. The terms of section (4) supersede UTCR 5.150(4), OR.

   _____ To conduct discovery in accordance with the requirements of UTCR 5.150(4).

(4) If the parties agree to the scope, nature, and timing of discovery pursuant to UTCR 5.150(3), those discovery provisions are stated here and supersede UTCR 5.150(4).

   (a) Document discovery
       _____ Set(s) of Requests for Production per party
       Serve by ____________ (date)
       Produce by ________________ (date)

   (b) Depositions
       _____ Depositions per party
       Complete by ________________ (date)

   (c) Requests for admissions
       _____ Sets of Requests for Admission per party
Serve by ____________________
Serve response by ____________________

(d) Exchange names, and if known, the addresses, and phone numbers of witnesses
Describe categories of witnesses ____________ (e.g. those described in UTCR 5.150(4)(a)(i), percipient, lay, expert, all)
Exchange by ________________ (date)

(e) Exchange existing witness statements
Describe categories of witnesses ____________ (e.g. those described in UTCR 5.150(4)(a)(i), percipient, lay, expert, all)
Exchange by ________________ (date)

(f) Insurance agreements and policies discoverable pursuant to ORCP 36B(2)
Produce by ________________ (date)

(g) Other, if any (describe):

Produce by ________________ (date)

5. The parties agree that expert testimony will be submitted at trial by:

☐ Report

☐ An alternative to in person testimony (specify): _________________________

☐ In person testimony

6. To expedite the trial, the parties further agree as follows (describe stipulations such as those concerning marking and admissibility of exhibits, damages, and other evidentiary issues):

______________________________________________________________________
______________________________________________________________________
______________________________________________________________________

Dated this __ day of __________, 20__,

____________________________________________
Attorney for __________________________________

____________________________________________
Attorney for __________________________________

____________________________________________
Attorney for __________________________________
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

____________________________________  )  Case No. _______________________
) ) ORDER DESIGNATING AN EXPEDITED
) ) CIVIL JURY CASE

Plaintiff

v.

Defendant

I HEREBY ORDER that:

1. This case is designated as an expedited civil jury case.

2. Good cause having been shown, pursuant to ORS 36.405(2)(a) and (b), this case is
   □ exempt
   □ removed
   from mandatory arbitration and from all court rules requiring mediation, arbitration, and
   other forms of alternative dispute resolution.

3. Trial date will be set at the case management conference and the trial will be held no
   later than ____________________
   (month/year)

4. This case is assigned to Judge ____________________, and the parties are directed to
   call the judge immediately and arrange for a case management conference to be held
   within 10 days if feasible.

5. □ The written agreement of the parties
   □ The default provisions of UTCR 5.150(4)
   is/are are adopted as the case management order.

6. This order takes effect immediately.

DATED this _______ day of ______________, 20_____.

_________________________________________
Presiding Judge
WHAT TO EXPECT AT THE FIRST CASE MANAGEMENT CONFERENCE OF AN EXPEDITED CASE

One of the available trial judges (Kantor, Litzenberger, Matarazzo, Nelson, Wilson) will schedule a conference within 10 days of the expedited case designation. All trial counsel and self-represented parties must appear either in person (preferred) or by telephone.

The conference will address the following issues, if not previously agreed upon by the parties:

- The setting of the trial date;
- The parties’ discovery agreement, if any;
- Handling of pretrial disputes.
- Time limits on voir dire.
- Scheduling of the trial management conference.

In the absence of a discovery agreement, the additional issues will be addressed:

- The scope, nature, and timing of discovery, including depositions, requests for production and discovery requests for admission and other discovery requests;
- The date discovery will be complete, which must be not later than 21 days before trial;
- Stipulations regarding the conduct of the trial, which may include stipulations for the admissions of exhibits and the manner of submissions of expert testimony.
- Production of the names and, if known, addresses and telephone numbers of all persons, other than expert witnesses, likely to have knowledge that the party may use to support its claims or defenses, unless the use would be solely for impeachment.
- Production of all unprivileged ORCP 43 A(1) documents and tangible things that the party had in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.
- Production of all insurance agreements and policies discoverable pursuant to ORCP 36 B(2).
On January 1, 2011, the Expedited Jury Trials Act and additions to the California Rules of Court took effect, establishing an expedited jury trial program throughout the state of California. The expedited jury trial (EJT) rules and procedures were developed by the Small Claims Working Group (Working Group), which was established in April 2009 at the request of the Chief Justice and the Administrative Director of the Courts. Chaired by Judge Mary Thornton House (Los Angeles Superior Court), the Working Group comprised members of the California Judicial Council’s Civil and Small Claims Advisory Committee and representatives of a broad range of stakeholders including the plaintiff and defense bars, the insurance industry, business groups, and consumer organizations.

The charge to the Working Group was to consider various innovations that California might adopt to promote the more economical resolution of cases, increase access to courts for litigants with lower-value cases, and streamline jury trials in light of declining court resources available for civil cases. In the course of research into how other states had addressed these issues, the Working

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87 Cal. R. Ct. 3.1545-3.1552.
88 The Expedited Jury Trials Act has a five-year sunset provision and is set to expire January 1, 2016. The California Judicial Council is charged with assessing the impact of expedited jury trials in reducing litigant and court costs and maintaining an efficient and expeditious trial court system.
90 Within California’s unified court system, civil cases have three classifications based on dollar values and for which some variations in rules apply. A civil case in which the amount in controversy is $10,000 or less ($7,500 for automobile accidents in which the defendant driver’s insurance policy includes a duty to defend) may be filed as a small claim. Small claims are handled under simplified procedures, and the parties must represent themselves at trial. Cal. Civ. Proc. Code §§ 116.210-116.880. Other civil cases are divided into two classifications: limited civil (amount in controversy is $25,000 or less) and unlimited civil (amount in controversy exceeds $25,000). Cal. Civ. Proc. Code §§ 85-89. Some modifications to discovery and evidentiary procedures, along with limitations on certain types of motions, apply in limited civil cases. Cal. Civ. Proc. Code §§ 90-100.
91 California courts are primarily state funded. Over the past few years state funding has declined by over 30%, including $350 million in cuts effective July 1, 2011. The consequences of declining budgets include the closure of civil courtrooms and large staff reductions. For example, San Francisco closed 10 civil courtrooms and cut 67 employees in October 2011. Los Angeles County has also closed courtrooms and laid off 1,600 staff since 2010.
Group invited representatives from New York and South Carolina to discuss their experiences with summary jury trials. The reported success of these programs in reducing costs without compromising litigants’ rights or systematically favoring either plaintiffs or defendants allayed many of the stakeholders’ concerns and encouraged them to explore adapting South Carolina’s summary jury trial model for use in California. With broad-based support from its constituents, the Working Group embarked upon an intensive and inclusive process to establish a legal framework for a summary trial format that would balance flexibility for litigants and courts with the economies necessary to meet the program’s goals. Over a period of one and a half years, the Working Group negotiated and fine-tuned a set of rules and procedures for EJTs that would become part of the California Code of Civil Procedure and the California Rules of Court.

California’s EJT program is now in its early stages of implementation. To date its usage is uneven across the state, and relatively few EJTs have occurred. For example, only 19 cases were disposed as EJTs in Los Angeles County during the first 11 months of the program (January through November 2011). Although EJTs have not yet become routine for courts or the civil bar, judges, attorneys, and jurors who have participated in EJTs are generally very satisfied with the process and outcomes. These initial experiences indicate the potential for the EJT program to gain the momentum needed to accomplish its goals.

This case study focuses on the EJT rules and their potential benefits, the manner in which the program operates in the Los Angeles and San Francisco Superior Courts, and the experiences of attorneys who have been early participants in the program. This case study is based primarily on interviews with superior court judges and staff, staff of the California Judicial Council and the Administrative Office of the Courts, and attorneys practicing in Los Angeles, Orange, Riverside and San Francisco Counties who have participated in EJTs.⁹³

During this period, 25 expedited jury trials were conducted during this time period.

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⁹³ Project staff also reviewed case file data from the 19 identified EJTs concluded in Los Angeles County through November 30, 2011.
Expedited Jury Trial
Program Structure

California’s EJTs are voluntary short trials intended to conclude in a single day. The word “expedited” refers to the trial itself, not to pretrial procedures: expedited trials are intended to be shorter than ordinary trials, but they do not advance through the pretrial phases of litigation more quickly than non-EJT cases and generally do not receive a calendar preference. The Working Group chose the word “expedited” to distinguish California’s program from other methods of alternative dispute resolution. The Working Group sought to emphasize that EJTs are “real trials with real judges.” To this end, only judicial officers assigned by the presiding judge of a superior court may conduct EJTs. As in a standard jury trial, the verdict of the EJT jury is binding.

The Expedited Jury Trials Act (Chapter 674 of the California Code of Civil Procedure) and the California Rules of Court set out the requirements for EJTs. Thirty days before the scheduled trial date, the parties must file a proposed consent order indicating their agreement to participate in an EJT. EJTs are purely voluntary, and all parties and their attorneys must sign the consent order. Four elements are mandatory under the EJT statute: (1) each side is limited to three hours for presenting its case (opening statements, presentation of evidence, direct and cross-examination of witnesses, and closing arguments); (2) the case is heard by a maximum of eight jurors as opposed to twelve, with no alternates; (3) each side is limited to three peremptory challenges; and (4) the parties waive their right to appeal or file post-trial motions, except for fraud or misconduct of the judge or jury.

Examples of modifications that the parties may make within the bounds of the consent order include changes to the timing for pretrial submissions and exchanges; limitations on the number of witnesses per party; stipulations rules also set timelines for the pretrial exchange of documentary evidence, witness lists, and other trial-related information; advance filings of motions in limine; and a pretrial conference. The EJT pretrial rules are intended to create a default system for narrowing issues and evidence for trial including a pretrial conference designed to resolve any outstanding issues and promote an efficient trial process.

The consent order may include modifications to the standard EJT rules, but four elements are mandatory under the EJT statute: (1) each side is limited to three hours for presenting its case (opening statements, presentation of evidence, direct and cross-examination of witnesses, and closing arguments); (2) the case is heard by a maximum of eight jurors as opposed to twelve, with no alternates; (3) each side is limited to three peremptory challenges; and (4) the parties waive their right to appeal or file post-trial motions, except for fraud or misconduct of the judge or jury.

94 The standard provisions of the California Code of Civil Procedure apply to any matters not expressly addressed by Chapter 674, the Rules of Court, or the consent order that specifies the parties’ agreement on various pretrial, trial and evidentiary issues.

95 CaL. R. Ct. 3.1547. The rule qualifies this requirement with the statement “unless the court otherwise allows.” Most expedited jury trials appear to have proceeded more or less spontaneously and therefore have not followed the EJT pretrial procedures. In Orange County, however, several cases reportedly have proceeded through the full EJT pretrial process.
96 The court may deny the proposed order for good cause.
97 CaL. R. Ct. 3.1548.
regarding factual matters; stipulations as to what constitutes necessary or relevant evidence for a particular factual determination; and the admissibility of particular evidence without legally required authentication.\(^99\) Many of the allowable modifications are intended to streamline the pretrial process and to reduce the time needed for presenting the case.

An important feature of California’s EJTs is the expressed ability of the parties to enter into high/low agreements, which are permitted but uncommon in traditional civil trials in California. Such agreements set a maximum amount of damages that the defendant will be liable to pay and a minimum amount of damages that the plaintiff will recover. Neither the existence of a high/low agreement nor its contents may be revealed to the jury.\(^100\) The ability of each side to limit its exposure was designed to reduce uncertainty about the potential effects of the smaller jury size and to mitigate the risk entailed in waiving the right to appeal the verdict.

\(^99\) CaL R. Ct. 3.1547(b).
\(^100\) CaL CIV. PROC. CODE § 630.01(b). The agreement may be submitted to the court only under specified circumstances (by agreement of the parties, in a case involving either a self-represented litigant or a minor or other protected person, or to enter or enforce a judgment). CaL R. Ct. 3.1547(a)(2).

Implementation of the California Expedited Jury Trial Program

Although the statutes and rules governing EJTs apply throughout the state of California, the mechanics of implementation have been left largely to individual courts and judges. Ordinarily, the Administrative Office of the Courts would support an initiative such as the EJT program through training, education, and statewide program management. However, budgetary constraints and reductions in personnel have limited the ability of the Administrative Office of the Courts to provide staff support for the EJT program beyond the drafting of forms and informal communication with courts and the bar regarding the use of EJTs across the state.

The state budget crisis has also delayed the drafting and approval process for the EJT forms. One year after the EJT statute went into effect, the Judicial Council had approved only an information sheet describing EJT procedures. Forms for the consent order and a juror questionnaire were still awaiting final approval. Some courts and attorneys have used the draft versions of these documents.

Publicity for the EJT program has been handled primarily by judges, court clerks’ offices, and interested law firms and individual attorneys, although there was some early outreach on
the part of AOC staff. Judges in Northern California have spoken about the program at local bench-bar meetings, and some courts include information about EJTs in the packet of documents provided to each plaintiff upon the filing of a complaint. The civil defense bar presented a series of continuing legal education sessions on EJTs, and several judges and attorneys have written articles and granted interviews explaining the EJT program for state and local legal periodicals.

Outreach by individual judges to attorneys and litigants is an important means of raising awareness of the program. However, judicial knowledge of and active support for the EJT program varies widely. Some judges make a point of informing litigants of the EJT option at the final pretrial conference, whereas some are familiar with the program but do not actively promote it. Others have very little knowledge of EJT procedures but are receptive when attorneys propose an EJT.

Although official statistics on the number of EJTs conducted during 2011 have yet to be collected, EJTs appear so far to be uncommon. The Los Angeles Superior Court, which handles nearly 30% of the state’s civil caseload, held an estimated 19 to 25 EJTs during the first 11 months of 2011; San Francisco held approximately four. These numbers represent around 3% to 4% of all civil jury trials conducted in each court. One reason for the scarcity of EJTs may be that nearly all EJTs occur in limited civil cases ($25,000 and under), which account for slightly more than one-tenth of civil jury trials held in California. Judges and attorneys generally agree that limited civil cases are best suited to the EJT procedure because the issues tend to be simple and the volume of evidence low.

Other factors contributing to the limited use of EJTs may include attorneys’ lack of familiarity with EJT procedures, the finality of the judgment, and strategic considerations on the part of defendants. Judges report that, despite the outreach efforts described above, many attorneys remain unaware of the EJT option until it is mentioned in a pretrial conference. Even attorneys who have heard of the program may be hesitant to participate until they have observed the results of EJTs conducted by other attorneys. Several interview subjects speculated that, especially in personal-injury cases in which plaintiffs’ attorneys work on a contingent-fee basis, defendant insurance companies may be reluctant to agree to any procedure that reduces the plaintiff’s expenses. On the other hand, attorneys for an insurance company noted the value of EJTs in resolving cases for defendants who seek closure in the matter being litigated.


See supra note 2 and infra note 109.

A few attorneys practicing in Orange County reported having conducted approximately 10 EJTs.

In 2009-2010, the latest fiscal year for which data are available, the Los Angeles Superior Court held a total of 507 civil jury trials, and the San Francisco Superior Court held 132. JUDICIAL COUNCIL OF CALIFORNIA, 2011 COURT STATISTICS REPORT 66 (2011).

See supra note 90.
Especially in unlimited civil cases (amount in controversy exceeds $25,000), attorneys may hesitate to recommend an EJT to clients who would be unable to challenge an unfavorable trial result. Post-trial motions and appeals are commonly filed in unlimited civil cases: in a sample of 12 California courts, post-trial motions were filed after 40 percent of unlimited civil jury trials held during 2005, and 26 percent of unlimited civil jury trials held in the same year resulted in appeals.\footnote{These data are taken from the 2005 Civil Justice Survey of State Courts, which included the superior courts in Alameda, Contra Costa, Fresno, Los Angeles, Orange, San Bernardino, San Francisco, Santa Clara, Ventura, Plumas, Marin, and Santa Barbara counties.} Although the absence of post-trial motions and appeals following an EJT has the potential to be a significant source of cost savings, parties and attorneys appear to be unwilling to give up the option of challenging the trial judgment in unlimited civil cases.

Even when the parties have opted for an EJT, many have not followed all the EJT procedures established by statute and rule. In the program’s early months, the EJT rules have been used primarily for trials themselves, and courts have frequently waived the required pretrial procedures. To date, the majority of EJT consent orders have been filed on the eve of trial, precluding the deadlines for the pretrial exchanges of documents and information and the filing of motions in limine. In San Francisco, all EJTs held as of December 2011 were elected during the final conference with the judge on the scheduled trial date. In 18 of the 19 Los Angeles EJT cases, the EJT consent order was filed less than a week before trial, although earlier notations regarding EJT appear in the files of two of these cases. In Orange County and Riverside County, however, attorneys have used the full EJT pretrial procedures. These attorneys report that the procedures have helped narrow the issues and evidence for trial, which has streamlined the trial and reduced litigant costs.

The relatively low level of awareness of the EJT option is an obvious explanation for the late election of EJTs in most cases tried to date. Another reason may be courts’ use of the master calendar system in which a case is not assigned to a specific judge until just before the trial begins. San Francisco, for example, uses a master calendar for all civil cases; Los Angeles employs a master calendar in limited civil cases, which represent the vast majority of EJTs. Under a master calendar system, lawyers and litigants may be reluctant to give up the right to appeal until they know which judge will preside at trial.

The last-minute election of an EJT reduces the potential cost savings to the court system as well as to litigants. If a trial is not designated in advance as an EJT, a full panel of jurors must be summoned and sent to the courtroom for jury selection. In some courts, 24 hours notice of an EJT is sufficient to avoid sending a full panel to the courtroom, but the court still wastes resources by summoning more jurors than needed. For litigants, attorneys, and witnesses, the late election of an EJT means that the issue-narrowing benefits of the EJT pretrial
procedures, along with any potential savings in the cost of trial preparation, are lost. As a practical matter, however, some attorneys suggest that the cost of preparing for an EJT may not be significantly less than the cost of preparing for a standard limited civil trial because discovery and other pretrial procedures for EJTs and limited civil cases are similar.

In practice, EJTs may not be substantially shorter than ordinary limited civil jury trials. Very few EJTs are actually completed within one day. For example, of the 19 EJTs held in Los Angeles County between January and November of 2011, only 4 were completed within one day, 12 lasted two days, and 3 were three days long. Attorneys and judges report that jury selection in most limited civil cases is already quite streamlined, but jury selection is typically faster in EJT cases due to the smaller size of the jury. Because of the flexibility of the EJT procedures, the time savings largely depend upon the wishes of the parties and the discretion of the judge. For instance, with judicial approval the parties may stipulate to allow additional time for voir dire, which lengthens the trial, or to relax the rules of evidence, which reduces the time needed for presentation of the case. Even the ostensibly mandatory features of EJTs appear to be waived in some cases—for example, alternate jurors were used in at least two EJTs conducted in Los Angeles, and some judges are flexible in granting a party more than three hours to present a case if needed.

Potential Benefits of the California Expedited Jury Trial Program

In individual cases, California’s EJT program has the potential to reduce trial costs for litigants and attorneys by encouraging the parties to agree upon a streamlined presentation of evidence. In one case, for example, the parties stipulated to use the plaintiff’s medical records without calling the plaintiff’s doctor to testify, saving both time and expert witness fees. Although the parties are free to make these types of evidentiary stipulations in any case, the EJT program’s exchange requirements and time limits are designed to encourage such agreements. The time limit for presenting the case also forces the attorneys to distill the case to its essential issues, potentially leading to the pretrial settlement of certain issues or even the entire case. The application of the EJT pretrial rules is expected to become more widespread as courts, judges and attorneys become more familiar with the process and with the benefits of the EJT pretrial procedures in reducing the costs of the trial itself.

By reducing the cost of taking a case to trial, the EJT program also is intended to increase access to justice in cases with damages of low to moderate value. If trial costs are reduced, then plaintiffs’ attorneys may be more willing
to accept less valuable personal injury cases on a contingent fee basis. For both plaintiffs and defendants, EJTs also may offer a more affordable way to have their day in court, allowing them the emotional satisfaction of having their cases heard by a jury instead of being forced into a settlement by the high cost of going to trial.

Two other factors suggest that EJTs may have beneficial effects on civil justice practice. First, EJTs produce jury verdicts, which provide metrics for assessing the value of particular types of claims. This knowledge should promote more informed negotiations and settlements of claims that do not proceed to any type of trial, whether an EJT or a conventional jury trial. Second, some attorneys have hypothesized that the EJT will provide a low-risk forum where young attorneys can gain trial experience.

The greatest real-world impact of the California expedited jury trial program may fall not upon litigants or the courts but on jurors. Judges and court staff conducted an informal study of EJTs that occurred in Los Angeles County during the first 11 months of the program (January through November 2011). At least 25 expedited jury trials were held during this time period. Nineteen of the cases were limited civil matters, and the remaining six essentially fit the profile of a limited civil case. The nineteen limited civil cases accounted for 20 percent of the approximately 101 limited civil trials concluded during the 11-month period. Verdicts split about evenly between plaintiffs (13) and defendants (12).

Judges provided more detailed information about 15 EJT trials. Thirteen of these cases arose from automobile accidents, and all but one of the 15 cases involved claims for minor impact soft tissue injuries. The trial records suggest that the EJT limits on case presentation time and provisions encouraging streamlined evidence production are

The First Year of Expedited Jury Trials in Los Angeles County

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109 This figure differs from the data collected by the director of juror services for Los Angeles Superior Court as of November 30, 2011. These data may not have accounted for other expedited jury trials across the several courts in Los Angeles County because the courts have yet to develop a uniform way to identify them.
110 The six unlimited civil cases represented, of course, a much smaller proportion of the approximately 836 unlimited civil trials concluded during the time period.
111 The other two cases were a dog bite and a slip-and-fall.
reasonable and achieving their intended effects on trial time and related costs. Both parties used all their allotted case presentation time in only three of the 13 cases for which this information was reported.\textsuperscript{112} Plaintiffs presented at least one witness and up to four, with an average of 2.3. The number of witnesses called by defendants ranged from none to two and averaged 1.2. In five of 14 cases the parties presented no experts. The jurors reportedly valued the lawyers focusing on the critical evidence, and their deliberations averaged approximately two hours.

Few of the EJTs achieved the goal of a one-day trial; the vast majority carried over to a second day. However, all of the 15 trials examined originally had been projected to require at least three trial days and as high as seven trial days, with the majority of trial estimates ranging from three to five days. In the end, all 15 trials, and deliberations in most, were completed in two days. Based on these figures, EJTs eliminated at least 50 trial days. The parties also incurred lower expert fees because the experts did not have to be on call to testify for a protracted period of time.

\textsuperscript{112} Among the 13 cases, six plaintiffs used all their time and only three defendants used the full amount.

Looking Forward

After one year, California’s EJT program remains in an experimental stage. Some jurisdictions and individual judges have moved more quickly and enthusiastically to try out the process, and a growing number of attorneys are gaining experience trying cases under the EJT rules. By and large, judges, attorneys, and jurors who have participated in EJTs view them quite favorably.

The positive experience with EJTs suggests that their use is likely to grow as more attorneys experience the benefits and share their positive perspectives with colleagues through professional publications and associations. Courts also are likely to promote EJTs more vigorously as judges and court clerks gain experience and learn from their colleagues in other courts.\textsuperscript{113}

To date, however, EJTs largely have been used in limited civil cases in which the issues are not complex, the number of witnesses is small, and the attorneys are able to work together in a collegial and cooperative manner. Litigants, attorneys, and the courts are more likely to realize the potential cost savings from EJTs if the use of the EJT procedure is expanded beyond limited civil cases and the parties select an expedited trial earlier in the litigation process.

\textsuperscript{113} The Administrative Office of the Courts is planning at least three presentations for judges around the state in 2012.
Courts can take a number of steps to encourage the use of expedited jury trials to achieve economies for the justice system and for litigants. First, judicial leadership is needed to promote the benefits of EJTs to attorneys much earlier in the pretrial stages of litigation. Second, the court can provide calendar preferences for EJTs, which will allow attorneys to coordinate witnesses and reduce costs to the parties. One suggestion is to set aside a designated time period for EJTs, such as one day per month or one week per quarter. As attorneys see that cases can get to trial faster under the EJT rules, they will be more likely to elect expedited jury trials, especially if budgetary pressures continue to diminish the availability of standard civil jury trials. Third, courts that employ a master calendar system can designate a specific judge or judges to hear all EJTs, decreasing the perceived risk of electing an EJT before the trial judge has been assigned. Ultimately, the success of California’s EJT program will depend on the efforts of its proponents to persuade attorneys and litigants that the advantages of an expedited trial outweigh any perceived risks.

**References and Resources: California Expedited Jury Trial Program**

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**Relevant Statutes/Rules**
Statute: Expedited Jury Trials Act (stats 2010 Ch. 674)
Code of Civil Procedure Sections 630.01-630.12

California Rules of Court Chapter 4.5
Expedited Jury Trials (Rules 3.1545-3.1552)

**General Information**
California Courts

**Los Angeles Superior Court**
This information sheet is for anyone involved in a civil lawsuit who is considering taking part in an expedited jury trial—a trial that is shorter and has a smaller jury than a traditional jury trial. Taking part in this type of trial means you give up your usual rights to appeal.

Please read this information sheet before you agree to have your case tried under the expedited jury trial procedures.

This information sheet does not cover everything you may need to know about expedited jury trials. It only gives you an overview of the process and how it may affect your rights. You should discuss all the points covered here and any questions you have about expedited jury trials with your attorney. If you do not have an attorney, you should consult with one before agreeing to an expedited jury trial.

1. What is an expedited jury trial?

An expedited jury trial is a short trial, generally lasting only one day. It is intended to be quicker and less expensive than a traditional jury trial.

As in a traditional jury trial, a jury will hear your case and will reach a decision about whether one side has to pay money to the other side. An expedited jury trial differs from a regular jury trial in several important ways:

- **The trial will be shorter.** Each side has 3 hours to put on all its witnesses, show the jury its evidence, and argue its case.

- **The jury will be smaller.** There will be 8 jurors instead of 12.

- **Choosing the jury will be faster.** The parties will exercise fewer challenges.

- **All parties must waive their rights to appeal.** In order to help keep down the costs of litigation, there are no appeals following an expedited jury trial except in very limited circumstances. These are explained more fully in 5.

2. Will the case be in front of a judge?

The trial will take place at a courthouse and a judge, or, if you agree, a temporary judge (a court commissioner or an experienced attorney whom the court appoints to act as a judge) will handle the trial.

3. Does the jury have to reach a unanimous decision?

No. Just as in a traditional civil jury trial, only three-quarters of the jury must agree in order to reach a decision in an expedited jury trial. With 8 people on the jury, that means that at least 6 of the jurors must agree on the verdict in an expedited jury trial.

4. Is the decision of the jury binding on the parties?

Generally, yes, but not always. A verdict from a jury in an expedited jury trial is like a verdict in a traditional jury trial. The court will enter a judgment based on the verdict, the jury’s decision that one or more defendants will pay money to the plaintiff or that the plaintiff gets no money at all.

But parties who agree to take part in expedited jury trials are allowed to make an agreement before the trial that guarantees that the defendant will pay a certain amount to the plaintiff even if the jury decides on a lower payment or no payment. That agreement may also put a cap on the highest amount that a defendant has to pay, even if the jury decides on a higher amount. These agreements are known as “high/low agreements.” You should discuss with your attorney whether you should enter into such an agreement in your case and how it will affect you.

5. Why do I give up most of my rights to appeal?

To keep costs down and provide a faster end to the case, all parties who agree to take part in an expedited jury trial must agree to waive the right to appeal the jury verdict or decisions by the judicial officer concerning the trial unless one of the following happens:

- Misconduct of the judicial officer that materially affected substantial rights of a party;

- Misconduct of the jury;

- Corruption or fraud or some other bad act that prevented a fair trial.

In addition, parties may not ask the judge to set the jury verdict aside, except on those same grounds. Neither you nor the other side will be able to ask for a new trial on the grounds that the jury verdict was too high or too low, that legal mistakes were made before or during the trial, or that new evidence was found later.
The goal of the expedited jury trial process is to have shorter and less expensive trials. The expedited jury trial rules set up some special procedures to help this happen. For example, the rules require that several weeks before the trial takes place, the parties show each other all exhibits and tell each other what witnesses will be at the trial. In addition, the judge will meet with the attorneys before the trial to work out some things in advance.

The other big difference is that the parties can make agreements about how the case will be tried so that it can be tried quickly and effectively. These agreements may include what rules will apply to the case, how many witnesses can testify for each side, what kind of evidence may be used, and what facts the parties already agree to and so do not need to take to the jury. The parties can agree to modify many of the rules that apply to trials generally or even to expedited jury trials (except for the four rules described in 3).

Who can have an expedited jury trial?

The process can be used in any civil case that the parties agree may be tried in a single day. To have an expedited jury trial, both sides must want one. Each side must agree that it will use only three hours to put on its case and agree to all the other rules above. The agreements between the parties must be put into writing in a document called a Proposed Consent Order Granting an Expedited Jury Trial, which will be submitted to the court for approval. The court must issue the consent order as proposed by the parties unless the court finds good cause why the action should not proceed through the expedited jury trial process.

You can find the law and rules governing expedited jury trials in Code of Civil Procedure sections 630.01–630.12 and in rules 3.1545–3.1552 of the California Rules of Court. You can find these at any county law library or online. The statutes are online at www.leginfo.ca.gov/calaw.html. The rules are at www.courts.ca.gov/rules.
This Consent to Expedited Jury Trial Form is be filled out and signed by all parties or their legal representatives and their attorney of record prior to jury selection in an Expedited Jury Trial Proceeding as defined by California Code of Civil Procedure §§630.01 through 630.12 and California Rules of Court 3.1545 through 3.1552. Information about Expedited Jury Trial [EJT] Procedures can be found on Form EJT-010-INFO.

Please check and initial the below boxes in response to the information requested.

I/We__________________________[insert name] am the □ Plaintiff □ Plaintiff’s Representative □ Defendant □ Defendant’s Representative □ Other __________ and have the authority to consent to an Expedited Jury Trial.

[Initial Here (Optional)]

1. □ I am represented by an attorney who has advised me about the EJT procedure and provided me with a copy of Judicial Council Form EJT-010-INFO.
   □ I am representing myself and understand the Expedited Jury Trial Procedures as set forth in the California Rules of Court 3.1545 and 3.1552.

[Initial Here (Optional)]

2. I understand and consent to the EJT Procedure which is a shorter trial with a smaller jury than a traditional 12 person jury and I have agreed to ______ persons on this jury.

[Initial Here (Optional)]

3. I understand and consent to the EJT Procedure which requires a waiver of the appeal rights of ALL parties except in very limited circumstances.

[Initial Here (Optional)]

4. I understand that I may not ask the judge to set aside the jury verdict except in extremely limited circumstances and in no case can any party ask for a new trial on the grounds that the verdict was too high or too low or that new evidence was found later.

[Initial Here (Optional)]

5. I understand and consent to the EJT Procedure which requires only three-quarters of the jury to agree in order to reach a decision.

[Initial Here (Optional)]
6. I understand that the parties may agree to the conditions of the trial in terms 
of applicable rules, number of witnesses, types of evidence, and that this is done in order to shorten 
the length of time in which the matter will be tried to the jury. A copy of that agreement is attached 
hereto as Exhibit __________________________. __________________ [Initial Here (Optional)]

7. I understand that the decision reached by the jury in the EJT procedure is BINDING 
on all parties and that the court will enter a judgment based on the verdict which may require one 
or more defendant to pay money to a party or to pay no money at all, except in the case of 
attorney fees and costs which will be decided by the court. [Initial Here (Optional)]

8. I understand and have agreed that a □ commissioner of the court and/or a 
□ temporary judge may preside over the EJT. A separate stipulation has been prepared and 
provided to the court by all the parties. [Initial Here (Optional)]

9. (Other)

10. □ Additional pages are attached hereto: Pages 3 through _____ and are 
incorporated by reference as though set forth fully herein.

11. After reading and initialing the above, I hereby consent to the Expedited Jury 
Trial Procedures:

□ Plaintiff/Representative □ Defendant/Representative  □ Other __________

[Signature] __________________________________________

[Print Name] __________________________________________

[Signature] __________________________________________

[Print Name] __________________________________________

Attorney for □ Plaintiff/Representative □ Defendant/Representative  □ Other

[Signature] __________________________________________

[Print Name] __________________________________________

[Signature] __________________________________________

[Print Name] __________________________________________

Date. ___________ IT IS SO ORDERED.

--------------------------------------------------------------------------------

□ Judge  □ Commissioner  □ Temporary Judge
Conclusions and Recommendations

The summary jury trial concept has evolved considerably since its debut in Judge Lambros’s courtroom in the early 1980s. Perhaps the most significant change is the summary jury trial’s transition from a tool to promote settlement of civil cases to a binding decision on the merits. Part of the attraction of an enforceable judgment may lie with the types of cases for which the summary jury trial programs in these courts were designed—namely, relatively simple, lower-value cases with genuine disputes with respect to liability, damages, or both. Providing a preview of how an actual jury might evaluate the evidence may be a useful settlement technique in a complex, high-stakes case filed in federal court, but for the types of cases adjudicated in these state court programs, a speedy, inexpensive, and final determination on the merits is the key to justice. A large portion of the institutional credibility enjoyed by the American justice system is due to its capacity to deliver fair and impartial justice to all comers, not just those who can afford to bring a case to trial. A key objective of these programs is to provide a forum in which civil cases can be resolved cost-effectively and still receive individual consideration regardless of the relative value of their claims.

A second consideration, of growing importance in both state and federal courts, is the rapid erosion of jury trial experience in the civil trial bar. If attorneys do not have sufficient opportunities to hone trial skills regularly in relatively low-risk cases, they will be woefully unprepared and unwilling to do so in those high-stakes disputes that warrant the commonsense approach of a jury. The concerns expressed by judges and attorneys during the NCSC site visits revealed all too clearly that mandatory arbitration and other forms of alternative dispute resolution do not adequately substitute for jury trial experience. The American justice system risks losing a valuable component of its institutional credibility unless a significant portion of the practicing bar maintains the trial skills necessary to keep trial by jury a viable option for dispute resolution.

In spite of the very different procedural and operational differences in the programs observed in these case studies, the courts that implemented these programs have implicitly adopted one of two underlying theories about how they reduce costs and increase access to jury trials. The first theory
focuses on streamlining the pretrial process to allow litigants to proceed to trial at lower cost. This approach normally employs incentives for litigants, such as the promise of an early trial date, priority placement on the court’s trial calendar, or at least a firm trial date, in exchange for restrictions on the scope and the length of time to complete discovery. The premise is that attorneys are forced to focus their attention only on the key disputed issues, rather than seeking evidence to support every conceivable issue that might be litigated and expending more money than the maximum value of the case. Because discovery is distilled to the most critical factual and legal disagreements, the subsequent trial requires less time, fewer witnesses, and less documentary evidence. Additional benefits of this approach include giving judges the ability to accommodate a greater number of such trials on the court’s calendar and ensuring that jurors receive a more coherent trial presentation from the attorneys. The newer program implemented in Oregon explicitly adopts this approach in its rules and procedures. The Charleston County and Clark County programs also do so, albeit to a somewhat lesser extent. The Charleston County program moves the case off the court’s rolling docket and offers litigants the incentive of a firm trial date. The Clark County program sets the trial date within six months of the parties’ stipulation to participate in the short trial program; otherwise the parties would wait up to four years for a regular jury trial.

The second theory focuses on streamlining the trial itself, which indirectly affects the pretrial process. The premise is that trial attorneys will not expend substantial amounts of time and effort to gather evidence that cannot be used at trial given constraints on time, the number of live witnesses, the form of expert evidence, or, in the case of the Clark County program, the restrictions on allowable attorneys’ and expert witness fees. The Clark County and Maricopa County short trials, the New York summary jury trial, and California’s EJTs are all examples of this approach. Of course, several of these programs adopt elements of both approaches by placing restrictions on both the pretrial and trial procedures.

In addition to their general underlying premise, these programs have a number of procedural and operational characteristics in common. Many of them explicitly exempt eligible cases from mandatory arbitration programs, for example. In some instances, the exemption responds to complaints about the quality of the arbitration decisions and in others it simply eliminates what many practitioners view as an unnecessary pretrial hurdle that adds expense and delays the final resolution. With one exception, all are voluntary options for civil litigants; in Clark County, Nevada, the short trial is mandatory for litigants seeking to opt out of mandatory arbitration or to appeal a mandatory arbitration decision.

All of the programs strongly encourage the attorneys to stipulate to the admission of uncontested evidence and to rely heavily on
documentary evidence presented in juror notebooks rather than live witness testimony. The intent of these preferences in evidentiary procedure is to facilitate a speedier trial than would otherwise take place under traditional jury trial procedures. Ironically, this shift in emphasis toward documentary evidence rather than live witness testimony brings the trial closer in appearance to an arbitration hearing in which the arbitrator may be provided a brief written or oral summary of the evidence with supporting documentation to review before rendering a decision. Although jurors were generally praised for taking their role seriously in summary jury trials, some individuals questioned the extent to which jurors closely examined all of the documentary evidence in the trial notebooks.

All of the programs impanel a smaller jury—by as much as half—than would otherwise be used in a regular jury trial, which saves time during jury selection and the expense of juror fees. Most of the participants in these programs reported their belief that the size of the jury does not affect the jury verdicts in any appreciable way, but some expressed concern that smaller juries tended to be less demographically diverse and more susceptible to the opinions of outlier jurors. Empirical research has confirmed the validity of these concerns, but they may be outweighed by advantages of smaller juries in lower-value cases.114

Of greater importance than their commonalities, however, is the apparent suitability of the summary jury trial approach for addressing a variety of disparate problems in each jurisdiction. Because the trials themselves are comparatively short and are presided over by local attorneys, the Charleston County court found that the summary jury trial could be used to circumvent longstanding problems related to civil calendar management. The restrictions on attorneys’ fees and expert witness fees in the Clark County program explicitly tackled the problem of affordable access to justice. The Oregon court uses its expedited civil jury trial process to introduce and refine individual calendar management and effective judicial supervision of the pretrial process. At least for a time, the Maricopa program offered litigants an escape from a much-criticized mandatory arbitration program. The original program implemented in Chautauqua County, New York, was similar to the federal model insofar that it served as a check on unrealistic litigant expectations, but the statewide rollout has deliberately sought sufficient flexibility to address all local conditions. In practice, if not intent, the statewide implementation effort in California also appears to be informally adapting to local circumstances in each county.

The intent to address local problems and concerns is no guarantee that a summary jury trial program will ultimately succeed, however. Looking across the six programs, several factors stand out as fundamental to their success. The first is strong judicial support for the program. Or, more to the point, weak judicial support can cripple a program. Maricopa County’s short trial

program provides the most concrete example as its popularity fizzled following the retirement of Judge Kaufman, its founder and most ardent supporter on the trial bench. Although the judges who are currently assigned to the Civil Division in Maricopa County generally view the Short Trial Program favorably, no one has yet stepped forward to champion the program and raise it from its current status as just another ADR track. Similarly, the slow start for EJTs in California can be partly attributed to the lack of consistent judicial knowledge of, and marketing for, the program in the different counties across the state.

It should be noted, moreover, that strong judicial support for a program need not involve a personal investment on the part of the entire bench. The South Carolina program, which relies on experienced attorneys to serve as judges in summary jury trials, garnered approval from the local trial bench by diverting civil cases from the court’s trial calendar, allowing the judges to reallocate their time and attention to reducing a criminal case backlog. The Clark County program, which employs judges pro tempore to oversee the trials, relieves trial judges of responsibility for pretrial management while giving them credit when cases are successfully resolved. The Clark County program also receives tremendous support from the local legislature because it is financially self-sustaining, thereby reducing the burden on local taxpayers.

Another characteristic of program success is the extent to which all segments of the local civil bar are confident that the program offers a fair and unbiased forum for resolving cases. Perceptions of fairness relate not only to the likelihood of an objectively just outcome for the litigants, but also to the impact of procedures on the ability of attorneys on both sides of a dispute to manage the case cost-effectively. The plaintiff and defense lawyers interviewed for the case studies candidly acknowledged their differing strategic approaches to making these types of cases financially profitable. Obviously, a large part of the focus for all segments of the civil bar will depend on their respective perceptions of the fairness of juries and jury verdicts, at least as compared to alternative dispute resolution methods. If summary jury trials are viewed as a dependably pro-defense venue, plaintiff lawyers understandably will be reluctant to participate, and vice versa.

Several of the programs examined in this study were initiated in response to broad dissatisfaction by both the plaintiff and defense bars with the fairness of mandatory arbitration decisions. The comparison of arbitration decisions with short trial verdicts in Clark County revealed that juries rarely decided cases comparably to arbitrators. While the majority of jury verdicts in 2011 favored defendants over plaintiffs, the jury returned a verdict that is more favorable to plaintiffs than the arbitration decision in approximately 20% of short trials. Moreover, the direction of verdicts has reportedly shifted from time to time. Consequently, both the plaintiff and defense bars in Clark County consider short trials a fair option for clients. The Clark County experience differs starkly from that of Maricopa County, where short
trial verdicts are believed to strongly favor the defense. Plaintiff appeals from arbitration decisions are rare, and when they do occur, most plaintiffs opt for a bench trial or a regular jury trial before a superior court judge. On the other hand, plaintiffs and defendants tended to prevail more or less equally in summary jury trials in New York and in Los Angeles.

Procedural requirements can also play a part in perceptions of fairness for the local bar, especially those concerning penalties for participating in the program as well as the right to appeal an adverse verdict. Several of the jurisdictions have arbitration-appeal penalties providing for awards of reasonable attorneys’ fees or expert witness fees if the jury verdict failed to improve the appellant’s position by a given percent. Maricopa County has the most stringent rule, requiring arbitration appellants to better their outcome by at least 23%, an especially high hurdle that serves as a significant disincentive to seeking a short trial. The arbitration-appeal penalty is less severe in other jurisdictions, reducing the risk to litigants. In addition, the Maricopa County, New York, and California programs greatly restrict the right to appeal. Attorneys in some of those jurisdictions noted that this feature can greatly discourage participation as it necessarily closes off all future options. In contrast, the Clark County and Oregon programs permit litigants to appeal a summary jury verdict as they could from any other jury verdict. It is extremely rare that a litigant actually does so.

Securing support by both the local plaintiff and defense bars was cited as critical to the success of programs examined in this study. Equally important, however, was garnering support across different segments of the defense bar, especially salaried, in-house lawyers representing insurance carriers and institutional clients as well as retained counsel working for more traditional law firms. In-house lawyers representing insurance carriers and institutional clients are repeat players in summary jury trial programs. Many of these individuals noted the importance for their clients of periodically “testing the market”—that is, trying cases before local juries for the specific purpose of establishing the range of reasonable settlements in similar cases. At the same time, the policies of national insurance carriers frequently differed from site to site on the degree of autonomy and discretion granted to in-house lawyers to make judgments about whether to settle a case or bring it to trial. For the most part, lawyers with greater autonomy seemed more supportive and enthusiastic about these programs, if only because they provided more options for resolving cases.

Retained defense attorneys faced a different set of incentives and disincentives concerning these programs. Their clients were more likely to be motivated to keep costs down, so the option of earlier trials that could be completed in a single day generally worked in the programs’ favor. Younger, less experienced lawyers may find these programs attractive insofar that they provide an opportunity for professional development.
that might be very valuable in the future, but they must also be realistic that preparing for a summary jury trial involves a great deal more time and effort than doing so for an arbitration hearing. Indeed, experienced practitioners in these programs repeatedly noted that summary jury trials typically require more preparation than regular jury trials due to the need for a considerably more focused, and thus more fine tuned, trial presentation. Jurors reportedly appreciate the clarity and conciseness of summary jury trial presentation, but the time savings at trial may be offset by the amount of additional time needed to hone the trial presentation. On the other hand, their clients could also be more risk-averse and less likely to consent to participation in the program unless there was a clear financial or strategic advantage in doing so.

One way that several of these programs developed local bar support was to actively involve representatives of the various plaintiff and defense bar segments in designing the program details. The Charleston County program does so explicitly insofar that it is an attorney-run program. Similarly, attorney involvement has been a critical component of the New York summary jury trial program. The statewide coordinator has adamantly emphasized the importance that local programs reflect the needs and interests of all major stakeholders to secure their institutional legitimacy. Their participation in developing the procedural details for the program will permit them to address multiple issues of concern and avoid introducing requirements that might lead to unintended consequences.

Suggestions for Expanding or Replicating Programs in New Jurisdictions

The factors that led to successful programs or inhibited their success, offer several lessons for states that wish to expand a local program statewide or local courts that wish to replicate a program in their own community. The first step should involve a careful assessment of the specific problems or concerns that the program is intended to address. One of the most notable aspects of the programs examined for this study was how often the programs were implemented as a workaround for one or more preexisting case management problems (e.g., trial date certainty, calendar management, mandatory arbitration, insufficient or inconsistent judicial supervision of the pretrial process). Courts that are considering a summary jury trial program certainly should consider whether existing problems or complaints can be fixed directly rather than introducing a workaround solution. Of course, some problems are more deeply entrenched and have resisted previous remedial attempts. If this is the case, then courts should, at the very least, design the summary jury trial program to address as many of those problems as possible. When doing so, consider which local resources are relatively abundant, and which are relatively scarce, and whether plentitude can be used creatively to offset scarcity.
The likelihood of identifying and accurately assessing the impact of a new program on the court’s existing operations will be greatly improved by involving well-respected and highly experienced representatives of the local plaintiff and defense bars. These individuals may be considerably more knowledgeable and more sensitive to the strategic interests of the various segments of the civil bar and should be given the opportunity to help design the operational details of the program to ensure that it will be perceived as a level playing field. Because local legal culture as well as local court conditions can differ markedly from county to county, it is especially imperative that efforts to expand a local program statewide have the flexibility to tailor the program to best meet local needs.

Similarly, credible judicial leadership and commitment are critical to program success. Although it may not be necessary for the entire trial bench to be actively involved in the operation of the program, much less its design, the leadership team should make a concerted effort to inform their judicial colleagues about the potential benefits of the program and alleviate concerns about how it might affect day-to-day operations, especially as it pertains to the allocation of court resources. If the court has an established culture of rotating judicial assignments, the program leadership should also take steps to ensure effective succession planning to maintain an appropriate level of supervision and support for the program.

In launching a new program, the leadership team should plan for an extended marketing campaign to ensure that all potentially affected interests are informed about the program, its objectives and intended benefits, and its procedures. It may be especially useful to have the representatives of the various stakeholder interests participate jointly in marketing efforts to avoid suspicion that the program is more beneficial to some interests than others. Marketing efforts can include op-ed articles in newsletters and local bar publications, CLE presentations, and informational announcements at local bar meetings, including specialty bars. Documentation about how the program operates can help bolster support by providing empirical information about the fairness of case outcomes and the time-and-expense savings. The data collection form employed in New York State may be a useful model.

Depending on local circumstances, the initiation period may be fairly slow until a sufficient number of trials have been conducted through the program to assure the local practicing bar knows about its benefits. The leadership team should not be discouraged, but rather should use that time to assess whether the program is delivering the intended benefits or whether it has introduced unanticipated consequences, and to make interim modifications to the program if necessary. Indeed, the program leadership should continue to monitor the program’s success and be prepared to adopt changes to the program procedures at any time, especially if needed to respond to changes in local conditions. As these case studies suggest, summary jury trials are highly adaptable to local circumstances and, with careful planning and supervision, provide a useful tool for meeting the ongoing needs in civil litigation.
1. People v. Basuta, 94 Cal. App. 4th 370

Client/Matter: None
People v. Basuta

Court of Appeal of California, Fourth Appellate District, Division One
December 10, 2001, Decided
No. D034429.

Reporter

THE PEOPLE, Plaintiff and Respondent, v. MANJIT KAUR BASUTA, Defendant and Appellant.

Notice: [***1] Opinion certified for partial publication. 1


Disposition: Reversed.

Core Terms

hemotoma, excused, trial court, hardship, shaking, assault, prospective juror, jurors, polygraph examination, rebleed, great bodily injury, jury commissioner, brain injury, violently, shaken, screening, injuries, likely to produce, vagueness, subdural, abused, argues, shook, lesser included offense, requires, presenting evidence, equal protection, defense counsel, bleeding, murder

Case Summary

Procedural Posture
Defendant was convicted of assault on a child with force likely to produce great bodily injury resulting in death in violation of Cal. Penal Code § 273ab. She was sentenced to a term of 25 years to life in prison by the Superior Court of San Diego County, California. She appealed.

Overview
Following her criminal conviction, defendant claimed the following points of error: (1) Cal. Penal Code § 273ab was unconstitutional; (2) the trial court erred in the admission and exclusion of scientific evidence and expert testimony and in the failure to give various instructions; and (3) she was denied the right to present relevant evidence corroborative of her theory of defense when the trial court excluded, based on Cal. Evid. Code § 352. The appellate court agreed. The improper mention of a polygraph test, in combination with the error in excluding evidence that defendant’s mother had jerked or shaken the child, was prejudicial. Both errors substantially affected the crucial issue in the case, an eyewitness’ credibility. The appellate court concluded it was reasonably probable that but for these errors a result more favorable to the defendant would have been reached.

Outcome
The judgment was reversed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence
Evidence > Admissibility > Procedural Matters > Rulings on Evidence
Evidence > Relevance > General Overview
Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time
Evidence > Relevance > Relevant Evidence

HN1 All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution, Cal. Evid. Code § 351, Cal. Evid. Code § 210 states that “relevant evidence” is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts C, E, F, G and J.

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Relevant evidence may be excluded pursuant to Cal. Evid. Code § 352 if the trial court in its discretion concludes its probative value is substantially outweighed by the probability that its admission will: (a) necessitate undue consumption of time; or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. A trial court’s decision to exclude evidence pursuant to § 352 will not be overturned absent an abuse of that discretion.

Evidence > ... > Procedural Matters > Objections & Offers of Proof > General Overview
Evidence > ... > Procedural Matters > Objections & Offers of Proof > Offers of Proof
Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN2 A defendant may present evidence that another person committed the charged offense. To be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Cal. Evid. Code § 352. The evidence must do more than merely show a motive or opportunity to commit the crime.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Jury Trials
Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors
Evidence > ... > Scientific Evidence > Lie Detection > Polygraphs


Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview
Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview
Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses
Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

HN4 Both Cal. Penal Code §§ 273ab, 245 (a)(1) require an assault by means of force likely to cause great bodily injury. Cal. Penal Code § 273ab, however, has the additional element that the assault result in death.

HN5 A trial court must instruct concerning all lesser included offenses which find substantial support in the evidence. An offense is necessarily included in a greater offense when, for present purposes, under the statutory definition of the offenses the greater offense cannot be committed without necessarily committing the lesser. To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense. Speculation is insufficient to require the giving of an instruction on a lesser included offense and a lesser included instruction need not be given when there is no evidence that the offense is less than that charged.

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview
Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview
Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

HN6 Cal. Penal Code § 273ab requires the assault on the child be by means of force that to a reasonable person would be likely to produce great bodily injury. Cal. Penal Code § 245 (a)(1) requires the assault be by any means of force likely to produce great bodily injury. If the two elements are different, and we do not hold that they are, then it could only be because the force requirement in § 273ab is more restrictive than the force requirement in § 245 (a)(1). That is so since at least nominally the sections differ in that § 273ab includes a reasonable person qualification while § 245 (a)(1) does not.

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview
Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > General Overview
Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Hardship, Illness & Incapacity
Governments > Courts > Court Personnel
Governments > Courts > Rule Application & Interpretation

HN7 Several California Code of Civil Procedure sections and California Rules of Court rules apply to the excusal of jurors based on economic hardship. Cal. Civ. Proc. Code § 204 (b) states that an eligible person may be excused from jury service only for undue hardship upon themselves or upon the public as defined by the Judicial Council. Cal. Civ.
Proc. Code § 218 requires all excuses be in writing and signed by the prospective juror. Section 218 requires the jury commissioner to hear excuses in accordance with standards prescribed by the Judicial Council. It is within the discretion of the commissioner to accept a hardship excuse without a prospective juror appearing before him or her.


HN8 Excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community.

HN9 Cal. R. Ct. 860 (b) defines general principles governing the granting of excuses. Cal. R. Ct. 860 (c) requires the juror seeking to be excused to state facts specifying the hardship and why the hardship cannot be avoided by a deferral of service. Cal. R. Ct. 860 (d) provides in detail the bases on which a hardship excuse may be granted. Such excuses may be granted if the prospective juror has no reasonably available means of transportation, service would require excessive travel, the prospective juror has impairments that would make service potentially harmful, the juror is immediately needed for the protection of public health and safety or must care for a person who requires the juror’s personal attention. The subdivision also states an extreme financial burden is a basis to be excused and gives four factors, including the expected length of service, for determining whether the claimed hardship is sufficient.

HN10 Hardship screening of the jury pool, even when conducted by the trial judge, is not a crucial stage and appellant had no absolute right to be present. Neither is it constitutionally significant that counsel was absent when the commissioner screened the pool to determine which prospective jurors would be financially unable to serve on this case. It is constitutionally repugnant for the commissioner to conduct, in the absence of counsel or the defendant, the initial hardship screening utilized in excusing potential jurors from service. If that process is unobjectionable, then it is difficult to understand why allowing the jury commissioner to conduct, in the absence of counsel or the defendant, a financial hardship screening of the jury pool for the purposes of a particular case is improper.

HN11 When prospective jurors are excused by the trial judge in open court, a record exists of the numbers excused and the reasons given. Cal. Civ. Proc. Code § 218 and Cal. R. Ct. 860 (c) requests to be excused from jury service must be in writing, signed by the potential juror and placed on the court’s record. The obvious purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool.

HN12 Statutes are presumed valid and must be upheld unless their unconstitutionality is positively and unmistakably demonstrated. With regard to vagueness, the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement.

HN13 It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect clarity in criminal statutes. Reasonable specificity exists if the statutory language conveys sufficiently definite
warning as to the proscribed conduct when measured by common understandings and practices. In practice, unconstitutional vagueness is a concept that only works on the extreme end of the vagueness continuum. Arguments that a statute appears vague in the ordinary sense will not suffice to bring relief from the courts.

HN15 There is nothing vague about Cal. Penal Code § 273ab, Section 273ab gives plain notice that the proscribed act is an assault on a child under eight years of age with force that objectively is likely to produce great bodily injury. Great bodily injury is clearly defined as a significant or substantial physical injury. In this regard, § 273ab is analogous to the felonious assault described in Cal. Penal Code § 245 (a)(1), which requires an assault by any means of force likely to produce great bodily injury.

HN16 Cal. Penal Code § 273ab makes clear that it is unlawful for one with custody of a child to assault that child by means of force that to a reasonable person would be likely to produce great bodily injury. It is the jury’s evaluation of the reasonable likelihood of some great bodily injury that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of Shaken Baby Syndrome or any other mechanism or injury might impact the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of § 273ab.
applied to legislation defining crimes or gradations of criminal activity is a matter of dispute.

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Domestic Offenses > General Overview

Family Law > Child Custody > General Overview

HN20 A violation of Cal. Penal Code § 273ab requires not only an assault on a child that results in death but also that the defendant have care or custody of the child. The element of care and custody in § 273ab creates a meaningful distinction between those committing that offense and murderers. Those who have the care and custody of children not only have a particular responsibility and occupy a position of trust, they are also the persons most likely to kill children.

Criminal Law & Procedure > ... > Crimes Against Persons > Domestic Offenses > General Overview

HN21 When legislation defines crimes or gradations of criminal activity, the distinction created need only satisfy the rational relationship test. Treating murderers and those who violate Cal. Penal Code § 273ab differently bears a rational relationship to a legitimate state interest.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A daycare center operator was convicted of assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), after the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome. The trial court excluded, based on Evid. Code, § 352 (probative value versus prejudice or confusion), testimony that the child’s mother had a history of abusive behavior. A police officer also made a statement to the jury that a key prosecution witness had taken a polygraph test was prejudicial. The court further held that defendant was entitled, on retrial, to an instruction that assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a lesser included offense of the charged offense, if the trial court found there was substantial evidence of the lesser included offense. The court held that the trial court erred when, in permitting the jury commissioner to conduct a hardship screening of prospective jurors without defendant present, it failed to require the commissioner to maintain a record of the screening procedure, as requested by defendant. The court also held that Pen. Code, § 273ab, was not void for vagueness as applied to defendant. The court further held that the fact that defendant’s term was equal to that imposed for first degree murder and longer than the sentence for second degree murder did not result in a denial of equal protection, since defendant was not similarly situated to those who murder children. (Opinion by Benke, J., with Kremer, P. J., and Haller, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a) (1a) CA(1b) (1b)

Criminal Law § 289 > Evidence > Admissibility > Prejudicial Matter > Third Party Culpability > Abusive Behavior of Mother of Victim of Shaken Baby Syndrome.

--In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), in which the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome, the trial court abused its discretion when it excluded, based on Evid. Code, § 352 (probative value versus prejudice or confusion), testimony that the child’s mother had a history of abusive behavior, and that the mother, when angry or frustrated, had jerked and shaken the child. The medical evidence was conflicting and, given evidence of an earlier brain injury, allowed for multiple possible causes of the child’s death. The court also held that the police officer’s inadmissible statement to the jury that a key prosecution witness had taken a polygraph test was prejudicial. The court further held that defendant was entitled, on retrial, to an instruction that assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a lesser included offense of the charged offense, if the trial court found there was substantial evidence of the lesser included offense. The court held that the trial court erred when, in permitting the jury commissioner to conduct a hardship screening of prospective jurors without defendant present, it failed to require the commissioner to maintain a record of the screening procedure, as requested by defendant. The court also held that Pen. Code, § 273ab, was not void for vagueness as applied to defendant. The court further held that the fact that defendant’s term was equal to that imposed for first degree murder and longer than the sentence for second degree murder did not result in a denial of equal protection, since defendant was not similarly situated to those who murder children. (Opinion by Benke, J., with Kremer, P. J., and Haller, J., concurring.)

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implication that reasonably could have affected their evaluation of the assistant’s credibility and ultimately their assessment of defendant’s core defense. Defendant was allowed to present her case that the child died from a rebleeding from his earlier hematoma. In light of the evidence, defendant should also have been allowed to present evidence that it was the child’s mother, and not defendant, who was the cause of that first injury.

CA(2) (2)
Evidence § 23 > Admissibility > Relevancy > Probative Value Versus Prejudice or Confusion.

--All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. Relevant evidence may be excluded pursuant to Evid. Code, § 352, if the trial court in its discretion concludes its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. A trial court’s decision to exclude evidence pursuant to § 352 will not be overturned absent an abuse of that discretion.

CA(3) (3)
Criminal Law § 289 > Evidence > Admissibility > Prejudicial Matter > Third Party Culpability.

--A criminal defendant may present evidence that another person committed the charged offense. To be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Evid. Code, § 352. The evidence must do more than merely show a motive or opportunity to commit the crime.

CA(4a) (4a) CA(4b) (4b)
Criminal Law § 403 > Evidence > Inadmissible Statement That Key Witness Took Polygraph Test > Prejudice.

--In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), defendant was prejudiced by the erroneous admission of a police officer’s inadmissible statement to the jury that a key prosecution witness had taken a polygraph test. Under Evid. Code, § 351.1, subd. (a), any reference to the taking of a polygraph examination is inadmissible. Moreover, the witness’s credibility was crucial to the prosecution’s case, and the officer’s comment had a high potential to affect the jury’s resolution of the credibility issue. From the officer’s statement that the witness agreed to take a polygraph examination, a juror might have concluded that the witness’s apparent readiness to take the examination reflected her confidence in its result. A juror could also have reasonably concluded that the state would not base a serious prosecution on the testimony of a lone witness whose credibility it had cause to doubt. Thus, a serious danger existed that one or more jurors concluded that the witness passed the polygraph examination and that she was, therefore, worthy of belief. However, the trial court acted properly in refusing the defense request to admit evidence that the witness’s test results were at best inconclusive. Such admission would have violated Evid. Code, § 351.1, and it would have improperly confused the issue of the witness’s credibility.


CA(5) (5)
Criminal Law § 403 > Evidence > Admissibility > Polygraph Test Results.

--The firm and broad exclusion, pursuant to Evid. Code, § 351.1, subd. (a), of the results of a polygraph examination, the opinion by a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of or the outcome of such examination, and because the introduction of polygraph evidence can negatively affect the jury’s appreciation of its exclusive power to judge credibility.

CA(6a) (6a) CA(6b) (6b)
Criminal Law § 250 > Trial > Instructions > Lesser Included Offenses > Assault by Means of Force Likely to Produce Great Bodily Injury > Included in Assault on Child with Force Likely to Produce Great Bodily Injury.

--In a prosecution for Pen. Code, § 273ab (assault on a child with force likely to produce great bodily injury resulting in death), defendant was entitled to an instruction that assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a lesser included offense, if the trial court found there was substantial evidence of the lesser included offense. Pen. Code, § 273ab, requires the assault on the child be by means of force that to a reasonable person would be likely to produce great bodily injury. Pen. Code, § 245, subd. (a)(1), requires the assault be by any means of force likely to produce great bodily injury. At least

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nominally the statutes differ in that Pen. Code, § 273ab, includes a reasonable person qualification while Pen. Code, § 245, subd. (a)(1), does not. Since the force requirement of the greater offense is the more restrictive than the force requirement of the lesser offense, it is impossible to commit the greater without necessarily committing the lesser. Thus, even if there is a difference in the force requirement of the two assault statutes, it does not affect the determination of whether one is a necessarily lesser included offense of the other.

CA(7) (7)
Criminal Law § 250 > Trial > Instructions > Lesser Included Offenses.

--A trial court must instruct concerning all lesser included offenses that find substantial support in the evidence. An offense is necessarily included in a greater offense when under the statutory definition of the offense the greater offense cannot be committed without necessarily committing the lesser. To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense. Speculation is insufficient to require the giving of an instruction on a lesser included offense and a lesser included instruction need not be given when there is no evidence that the offense is less than that charged.

CA(8) (8)
Jury § 31 > Challenges > Hardship Screening of Prospective Jurors by Jury Commissioner Without Defendant Present Propriety > Failure to Maintain Record of Procedure.

--In a prosecution for Pen. Code, § 273ab (assault on a child with force likely to produce great bodily injury resulting in death), the trial court erred when, in permitting the jury commissioner to conduct the hardship screening of prospective jurors without defendant present, it failed to require the commissioner to maintain a record of the screening procedure, as requested by defendant. Hardship screening of the jury pool is not a crucial stage and defendant had no absolute right to be present. Nor was it constitutionally significant that counsel was absent when the commissioner screened the pool. However, the trial court should have required that records be kept concerning the number of jurors screened, the number excused from service, and the reasons given by the excused prospective jurors in claiming financial hardship. Excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community. Code Civ. Proc., § 218, and Cal. Rules of Court, rule 860 (c), require that requests to be excused from jury service must be in writing, signed by the potential juror and placed on the court’s record. The purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool.

CA(9a) (9a) CA(9b) (9b)
Injuries § 16 > Offenses Against Infants > Assault on Child Resulting in Death > Vagueness: Constitutional Law § 115 > Due Process > Statutory Vagueness.

--In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), in which the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome, the statute was not void for vagueness as applied to defendant. The statute gives plain notice that the proscribed act is an assault on a child under eight years of age with force that objectively is likely to produce great bodily injury. Great bodily injury is clearly defined as a significant or substantial physical injury. Scientific disagreement about the validity of shaken baby syndrome was irrelevant to the issue of the requisite specificity of § 273ab. Section 273ab makes clear that it is unlawful for one with custody of a child to assault that child by means of force that to a reasonable person would be likely to produce great bodily injury. It is the jury’s evaluation of the reasonable likelihood of some great bodily injury that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of shaken baby syndrome or any other mechanism or injury might affect the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of § 273ab.

CA(10) (10)
Constitutional Law § 113 > Due Process > Substantive Due Process > Statutory Vagueness or Overbreadth > Penal Statutes.

--Statutes are presumed valid and must be upheld unless their unconstitutionality is positively and unmistakably demonstrated. With regard to vagueness, the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect clarity in criminal statutes. Reasonable specificity exists if the statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices.
Infants § 16 > Offenses Against Infants > Assaul on Child Resulting in Death > Sentencing > Equal Protection: Constitutional Law § 90 > Equal Protection > Groups Not Similarly Situated.

--In a prosecution in which a daycare center operator was convicted of assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), and sentenced to prison for a term of 25 years to life, the fact that the term was equal to that imposed for first degree murder and longer than the sentence for second degree murder did not result in a denial of equal protection. Defendant was not denied equal protection since she was not similarly situated with those who murder children. A violation of § 273ab requires not only an assault on a child that results in death, but also that the defendant have care or custody of the child. The element of care and custody in § 273ab creates a meaningful distinction between those committing that offense and murderers. Those who have the care and custody of children not only have a particular responsibility and occupy a position of trust, they are also the persons most likely to kill children. When legislation defines crimes or gradations of criminal activity, the distinction created need only satisfy the rational relationship test. Treating murderers and those who violate § 273ab differently bears a rational relationship to a legitimate state interest.

CA(12) (12)
Constitutional Law § 76 > Equal Protection > Nature and Scope of Equal Protection.

--In order to establish a meritorious claim under the equal protection provisions of the state and federal Constitutions, the claimant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. The similarly situated requirement simply means that an equal protection claim cannot succeed, and it does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose. Liberty is a fundamental interest, and classifications dealing with it must satisfy the strict scrutiny test.


Raveen Obhrai for Fiona MacTaggart, House of Commons, a member of Parliament from the United Kingdom, as Amicus Curiae on behalf of Defendant and Appellant.

Dixon & Truman and Lisa A. Rasmussen for Physicians and Bio-Scientists as Amici Curiae on behalf of Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kyle Niki Shaffer and Alana Butler Cohen, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Benke, J., with Kremer, P. J. [***2], and Haller, J., concurring.

Opinion by: BENKE

Opinion

[*376] [**290] BENKE, J.

Defendant Manjit Kaur Basuta was convicted of assault on a child with force likely to produce great bodily injury resulting in death. (Pen. [*377] Code, § 273ab.) Basuta was sentenced to a term of 25 years to life in prison. She appeals making numerous arguments, among them that section 273ab is unconstitutional, the trial court erred in the admission and exclusion of scientific evidence and expert testimony and in the failure to give various instructions. We reverse, finding prejudicial error in the exclusion of defense evidence and in the unlawful mention that a key prosecution witness underwent a polygraph examination.

FACTS

A. Prosecution Case

1. The Death of Oliver S.

Thirteen-month-old Oliver S. died on March 18, 1998, in the San Diego Children’s Hospital.

[***3] On March 17, 1998, Oliver’s grandmother took him, an apparently healthy and normal child, to a home daycare

2 All further statutory references are to the Penal Code unless otherwise specified.
facility operated by appellant. Oliver had attended the facility since February 9, 1998. At 12:23 p.m., appellant called 911 and requested assistance, stating that a baby had fallen, he was choking and not breathing. Police Officer Jeffrey Dunn arrived shortly and was met by appellant’s housekeeper, Ana Christina Carrillo. Carrillo led the officer to the rear yard where appellant was attempting to revive Oliver. The child was unconscious and not breathing. Believing Oliver was choking, the officer struck him six to eight times in the back, hoping to dislodge any object in the child’s airway.

When paramedics arrived, appellant told them Oliver fell going outside and struck his head on a carpeted area of the patio. By this time, Oliver had very slow respiration and was blue. The paramedics concluded he had sustained a severe head injury and transported him to Children’s Hospital. On arrival, Oliver was unconscious and not breathing, his body temperature was low, his blood pressure high, he was nonresponsive to stimuli and his pupils were dilated. The emergency room physician concluded Oliver was suffering from high cranial pressure and severe brain damage. Oliver died the next morning.

An autopsy conducted by the medical examiner revealed no external injury except a recent bruise on the right side of the child’s forehead. On internal examination the pathologist found a large subdural hematoma. A microscopic examination revealed an earlier subdural hematoma that the pathologist estimated was two to four weeks old. The doctor also found bleeding around Oliver’s optic nerve and in the retina of each eye.

The medical examiner concluded the most recent hematoma was not a “rebleed” from the earlier hematoma. Rebleeds bleed slowly and would not account for Oliver’s sudden deterioration. The retinal hemorrhages found were not the result of either attempts at resuscitation or the earlier hematoma.

The medical examiner concluded the cause of death was a recent traumatic event involving shaking alone or with impact against a relatively soft object. The injuries were inconsistent with Oliver’s falling or being pushed to the ground by another child.

Oliver’s health history revealed that in June 1997, he fell out of his car seat approximately 30 inches to a carpeted floor. Oliver’s mother contacted medical personnel who advised her that if he remained asymptomatic she should not be concerned. Oliver appeared to be uninjured.

Approximately three weeks before Oliver’s death, his grandmother noticed he was having trouble with his balance. Over several weeks the dizziness subsided. Two weeks prior to his death, when his mother was giving him a bath, Oliver had a spasm or seizure. The child appeared to shiver for several seconds. He did not lose consciousness and his breathing was normal. Oliver ate and slept normally that evening. His mother and grandmother concluded he shivered because he was cold and did not take him to the doctor.

2. The Statements of Ana Christina Carrillo

a. Trial Testimony

In January 1997 Carrillo, a native of Guatemala not legally residing in this country, started working for appellant as a housekeeper and an aid with the children. In early March 1998, she quit but returned on March 17 to help for the day. After the children finished lunch that afternoon, appellant began to change their diapers. Appellant called Oliver to come for his diaper change. When he did not come, appellant repeatedly and angrily told him to do so. Finally, she walked to Oliver, picked him up with her hands under his arms and shook him. The child began to cry. Appellant carried Oliver to the diaper changing area shaking him as she went. As she finished with his diaper change, Oliver stopped crying. Appellant tried to stand him up, his eyes fluttered, he looked dizzy and was unable to stand. Oliver fell into appellant’s arms and stopped breathing. Appellant attempted to resuscitate him.

At first appellant did not want Carrillo to call for help. Finally, she relented, telling Carrillo to state that Oliver had fallen. While the police and paramedics placed Oliver in the ambulance, appellant and Carrillo remained in the house. Appellant told Carrillo to tell the police that Jessica, one of the children, pushed Oliver and he fell.

b. Carrillo’s Pretrial Statements and Activities

After Oliver was transported to the hospital, Carrillo told officers that Jessica pushed Oliver and he hit his head. Carrillo later stated she made the statement up because appellant threatened that immigration would put her in jail. Carrillo called her brother Pedro Carrillo from appellant’s house. She told him that a girl had pushed a boy and the boy hit his head and was taken to the hospital. Appellant wanted Carrillo to spend the night at her house. Carrillo declined and left with her friend and roommate Araceli Arrendondo Aquino. Appellant told Carrillo to come back the next day.

As they drove home, Carrillo told Arrendondo that appellant shook Oliver. Carrillo stated that appellant told her to tell
the police he fell. Later in the evening Carrillo called her brother and told him that appellant shook Oliver because she was angry he would not come when she called. Carrillo told her brother she did not tell the truth because appellant told her if she told the truth she would be deported.

The next day, Arrendondo took Carrillo back to appellant’s house. Carrillo told appellant she was afraid. Appellant told her if she did not want to be involved, she should move far away. Arrendondo wanted Carrillo to leave but appellant insisted she stay since the police were returning and wanted to talk to Carrillo. When a police detective came to the house, Carrillo agreed to accompany him to the police station for questioning. However, while Carrillo used the telephone to call [***8] a friend to accompany her, appellant told the officer that Carrillo did not understand what the officer was asking her to do and that Carrillo did not want to go to the station. Appellant told the officer her attorney told her that Carrillo was not required to speak to the police. The detective departed.

Later in the day, appellant, her husband and Carrillo talked to appellant’s attorney. On the drive to his office, appellant repeatedly told Carrillo to say that Jessica pushed Oliver. Fearful of being deported, Carrillo told the lawyer that Oliver had fallen. After returning to appellant’s home, they learned Oliver had died.

Carrillo went home. During the evening appellant called Carrillo and reminded her that Jessica had pushed Oliver. Appellant asked Carrillo to come that evening to appellant’s sister-in-law’s house since appellant’s [***9] lawyer wanted to ask her additional questions. Appellant also stated Carrillo should not stay at home since the police would be coming there to question her.

Carrillo and Arrendondo went to appellant’s sister-in-law’s house. Appellant wanted Carrillo to spend the night. Fearful, Carrillo wanted Arrendondo to stay as well; however, Arrendondo [***9] departed. Appellant went to her nearby home. Later, Arrendondo returned to the home of appellant’s sister-in-law. Carrillo’s other roommates, Irma and Norma, accompanied her. The women told Carrillo she should go home, that her brother wanted to talk to her. As they started to leave, appellant returned. An argument began between Carrillo’s roommates and appellant and appellant’s brother-in-law. Appellant told Carrillo her brother could see her there. Appellant grabbed one of Carrillo’s arms, Irma the other. Carrillo was able to get away from appellant and she departed with her roommates.

On the drive back to their apartment, Carrillo told the women that appellant had shaken Oliver. Later that evening when Carrillo again told her brother what had occurred, he told her to see an attorney. The next day Carrillo talked to a lawyer. She explained that when appellant told Oliver to come and he did not do so, she picked him up and carried him to the diaper changing area. After appellant changed his diaper, Oliver could not stand up. Carrillo explained she told the police that Jessica pushed Oliver because she was afraid if she told the truth she might be deported. Carrillo did not tell [***10] the attorney that appellant had shaken the child. The lawyer advised Carrillo to speak to the police.

[**293] That evening Carrillo talked to the mother of one of the children she helped care for at appellant’s daycare center. Crying, Carrillo stated that Jessica did not push Oliver. She related that appellant was very upset when Oliver would not come and because of this, she shook him. After his diaper was changed, Oliver could not stand and stopped breathing. The following day Carrillo related this account of events to the police.

3. Shaken Baby Syndrome

The pediatric emergency room physician who treated Oliver believed his injury was consistent with having been shaken and inconsistent with a short fall. The medical examiner concluded the cause of Oliver’s death was a nonaccidental trauma involving shaking and/or impact into a relatively soft object.

Dr. Randell Alexander, an associate professor of pediatrics and the director of the Center for Child Abuse at the Morehouse School of Medicine in [***11] Atlanta, Georgia, testified as an expert on shaken baby syndrome (SBS). Dr. Alexander explained the syndrome results when a child is violently shaken and the brain [***11] is damaged either by direct injury to brain cells or secondarily by damage to the vascular system of the brain’s coverings resulting in intracranial bleeding and pressure. The violent shaking can also result in retinal hemorrhages. The doctor explained the brain and eyes are not designed to handle the rapid accelerations and decelerations of violent back and forth shaking.

The doctor noted there are clinical indications of such injury, including swelling of the soft spot on the head, unconsciousness or semiresponsiveness, nausea and difficulty with motor functions. The child might have trouble breathing, be irritable, have trouble sleeping and be unwilling to eat.

Dr. Alexander stated studies indicated that short falls do not cause serious brain injuries. In a small percentage of short

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fall cases, a minor skull fracture can occur and cause no internal injury. Short falls do not cause subdural bleeding. Neither do short falls cause direct brain cell injury. Such falls do not result in retinal hemorrhages.

The doctor reviewed Oliver’s medical records. He concluded Oliver’s death was the result of complications of SBS. Dr. Alexander believed the earlier subdural hematoma was evidence **294** that Oliver had been shaken before. He did not believe the earlier injury had any significant affect on the later fatal injury. Nor did he believe Oliver’s death was the result of a rebleed of the earlier hematoma. Rebleeding can be caused by minor trauma but rebleeds rarely occur in children. Rebleeding results, however, in slow bleeding and seldom causes clinical signs. Any clinical signs would be slow in developing.

Dr. Alexander concluded that based on his behavior on the morning of March 17, 1998, Oliver was not suffering from a serious brain injury. The symptoms displayed in the early afternoon of that day, however, were evidence of a serious brain injury. Those symptoms were not the result of a rebleed of the earlier subdural hematoma.

The doctor stated it was not significant that Oliver had no injury of his ribcage or neck and no bruising on his chest or arms. The doctor noted such findings are relatively rare in SBS cases.

On cross-examination Dr. Alexander agreed that there were some doctors who believed that shaking alone could not result in a fatal injury to a child.

### B. Defense Case

The defense sought to discredit Carrillo’s claim that appellant violently **294** shook **294** Oliver. The defense noted the accusation contradicted her earlier **382** statements, that the details of her accusation varied and that she had an interest in diverting suspicion from herself and in cooperating with the authorities.

The defense also offered evidence that shaking a baby, even violently, could not have caused Oliver’s injuries, that his death resulted instead from accidental trauma causing a rebleed of his earlier hematoma. Dr. Janice Carter-Lourensz, a pediatrician specializing in child development and sexual abuse, questioned whether physicians were by training and experience qualified to discuss the forces, velocities, etc., involved and to draw valid conclusions concerning the cause of head injuries in children.

The doctor stated a controversy exists in medicine concerning the cause of the injuries described as SBS. Some physicians believe the syndrome exists but only in particularly vulnerable children. They believe it is highly unlikely, given the biomechanics of the act, that a human being could exert sufficient force on a healthy child to cause a brain injury. The doctor stated that tests by biomechanical engineers and a pathologist [314] supported this conclusion.

Dr. Carter-Lourensz also stated that retinal bleeding is not a sign of child abuse since it is seen in children who have not been abused. The doctor stated that many conditions could cause retinal bleeding, including prolonged cardiopulmonary resuscitation (CPR) and high intracranial pressure. She noted that Oliver was given CPR for 25 minutes and had high intracranial pressure.

The doctor also testified there was documentation of instances, and she was personally aware of cases, in which falls of four feet or less had resulted in fatal head injuries. She stated that while this was a controversial matter among physicians, biomechanists were uniform in the conclusion that it could occur and had experimental results to prove it.

The doctor explained that children who have suffered serious brain injuries can have lucid intervals in which they appear normal. Dr. Carter-Lourensz testified that different children reacted to serious brain injuries in different ways.

Dr. John Plunkett, a forensic pathologist, reviewed Oliver’s medical records, including the autopsy report. The doctor concluded there was no medical evidence that Oliver was shaken violently ***15*** on March 17, 1998.

The doctor stated that a subdural hematoma cannot be caused in a healthy child with no previous hematoma as the result of shaking alone. He explained in great detail that based on cadaver and live primate studies and on [383] studies attempting to model the violent shaking of babies (there have been no biomechanical studies dealing directly with the shaking of babies), the forces necessary to cause intracranial hemorrhaging cannot be produced merely by shaking a healthy child. Shaking as a cause of such injury was biomechanically impossible. The doctor stated that other persons in the medical and biomechanical community were of the same opinion. Dr. Plunkett had published an article expressing his views in the American Journal of Forensic Medicine and Pathology.

Dr. Plunkett further stated that impact injuries can cause subdural hematomas in healthy children with no history of an earlier hematoma, but there was no indication Oliver had suffered a serious impact injury. A minor impact to Oliver’s head could, however, have caused a rebleed of his healing...
hematoma. Dr. Plunkett estimated that Oliver’s earlier hematoma was two to three weeks old but could be as old as several months.

Referring to government statistics and scientific publications dealing with playground accidents, Dr. Plunkett concluded that short falls could result in serious injuries and death. The doctor also indicated that lucid intervals of hours and even days can occur in children who have suffered serious brain injuries.

Dr. Plunkett testified that Oliver’s hematoma was consistent with a rebleed from his earlier hematoma. The injury to Oliver that resulted in his death was consistent with him falling to the ground. The doctor stated the respiratory arrest that resulted in Oliver’s death could have been the result of a seizure caused by the earlier hematoma. A rebleed might have been caused by minor trauma. Someone picking Oliver up and shaking him might have caused that trauma.

C. Prosecution Rebuttal

Dr. Daniel Davis, a forensic pathologist, reviewed Oliver’s medical records and concluded he died from a blunt force head injury as the result of being shaken. The doctor explained the mechanics of injuries caused to babies by being violently shaken. The doctor stated that retinal bleeding is not associated with CPR. Dr. Davis stated that the lack of injury to Oliver’s neck did not contraindicate SBS since in the vast majority of cases such injuries are not seen. The doctor, citing studies, stated that Oliver’s injuries were not consistent with a short fall. In the doctor’s opinion the vast majority of forensic pathologists believe in the concept of SBS.

[*384] DISCUSSION

A. Exclusion of Evidence of Physical Abuse by Mother

Appellant argues the trial court erred when it excluded evidence that Oliver’s mother was prone to anger and violence and had physically abused him.

1. Background

In its written motions in limine the prosecution asked the court to admit, pursuant to Evidence Code section 1101, subdivision (b), evidence of prior acts by appellant showing that in dealing with children she was easily frustrated and prone to abusive conduct. The prosecution asked the court not to admit evidence that during a custody dispute between Oliver’s parents, the child’s father accused Oliver’s mother of being psychotic and of physically abusing the child. The prosecutor argued such evidence was not admissible to prove third party culpability.

At a pretrial hearing both issues were discussed at length. With regard to evidence of prior abuse by Oliver’s mother, the prosecution first argued that while the fact of the earlier brain injury and hematoma was relevant, and which were undoubtedly the result of abuse, the identity of the abuser was irrelevant. This was so since whether some earlier brain injury made it more likely Oliver would be injured by shaking was not a defense to the charged offense. Further, the prosecutor argued that the claim Oliver’s mother had abused him came from Oliver’s father during a contentious custody dispute. The prosecutor stated much of the father’s claim of abuse and injury to Oliver was based on alleged hearsay reports from medical personnel. Investigation of the declarants indicated the father’s claims were untrue. In any case the father later recanted the accusations.

The defense responded that Oliver’s father reported to the police and others seven months before Oliver’s death that his wife, after giving birth, was very emotional. She would become so frustrated with Oliver that she jerked and shook him. Counsel stated that Oliver’s father had not recanted his allegations but had become more vague in voicing them. [***19] Counsel noted this might be explained by the fact Oliver’s mother and father were suing appellant and seeking substantial damages.

The defense noted its theory was that Oliver died from the rebleed of an earlier hematoma, which rebleed could have been caused by minor trauma. Appellant argued that if the prosecution was allowed to present evidence of an earlier hematoma, which most likely occurred after Oliver was in appellant’s care, and if the prosecution offered evidence that Oliver had been healthy his entire life, the jury would inevitably be led to conclude it was appellant, and appellant alone, who was responsible for the earlier hematoma. The defense argued it should be allowed to show that his mother caused Oliver’s earlier brain injury. Defense counsel stated it would accept a stipulation that appellant was not responsible for the earlier hematoma.

The trial court stated it did not want to hold multiple confusing and time-consuming trials on the issue of claimed abuse by either appellant or Oliver’s mother. It refused to allow the prosecution to present evidence concerning appellant’s treatment of other children. The court also held that while the defense was entitled to show the fact of Oliver’s earlier brain injury, it could not present evidence that the child’s mother might have caused that injury. The court stated it was prepared to revisit the issue during trial.
At the time Oliver’s mother testified, the defense filed memoranda, arguing it should be allowed to cross-examine her concerning the evidence of earlier injuries and the allegation that she had jerked or shaken Oliver. Appended to the memoranda were exhibits indicating the father’s concern for Oliver’s safety in light of the mother’s emotional state, the general history of her violent actions and of her jerking or shaking the child. Other exhibits quoted the father concerning hearsay statements made to him about injuries to Oliver.

The defense argued that as the prosecution case was developing, it believed the People would argue or at least the jury would conclude that it was appellant who caused Oliver’s earlier hematoma. The pattern of reasoning would be that if Carrillo stated appellant shook Oliver on March 17, it was reasonable to believe appellant shook the child on an earlier date causing the first hematoma. Defense counsel stated the issue was not one of third-party culpability but simply whether appellant would be allowed a meaningful cross-examination of Oliver’s mother.

The trial court denied the defense request to cross-examine Oliver’s mother concerning her prior conduct toward Oliver. The court reiterated that the fact of an earlier injury was relevant but who caused the injury was of questionable relevance. The court concluded the evidence was of questionable value because it came from an ex-husband during a divorce proceeding and it had since been recanted. It believed the matter was collateral, confusing and time-consuming.

During argument, the prosecutor told the jury there was no evidence that Oliver had been beaten the night before he collapsed at appellant’s daycare center. The prosecutor told the jury: “A parent has an absolute duty not to hurt or injure their child. But when you go to work to maintain a living so that child can eat, then you have to ask somebody else to do it, so you have to delegate that duty.” During argument the prosecutor repeatedly referred to Oliver as a healthy and happy child who never had anything wrong with him except the usual ills of childhood. The prosecutor noted Oliver’s earlier daycare workers testified the child “never had a scratch on him.” In talking about the medical concept of a lucid interval, i.e., an asymptomatic period following a brain injury, the prosecutor noted that defense counsel asked if a lucid interval could account for the lack of symptoms following an injury the night before Oliver collapsed. The prosecutor noted the defense pathologist stated it could. The prosecutor then rhetorically asked: “What happened to him the night before?”

2. Discussion

**CA(1a)** (1a) Appellant argues she was denied the right to present relevant evidence corroborative of her theory of defense when the trial court excluded, based on **Evidence Code section 352**, testimony that Oliver’s mother had a history of abusive behavior directed at her former husband, other persons and Oliver. We agree.

a. Law

**CA(2) (2) HN1** All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. (Evid. Code, § 351.) **Evidence Code section 210** states that “relevant evidence” is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (People v. Scheid (1997) 16 Cal. 4th 1, 13, 65 Cal. Rptr. 2d 348, 939 P.2d 748.) Relevant evidence may be excluded pursuant to **Evidence Code section 352** if the trial court in its discretion concludes “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (People v. Minifie (1996) 13 Cal. 4th 1055, 1069-1070, 156 Cal. Rptr. 2d 133, 920 P.2d 1337, 55 A.L.R.5th 835.) A trial court’s decision to exclude evidence pursuant to **Evidence Code section 352** will not be overturned absent an abuse of that discretion. (Minifie, at p. 1070.)

**CA(3) (3) HN2** A defendant may present evidence that another person committed the charged offense. [T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under **Evidence Code section 352.”** (People v. Bradford (1997) 15 Cal. 4th 1229, 1325 [65 Cal. Rptr. 2d 145, 939 P.2d 259].) The evidence must do more than merely show a motive or opportunity to commit the crime. (People v. Hall (1986) 41 Cal. 3d 826, 833 [226 Cal. Rptr. 112, 718 P.2d 99].)

b. Analysis

**CA(1b)** (1b) We conclude the trial court erred in excluding evidence that Oliver’s mother, when angry or frustrated, had jerked and shaken the child.

The medical evidence in this case was conflicting and, given evidence of an earlier brain injury, allowed for multiple
possible causes of Oliver’s death. Certainly the evidence allowed the jury to conclude that Oliver died as a result of violent [***25] shaking by appellant on March 17. It also allowed, however, for the possibility that the child died from a rebleed of his earlier subdural hematoma, which rebleed resulted from a minor trauma unaccompanied by a violent assault.

If the jury believed Carrillo’s account that on March 17 appellant violently shook the child and such act resulted in Oliver’s [**298] death, it could properly convict appellant of a violation of section 273ab. This is so even if Oliver’s death would not have occurred but for his earlier injury. (See People v. Wattier (1996) 51 Cal. App. 4th 948, 953 [59 Cal. Rptr. 2d 483]; People v. Stamp (1969) 2 Cal. App. 3d 203, 211 [82 Cal. Rptr. 598].) The difficulty is that the jury had to believe Carrillo. Whatever the jury concluded about the medical evidence, if Carrillo was not believed, the prosecution had no case against appellant. The defense impeached Carrillo in a variety of ways. It noted she at first did not report a shaking, her later accounts of the incident were inconsistent and she had an interest in deflecting suspicion from herself and cooperating with the authorities.

Without the evidence that Oliver’s mother [***26] might have been the cause of the original hematoma, the jurors were left with a false impression that reasonably could have affected their evaluation of Carrillo’s credibility and ultimately their assessment of appellant’s core defense. The evidence strongly suggested that Oliver’s first injury, which prosecution evidence attributed to shaking, occurred soon after he began attending appellant’s daycare center. That conclusion was supported by medical testimony concerning the age of the original hematoma and the timing of Oliver’s [*388] dizziness and seizure. The evidence at trial and the prosecution’s argument suggested Oliver’s home life was happy, safe and unremarkable. If Oliver’s first injury did not occur at home, then it most likely occurred at daycare, a conclusion supported by the fact that appellant’s home life was, as portrayed by the prosecution, safe, happy and nonthreatening.

The fact that Oliver’s earlier shake-induced injury likely occurred while he was in appellant’s care tended to corroborate Carrillo’s testimony that appellant violently shook him on March 17. That testimony reciprocally tended to support the conclusion that it was appellant who caused Oliver’s [***27] first injury.

Appellant was allowed to present her case that Oliver died from a rebleed from his earlier hematoma. In light of the evidence presented, she should also have been allowed to present evidence that it was Oliver’s mother, and not her, who was the cause of that first injury. While the trial court was not required to allow the defense to present every piece of evidence suggesting that Oliver’s mother was emotional or angered easily, it was an abuse of discretion to exclude evidence that she had physically abused Oliver. Such evidence showed more than a mere motive or opportunity. At least one defense theory was that Oliver’s mother injured him, causing a subdural hematoma, and that the child died when the hematoma rebled as the result of minor trauma on March 17. Appellant should have been able to present evidence about and argue that Oliver’s mother had abused him.

Since we find additional error, we reserve discussion of prejudice.

B. Mention of Polygraph Examination

CA(4a) (4a) Appellant argues her conviction should be reversed because a police officer revealed to the jury that Carrillo had taken a polygraph test. Appellant further asserts the trial court erred in refusing [***28] to allow testimony that Carrillo failed the test.

1. Background

The prosecution in its trial brief noted Carrillo took and passed a lie detector test. During the hearing on in limine motions, the trial court expressed concern that the evidence might not be evidence that she had physically abused Oliver. Such evidence showed more than a mere motive or opportunity. At least one defense theory was that Oliver’s mother injured him, causing a subdural hematoma, and that the child died when the hematoma rebled as the result of minor trauma on March 17. Appellant should have been able to present evidence about and argue that Oliver’s mother had abused him.

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1. Background

The prosecution in its trial brief noted Carrillo took and passed a lie detector test. During the hearing on in limine motions, the trial court expressed concern that the prosecution might directly or indirectly reveal that fact. The prosecutor stated he did not intend to do so. He stated there would be evidence of an incident involving [***299] Carrillo and Detective McDonald in which the possibility that Carrillo would take a polygraph test was discussed. The prosecutor asked the trial court to order that he tell Carrillo and McDonald not to mention the word polygraph.

[***28] The defense counsel noted that, contrary to the prosecutor’s representation, the polygraph test was inconclusive and tended to show falsity. Counsel noted that Evidence Code section 351.1 not only excludes evidence of polygraph results but any reference to polygraph examinations. The trial court ordered the prosecutor to ensure there be no mention of the examination by his witnesses.

The last witness in the prosecution’s case was Police Detective Maria Rivera. Rivera participated in an interview at the police [***29] station in which Carrillo accused appellant of shaking Oliver. The detective authenticated a videotape of that interview. After the tape was played for the jury, the detective testified about how the interview was conducted. The prosecutor then asked: “After Christina

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Carrillo finished the interview, what happened?” THE DETECTIVE RESPONDED: “She agreed to take a polygraph.”

Defense counsel objected. At the close of the witness’s testimony, counsel asked for a mistrial, noting the court’s order that no mention be made of the polygraph examination and the violation of that order during the detective’s testimony. The prosecutor stated he was shocked by the answer to his question. He stated he did not warn Rivera about avoiding mention of the polygraph examination believing a police detective would know not to do so. The prosecutor argued the reference to the examination was brief, did not reveal the result and did not require the court grant a mistrial.

The trial court noted the law considers polygraph examinations unreliable and, absent a stipulation, excludes any reference to them. The court concluded, however, that since no mention of the results, which were in dispute, was made, the reference to the examination was meaningless and nonprejudicial. The court denied the motion for mistrial and concluded it best not to give a curative admonition at that time.

The defense requested, in light of the mention of the polygraph examination, that its own polygraph expert be allowed to testify that Carrillo’s test was inconclusive but tended to indicate falsity. Counsel noted the jury now knew Carrillo was given a polygraph examination by the police and could only conclude she passed it. The court noted the prosecution expert had a different opinion concerning the results of the test and would not allow testimony on the matter.

During the instruction conference, defense counsel renewed the motion for mistrial. In the alternative, counsel asked to present evidence concerning Carrillo’s examination results. The trial court denied the motion for mistrial and stated it would not permit evidence concerning Carrillo’s performance on the polygraph examination. The prosecutor stated that if the defense insisted on it, he had no objection to a curative admonition. The court considered the matter and decided not to resurrect the issue by telling the jury to disregard the mention of Carrillo’s polygraph examination.

2. Discussion

There is no dispute that inadmissible evidence was presented to the jury. Evidence Code section 351.1, subdivision (a), states in part, HN3 “the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding.” CA(5) (5) This firm and broad exclusion is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of or the outcome of such examination and because the introduction of polygraph evidence can negatively affect the jury’s appreciation of its exclusive power to judge credibility. (See In re Aontae D. (1994) 25 Cal. App. 4th 167, 176-177 [30 Cal. Rptr. 2d 176]; People v. Kegler (1987) 197 Cal. App. 3d 72, 86-89 [242 Cal. Rptr. 897].)

CA(4b) (4b) Since the error is conceded, the issue is its significance. We conclude the error was serious. Carrillo’s credibility was crucial to the prosecution’s case. While it was possible for the prosecution to have partially lost the battle of experts and still convict appellant of a violation of section 273ab, the prosecution’s case could not tolerate a loss of the conflict over Carrillo’s credibility. Rivera’s comment had a high potential to affect the jury’s resolution of that issue.

The People argue, as the trial court concluded, that Detective Rivera’s mention of Carrillo taking a polygraph examination was essentially a technical error since no statement was made about its result. We disagree. The mention of Carrillo taking a polygraph test came at the worst possible time. The prosecution’s case had reached a crescendo when Rivera introduced the videotaped recording of Carrillo’s vivid statement to the police. Asked what happened after the statement, Rivera replied Carrillo agreed to take a polygraph examination. First, a juror might conclude that Carrillo’s apparent readiness to take a polygraph examination reflected her confidence in its result. A juror could also reasonably conclude the state would not base a serious prosecution on the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding.” CA(5) (5) This firm and broad exclusion is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of or the outcome of such examination and because the introduction of polygraph evidence can negatively affect the jury’s appreciation of its exclusive power to judge credibility. (See In re Aontae D. (1994) 25 Cal. App. 4th 167, 176-177 [30 Cal. Rptr. 2d 176]; People v. Kegler (1987) 197 Cal. App. 3d 72, 86-89 [242 Cal. Rptr. 897].)

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We conclude the improper mention of the polygraph test, in combination with the error in excluding evidence that
Oliver’s mother had jerked or shaken the child, was prejudicial. Both errors substantially affected the crucial issue in the case—Carrillo’s credibility. We conclude it is reasonably probable that but for these errors a result more favorable to the defendant would have been reached and we reverse the judgment. (See People v. Watson (1956) 46 Cal. 2d 818, 836 [299 P.2d 243].)

We address additional issues [*34] relevant to a retrial of this matter.

C. Scientific Evidence, Expert Opinion and Experiments *

D. Instruction on Lesser Included Offense

CA(6a) (6a) Appellant was charged with a violation of section 273ab, assault on a child with force likely to produce great bodily injury resulting in death. She contends that assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) is a [*301] lesser included offense of the charged crime and the trial court erred in denying her request to so instruct the jury.

1. Background

Appellant requested the trial court to instruct concerning what she argued were the lesser included offenses of simple assault and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). As to the section 245, subdivision (a)(1), lesser included offense, appellant argued that HN4 both sections [*35] 273ab and 245, subdivision (a)(1), require an assault by means of force likely to cause great bodily injury. Section 273ab, however, has the additional element that the assault result in death. Appellant argued that given the medical evidence, the jury could conclude that while she assaulted Oliver with the required force, the assault did not cause the child’s death. If the jury so found, they could find appellant guilty of section 245, subdivision (a)(1). The trial court concluded the elements of sections 273ab and 245, subdivision (a)(1), were different and appellant, while entitled to an instruction on simple assault, was not entitled to a lesser included offense instruction on section 245, subdivision (a)(1).

[*392] 2. Discussion

CA(7) HN5 A trial court must instruct concerning all lesser included offenses which find substantial support in the evidence. ( People v. Barton (1995) 12 Cal. 4th 186, 195 [47 Cal. Rptr. 2d 569, 906 P.2d 531].) An offense is necessarily included in a greater offense when, for present purposes, under the statutory definition of the offenses [*36] the greater offense cannot be committed without necessarily committing the lesser. ( People v. Hagen (1998) 19 Cal. 4th 652, 667 [80 Cal. Rptr. 2d 24, 967 P.2d 563]; People v. Joiner (2000) 84 Cal. App. 4th 946, 971-972 [101 Cal. Rptr. 2d 270].) To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, “evidence from which a rational trier of fact could find beyond a reasonable doubt” that the defendant committed the lesser offense. ( People v. Berryman (1993) 6 Cal. 4th 1048, 1081 [25 Cal. Rptr. 2d 867, 864 P.2d 40].)

Speculation is insufficient to require the giving of an instruction on a lesser included offense and a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. ( People v. Mendoza (2000) 24 Cal. 4th 130, 174 [99 Cal. Rptr. 2d 485, 6 P.3d 150].)

CA(6b) (6b) The CJER handbook of mandatory criminal jury instructions states, without analysis, that section 245 is a lesser included offense of section 273ab. (CJER Mandatory Criminal Jury Instructions Handbook (CJER 2000) § 2.16, p. 25.) Respondent does [*37] not argue to the contrary.

Section 273ab HN6 requires the assault on the child be “by means of force that to a reasonable person would be likely to produce great bodily injury.” Section 245, subdivision (a)(1), requires the assault be “by any means of force likely to produce great bodily injury.” If the two elements are different, and we do not hold that they are, then it could only be because the force requirement in section 273ab is more restrictive than the force requirement in section 245, subdivision (a)(1). That is so since at least nominally the sections differ in that section 273ab includes a reasonable person qualification while section 245, subdivision (a)(1), does not.

Since under this reasoning the force requirement of the greater offense is more restrictive than the force requirement of the lesser offense, it is impossible to commit the greater without necessarily committing the lesser. Thus, even if there is a difference in the force requirement of the two assault statutes, it does not affect [*302] the determination of whether one is a necessarily lesser included offense of [*38] the other.

If on retrial the court finds substantial evidence of the lesser included offense, it should instruct on that crime.

* See footnote 1, ante, page 370.
H. Hardship Screening

**CA(8) (8)** Appellant argues the trial court erred when over objection it allowed the jury commissioner to conduct the hardship screening of prospective jurors. She contends such procedure was unconstitutional since the process was not conducted in public, defendant and counsel were not present, had no opportunity to be heard or object and because no record was kept for review.  

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1. **Background**

Before the start of voir dire the trial court indicated there would be 100 prospective jurors available for questioning who had been “preprocessed” by the jury commissioner, i.e., jurors who would be able to serve the three to four weeks the trial was expected to take. The defense objected to the procedure, arguing such screening was a part of the jury selection process and should be conducted by the court in the defendant’s presence. The defense’s concern was that given the nature of the charge, some prospective jurors would claim a hardship merely to avoid serving on the case.

The court replied that many employers would only pay the salary of jurors for five days of service. The court stated that in its experience, in trials lasting longer than five days many prospective jurors claimed service would be a financial hardship. The court stated it only intended the jury commissioner to address claims of economic hardship and overruled the defense objection.

The defense requested that the court have the jury commissioner maintain a record of the number of jurors in the pool, the number excused and the reason a prospective juror was excused. Counsel argued such records would be helpful in determining if the process resulted in a jury panel that did not reflect a cross-section of the community. The court stated it would ask if such records, including the gender and race of the prospective jurors excused, could be kept.

After the start of voir dire, the defense moved to strike the panel based on its claim that screening by the jury commissioner was improper. Counsel argued it was possible the process had skewed the makeup of the panel. Prior to the jury being sworn, the court heard the motion. The defense asked for the data concerning the prospective jurors excused. The court stated the jury commissioner told it that such information was not available.

Appellant argued she had the right to be present at all critical stages of the process. Jury selection was such a stage. She argued that excusing a prospective juror was not a mere administrative task but required judicial discretion. Appellant also argued the process denied her a jury drawn from a fair cross-section of the community.

The prosecutor noted that from the answers of the prospective jurors during voir dire the jury commissioner merely asked if serving would cause economic hardship or if a prospective juror had a planned vacation. He argued such inquiries were race and gender neutral and granting excuses based on such considerations would not skew the makeup of the panel.

Defense counsel argued that it did not appear that the panel represented a cross-section of the community. Counsel asserted that San Diego County is 24 or 25 percent...
Hispanic. Based on counsel’s review of the surnames on the panel, he concluded 15 percent of the panel was Hispanic. Counsel also stated his belief that the panel had a higher percentage of older persons than was true of the community as a whole. Defense counsel argued that even if the selection process was race and gender neutral, allowing economic hardship excuses would result in fewer low-income or younger persons being on the panel.

The court denied the motion.

2. Relevant Statutes and Rules

**HN7** Several Code of Civil Procedure sections and California Rules of Court rules apply to the excusal of jurors based on economic hardship. [Code of Civil Procedure section 204, subdivision [***42] (b), states that an eligible person may be excused from jury service only for undue hardship upon himself or [*395] herself or upon the public as defined by the Judicial Council. *Section 218 of the Code of Civil Procedure* requires all excuses be in writing and signed by the prospective juror. The section requires the jury commissioner to hear excuses in accordance with standards prescribed by the Judicial Council. It is within the discretion of the commissioner to accept a hardship excuse without a prospective juror appearing before him or her. [Code of Civil Procedure section 194, subdivision (d), HN8] defines an “excused juror” as one “excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and polices.”

**HN9** California Rules of Court, rule 860(b), defines general principles governing the granting of excuses. Subdivision (c) of rule 860 requires the juror seeking to be excused to state facts [***43] specifying the hardship and why the hardship cannot be avoided by a deferral of service. Subdivision (d) of rule 860 provides in detail the bases on which a hardship excuse may be granted. Such excuses may be granted if the prospective juror has no reasonably available means of transportation, service would require excessive travel, the prospective juror has impairments that would make service potentially harmful, the juror is immediately needed for the protection of public health and safety or must care for a person who requires the juror’s personal attention. The subdivision also states that an extreme financial burden is a basis to be excused and gives four factors, including the expected length of service, for determining whether the claimed hardship is sufficient.

3. Discussion

The issue is whether the screening procedure used here, carried out over appellant’s [***304] objection, prejudiced any of her rights.

We find no merit in appellant’s argument that allowing the jury commissioner to conduct hardship screening of the jury pool for this case denied her the right to be present at a crucial stage of the proceeding or to counsel. First, [***44] **HN10** hardship screening of the jury pool, even when conducted by the trial judge, is not a crucial stage and appellant had no absolute right to be present. *(People v. Ervin (2000) 22 Cal. 4th 48, 72, 74 [91 Cal. Rptr. 2d 623, 990 P.2d 506].)* Neither do we think it is constitutionally significant that counsel was absent when the commissioner screened the pool to determine which prospective jurors would be financially unable to serve on this case. Appellant makes no complaint, and we find no case in which such a complaint was made, that it is constitutionally repugnant for the commissioner to conduct, in the absence of counsel or the defendant, the initial hardship screening utilized in excusing potential jurors from service. If that process is unobjectionable, then it is difficult to understand why allowing the jury commissioner to conduct, in the absence of counsel or the defendant, a financial [*396] hardship screening of the jury pool for the purposes of a particular case is improper.

We are more concerned with the failure of the trial court to require that records be kept concerning, for example, the number [***45] of jurors screened, the number excused from service and the reasons given by the excused prospective jurors in claiming financial hardship. In *(People v. Wheeler (1978) 22 Cal. 3d 258, 273 [148 Cal. Rptr. 890, 583 P.2d 748].)* the court noted that **HN11** excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community.

**HN12** When prospective jurors are excused by the trial judge in open court, a record exists of the numbers excused and the reasons given. As we read [Code of Civil Procedure section 218] and California Rules of Court, rule 860 (c), requests to be excused from jury service must be in writing, signed by the potential juror and placed on the court’s record. The obvious purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the [***46] pool. No such record exists in this case.

As noted, the keeping of such a record is not for historical purposes. It is kept because it along with other evidence may be useful in demonstrating that the manner in which potential jurors are excused for hardship, either by the jury commissioner or trial court, improperly results in panels not representative of the community.

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We conclude where there is a request, the trial court must require the jury commissioner to maintain a record of the hardship screening procedure.

I. Constitutionality of section 273ab

Appellant argues section 273ab is void for vagueness as applied in this case and denies equal protection. Appellant argues the section is vague because it fails to give sufficient notice of the prohibited conduct. She argues the section denies equal protection since it treats a child’s caregiver who simply assaults the child more harshly than a caregiver who murders the child.

1. Vagueness

CA(9a) (9a) Appellant argues that given the dispute among experts “whether shaking alone can cause, much less is ‘likely to’ [***305] produce,” great bodily injury (GBI) in a 13-month old, 30-plus pound child, and given the lack of a [***397] [***47] requirement for subjective intent to inflict GBI, [section 273ab] is void for vagueness.” Appellant argues that given the medical debate on whether shaking can cause a subdural hematoma in a 13-month-old child, “how is it that any reasonable person would believe that it is more probable than not (‘likely’) that GBI will result from brief but vigorous shaking of a [young child]?”

CA(10) (10) HN13 Statutes are presumed valid and must be upheld unless their unconstitutionality is positively and unmistakably demonstrated. With regard to vagueness, the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. ( People v. Albritton (1998) 67 Cal. App. 4th 647, 656-657 [79 Cal. Rptr. 2d 169].)

HN14 It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect [***48] clarity in criminal statutes. Reasonable specificity exists if the statutory language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices.” ( United States v. Petrillo (1947) 332 U.S. 1, 8 [67 S. Ct. 1538, 1542, 91 L. Ed. 1877]; see also People v. Deskin (1992) 10 Cal. App. 4th 1397, 1400 [13 Cal. Rptr. 2d 391].) Given these practical difficulties, one commentary has stated: “In practice, unconstitutional vagueness is a concept that only works on the extreme end of the vagueness continuum. . . . Arguments that a statute appears vague in the ordinary sense will not suffice to bring relief from the courts.” (2 Antieau & Rich, Modern Constitutional Law (2d ed. 1997) § 38.00, p. 429.)

CA(9b) (9b) HN15 There is nothing vague about section 273ab. In Albritton we stated “[section 273ab] gives plain notice that the proscribed act is an assault on a child under eight years of age with force that objectively is likely to produce great bodily injury.” ( People v. Albritton, supra, 67 Cal. App. 4th at pp. 657-658.) [***49] We noted that great bodily injury is clearly defined as “‘a significant or substantial physical injury.’” ( Id. at p. 658.) In this regard, section 273ab is analogous to the felonious assault described in section 245, subdivision (a)(1), which requires an assault “‘by any means of force likely to produce great bodily injury.’” ( People v. Albritton, supra, at p. 658.)

Contrary to the manner in which appellant casts the question, section 273ab is not an SBS offense. Appellant’s observations concerning scientific disagreement about the validity of SBS are irrelevant to the issue of the requisite specificity of section 273ab. Section 273ab HN16 makes clear that it is unlawful for one with custody of a child to assault that child by “means of force that to a reasonable person would be likely to produce great bodily [***398] injury.” It is the jury’s evaluation of the reasonable likelihood of some great bodily injury that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of SBS or any other mechanism or injury [***50] might impact the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of section 273ab.

2. Denial of Equal Protection

CA(11a) (11a) Appellant notes she was sentenced to prison for a term of 25 years to life—the same punishment imposed for first degree murder and longer than the sentence for second degree murder. She further notes that the intent required for a violation of section 273ab is no more than [***306] required for simple assault. She argues that to impose a term equal to that imposed for first degree murder and longer than that for second degree murder, i.e., those who intentionally kill a child, makes no sense and denies her equal protection.

a. Law

CA(12) (12) HN17 “In order to establish a meritorious claim under the equal protection provisions of our state and federal Constitutions appellant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.] Equal protection applies to ensure that persons similarly situated with respect to the legitimate [***51] purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]” [Citations.]” ( People v.
CA(11b) (11b) **HN18** ""The use of the term 'similarly situated' in this context refers only to the fact that 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same' . . . .' [Citation.] 'There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The "similarly situated" prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.' [Citation.]

In any event we conclude that **HN21** when legislation defines crimes or gradations of criminal activity, the distinction created need only satisfy the rational relationship test. ( **People v. Bell (1996) 45 Cal. App. 4th 1030, 1046-1049 [53 Cal. Rptr. 2d 156]; but see **People v. Nguyen (1997) 54 Cal. App. 4th 705, 717, fn. 6 [63 Cal. Rptr. 2d 173].) For the reasons cited above, treating murderers and those who violate section 273ab differently bears a rational relationship to a legitimate state interest.

**J. Sufficiency of Evidence**

The judgment is reversed.

Kremer, P. J., and Haller, J., concurred.

A petition for a rehearing was denied January 7, 2002, and the opinion was modified to read as printed above.

* See footnote 1, ante, page 370.
A daycare center operator was convicted of assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), after the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome. The trial court excluded, based on Evid. Code, § 352 (probative value versus prejudice or confusion), testimony that the child’s mother had a history of abusive behavior. A police officer also made a statement to the jury that a key prosecution witness had taken a polygraph test. Also, the trial court permitted the jury commissioner to conduct a hardship screening of prospective jurors without defendant present. (Superior Court of San Diego County, No. SCD130926, William H. Kennedy, Judge.)

The Court of Appeal reversed the judgment. The court held that the trial court abused its discretion when it excluded testimony that the child’s mother had a history of abusive behavior, and that the mother, when angry or frustrated, had jerked and shaken the child. The medical evidence was conflicting and, given evidence of an earlier brain injury, allowed for multiple possible causes of the child’s death. The court also held that the police officer’s inadmissible statement to the jury that a key prosecution witness had taken a polygraph test was prejudicial. The court further held that defendant was entitled, on retrial, to an instruction that assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a lesser included offense of the charged offense, if the trial court found there was substantial evidence of the lesser included offense. The court held that the trial court erred when, in permitting the jury commissioner to conduct a hardship screening of prospective jurors without defendant present, it failed to require the commissioner to maintain a record of the screening procedure, as requested by defendant. The court also held that Pen. Code, § 273ab, was not void for vagueness as applied to defendant. The court further held that the fact that defendant’s term was equal to that imposed for first degree murder and longer than the sentence for second degree murder did not result in a denial of equal protection, since defendant was not similarly situated to those who murder children. (Opinion by Benke, J., with Kremer, P. J., and Haller, J., concurring.)

HEADNOTES
In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), in which the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome, the trial court abused its discretion when it excluded, based on Evid. Code, § 352 (probative value versus prejudice or confusion), testimony that the child’s mother had a history of abusive behavior, and that the mother, when angry or frustrated, had jerked and shaken the child. The medical evidence was conflicting and, given evidence of an earlier brain injury, allowed for multiple possible causes of the child’s death. Whatever the jury concluded about the medical evidence, if defendant's assistant at the daycare center was not believed, the prosecution had no case against defendant. The defense impeached the assistant in a variety of ways. Without the evidence that the child’s mother might have been the cause of the original hematoma, the jurors were left with a false impression that reasonably could have affected their evaluation of the assistant's credibility and ultimately their assessment of defendant's core defense. Defendant was allowed to present her case that the child died from a rebleeding from his earlier hematoma. In light of the evidence, defendant should also have been allowed to present evidence that it was the child’s mother, and not defendant, who was the cause of that first injury.

Evidence § 23--Admissibility--Relevancy--Probative Value Versus Prejudice or Confusion. All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. Relevant evidence may be excluded pursuant to Evid. Code, § 352, if the trial court in its discretion concludes its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. A trial court’s decision to exclude evidence pursuant to § 352 will not be overturned absent an abuse of that discretion.

Criminal Law § 289--Evidence--Admissibility--Prejudicial Matter--Third Party Culpability. A criminal defendant may present evidence that another person committed the charged offense. To be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Evid. Code, § 352. The evidence must do more than merely show a motive or opportunity to commit the crime.

Criminal Law § 403--Evidence--Inadmissible Statement That Key Witness Took Polygraph Test--Prejudice. In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), defendant was prejudiced by the erroneous admission of a police officer’s inadmissible statement to the jury that a key prosecution witness had taken a polygraph test. Under Evid. Code, § 351.1, subd. (a), any reference to the taking of a polygraph

examination is inadmissible. Moreover, the witness’s credibility was crucial to the prosecution’s case, and the officer’s comment had a high potential to affect the jury’s resolution of the credibility issue. From the officer’s statement that the witness agreed to take a polygraph examination, a juror might have concluded that the witness’s apparent readiness to take the examination reflected her confidence in its result. A juror could also have reasonably concluded that the state would not base a serious prosecution on the testimony of a lone witness whose credibility it had cause to doubt. Thus, a serious danger existed that one or more jurors concluded that the witness passed the polygraph examination and that she was, therefore, worthy of belief. However, the trial court acted properly in refusing the defense request to admit evidence that the witness’s test results were at best inconclusive. Such admission would have violated Evid. Code, § 351.1, and it would have improperly confused the issue of the witness’s credibility.


(5)
Criminal Law § 403--Evidence--Admissibility--Polygraph Test Results.
The firm and broad exclusion, pursuant to Evid. Code, § 351.1, subd. (a), of the results of a polygraph examination, the opinion by a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of or the outcome of such examination, and because the introduction of polygraph evidence can negatively affect the jury’s appreciation of its exclusive power to judge credibility.

(6a, 6b)
Criminal Law § 250--Trial--Instructions--Lesser Included Offenses--Assault by Means of Force Likely to Produce Great Bodily Injury--Included in Assault on Child with Force Likely to Produce Great Bodily Injury.
In a prosecution for Pen. Code, § 273ab (assault on a child with force likely to produce great bodily injury resulting in death), defendant was entitled to an instruction that assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a lesser included offense, if the trial court found there was substantial evidence of the lesser included offense. Pen. Code, § 273ab, requires the assault on the child be by means of force that to a reasonable person would be likely to produce great bodily injury. Pen. Code, § 245, subd. (a)(1), requires the assault be by any means of force likely to produce great bodily injury. At least nominally the statutes differ in that Pen. Code, § 273ab, includes a reasonable person qualification while Pen. Code, § 245, subd. (a)(1), does not. Since the force requirement of the greater offense is the more restrictive than the force requirement of the lesser offense, it is impossible to commit the greater without necessarily committing the lesser. Thus, even if there is a difference in the force requirement of the two assault statutes, it does not affect the determination of whether one is a necessarily lesser included offense of the other.

(7)
Criminal Law § 250--Trial--Instructions--Lesser Included Offenses.
A trial court must instruct concerning all lesser included offenses that find substantial support in the evidence. An offense is necessarily included in a greater offense when under the statutory definition of the offenses the greater offense cannot be committed without necessarily committing the lesser. To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant
committed the lesser offense. Speculation is insufficient to require the giving of an instruction on a lesser included offense and a lesser included instruction need not be given when there is no evidence that the offense is less than that charged.

(8)

Jury § 31--Challenges--Hardship Screening of Prospective Jurors by Jury Commissioner Without Defendant Present Propriety--Failure to Maintain Record of Procedure.

In a prosecution for Pen. Code, § 273ab (assault on a child with force likely to produce great bodily injury resulting in death), the trial court erred when, in permitting the jury commissioner to conduct the hardship screening of prospective jurors without defendant present, it failed to require the commissioner to maintain a record of the screening procedure, as requested by defendant. Hardship screening of the jury pool is not a crucial stage and defendant had no absolute right to be present. Nor was it constitutionally significant that counsel was absent when the commissioner screened the pool. However, the trial court should have required that records be kept concerning the number of jurors screened, the number excused from service, and the reasons given by the excused prospective jurors in claiming financial hardship. Excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community. Code Civ. Proc., § 218, and Cal. Rules of Court, rule 860 (c), require that requests to be excused from jury service must be in writing, signed by the potential juror and placed on the court's record. The purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool.

(9a, 9b)

Infants § 16--Offenses Against Infants--Assault on Child Resulting in Death--Vagueness: Constitutional Law § 115--Due Process--Statutory Vagueness.

In a prosecution of a daycare center operator for assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), in which the prosecution presented evidence that the child died from injuries consistent with shaken baby syndrome, the statute was not void for vagueness as applied to defendant. The statute gives plain notice that the proscribed act is an assault on a child under eight years of age with force that objectively is likely to produce great bodily injury. Great bodily injury is clearly defined as a significant or substantial physical injury. Scientific disagreement about the validity of shaken baby syndrome was irrelevant to the issue of the requisite specificity of § 273ab. Section 273ab makes clear that it is unlawful for one with custody of a child to assault that child by means of force that to a reasonable person would be likely to produce great bodily injury. It is the jury's evaluation of the reasonable likelihood of some great bodily injury that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of shaken baby syndrome or any other mechanism or injury might affect the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of § 273ab.

(10)

Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Vagueness or Overbreadth--Penal Statutes.

Statutes are presumed valid and must be upheld unless their unconstitutionality is positively and unmistakably demonstrated. With regard to vagueness, the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect clarity in criminal statutes. Reasonable specificity exists if the statutory language conveys
sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices.

(11a, 11b)

Infants § 16 -- Offenses Against Infants -- Assault on Child Resulting in Death -- Sentencing -- Equal Protection: Constitutional Law § 90 -- Equal Protection -- Groups Not Similarly Situated.

In a prosecution in which a daycare center operator was convicted of assault on a child with force likely to produce great bodily injury resulting in death (Pen. Code, § 273ab), and sentenced to prison for a term of 25 years to life, the fact that the term was equal to that imposed for first degree murder and longer than the sentence for second degree murder did not result in a denial of equal protection. Defendant was not denied equal protection since she was not similarly situated with those who murder children. A violation of § 273ab requires not only an assault on a child that results in death, but also that the defendant have care or custody of the child. The element of care and custody in § 273ab creates a meaningful distinction between those committing that offense and murderers. Those who have the care and custody of children not only have a particular responsibility and occupy a position of trust, they are also the persons most likely to kill children. When legislation defines crimes or gradations of criminal activity, the distinction created need only satisfy the rational relationship test. Treating murderers and those who violate § 273ab differently bears a rational relationship to a legitimate state interest.

(12)

Constitutional Law § 76 -- Equal Protection -- Nature and Scope of Equal Protection.

In order to establish a meritorious claim under the equal protection provisions of the state and federal Constitutions, the claimant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. The similarly situated requirement simply means that an equal protection claim cannot succeed, and it does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose. Liberty is a fundamental interest, and classifications dealing with it must satisfy the strict scrutiny test.

COUNSEL

Raveen Obhrai for Fiona Mactaggart, House of Commons, a member of Parliament from the United Kingdom, as Amicus Curiae on behalf of Defendant and Appellant.
Dixon & Truman and Lisa A. Rasmussen for Physicians and Bio-Scientists as Amici Curiae on behalf of Defendant and Appellant.
Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kyle Niki Shaffer and Alana Butler Cohen, Deputy Attorneys General, for Plaintiff and Respondent.

BENKE, J.

Defendant Manjit Kaur Basuta was convicted of assault on a child with force likely to produce great bodily injury resulting in death. (**377 Pen. Code, 3 § 273ab.) Basuta was sentenced to a term of 25

years to life in prison. She appeals making numerous arguments, among them that section 273ab is unconstitutional, the trial court erred in the admission and exclusion of scientific evidence and expert testimony and in the failure to give various instructions. We reverse, finding prejudicial error in the exclusion of defense evidence and in the unlawful mention that a key prosecution witness underwent a polygraph examination.

Facts

A. Prosecution Case

1. The Death of Oliver S.

Thirteen-month-old Oliver S. died on March 18, 1998, in the San Diego Children’s Hospital.

On March 17, 1998, Oliver’s grandmother took him, an apparently healthy and normal child, to a home daycare facility operated by appellant. Oliver had attended the facility since February 9, 1998. At 12:23 p.m., appellant called 911 and requested assistance, stating that a baby had fallen, he was choking and not breathing. Police Officer Jeffrey Dunn arrived shortly and was met by appellant’s housekeeper, Ana Christina Carrillo. Carrillo led the officer to the rear yard where appellant was attempting to revive Oliver. The child was unconscious and not breathing. Believing Oliver was choking, the officer struck him six to eight times in the back, hoping to dislodge any object in the child’s airway.

When paramedics arrived, appellant told them Oliver fell going outside and struck his head on a carpeted area of the patio. By this time, Oliver had very slow respiration and was blue. The paramedics concluded he had sustained a severe head injury and transported him to Children's Hospital. On arrival, Oliver was unconscious and not breathing, his body temperature was low, his blood pressure high, he was nonresponsive to stimuli and his pupils were dilated. The emergency room physician concluded Oliver was suffering from high cranial pressure and severe brain damage. Oliver died the next morning.

An autopsy conducted by the medical examiner revealed no external injury except a recent bruise on the right side of the child’s forehead. On internal examination the pathologist found a large subdural hematoma. A microscopic examination revealed an earlier subdural hematoma that the pathologist estimated was two to four weeks old. The doctor also found bleeding around Oliver's optic nerve and in the retina of each eye. *378

The medical examiner concluded the most recent hematoma was not a “rebleed” from the earlier hematoma. Rebleeds bleed slowly and would not account for Oliver's sudden deterioration. The retinal hemorrhages found were not the result of either attempts at resuscitation or the earlier hematoma.

The medical examiner concluded the cause of death was a recent traumatic event involving shaking alone or with impact against a relatively soft object. The injuries were inconsistent with Oliver’s falling or being pushed to the ground by another child.

Oliver’s health history revealed that in June 1997, he fell out of his car seat approximately 30 inches to a carpeted floor. Oliver’s mother contacted medical personnel who advised her that if he remained asymptomatic she should not be concerned. Oliver appeared to be uninjured.

Approximately three weeks before Oliver’s death, his grandmother noticed he was having trouble with his balance. Over several weeks the dizziness subsided. Two weeks prior to his death, when his
mother was giving him a bath, Oliver had a spasm or seizure. The child appeared to shiver for several seconds. He did not lose consciousness and his breathing was normal. Oliver ate and slept normally that evening. His mother and grandmother concluded he shivered because he was cold and did not take him to the doctor.

2. The Statements of Ana Christina Carrillo

a. Trial Testimony

In January 1997 Carrillo, a native of Guatemala not legally residing in this country, started working for appellant as a housekeeper and an aid with the children. In early March 1998, she quit but returned on March 17 to help for the day. After the children finished lunch that afternoon, appellant began to change their diapers. Appellant called Oliver to come for his diaper change. When he did not come, appellant repeatedly and angrily told him to do so. Finally, she walked to Oliver, picked him up with her hands under his arms and shook him. The child began to cry. Appellant carried Oliver to the diaper changing area shaking him as she went. As she finished with his diaper change, Oliver stopped crying. Appellant tried to stand him up, his eyes fluttered, he looked dizzy and was unable to stand. Oliver fell into appellant's arms and stopped breathing. Appellant attempted to resuscitate him.

At first appellant did not want Carrillo to call for help. Finally, she relented, telling Carrillo to state that Oliver had fallen. While the police and paramedics placed Oliver in the ambulance, appellant and Carrillo remained in the house. Appellant told Carrillo to tell the police that Jessica, one of the children, pushed Oliver and he fell.

b. Carrillo's Pretrial Statements and Activities

After Oliver was transported to the hospital, Carrillo told officers that Jessica pushed Oliver and he hit his head. Carrillo later stated she made the statement up because appellant threatened that immigration would put her in jail. Carrillo called her brother Pedro Carrillo from appellant's house. She told him that a girl had pushed a boy and the boy hit his head and was taken to the hospital. Appellant wanted Carrillo to spend the night at her house. Carrillo declined and left with her friend and roommate Araceli Arrendondo Aquino. Appellant told Carrillo to come back the next day.

As they drove home, Carrillo told Arrendondo that appellant shook Oliver. Carrillo stated that appellant told her to tell the police he fell. Later in the evening Carrillo called her brother and told him that appellant shook Oliver because she was angry he would not come when she called. Carrillo told her brother she did not tell the truth because appellant told her if she told the truth she would be deported.

The next day, Arrendondo took Carrillo back to appellant's house. Carrillo told appellant she was afraid. Appellant told her if she did not want to be involved, she should move far away. Arrendondo wanted Carrillo to leave but appellant insisted she stay since the police were returning and wanted to talk to Carrillo. When a police detective came to the house, Carrillo agreed to accompany him to the police station for questioning. However, while Carrillo used the telephone to call a friend to accompany her, appellant told the officer that Carrillo did not understand what the officer was asking her to do and that Carrillo did not want to go to the station. Appellant told the officer her attorney told her that Carrillo was not required to speak to the police. The detective departed.

Later in the day, appellant, her husband and Carrillo talked to appellant's attorney. On the drive to his
office, appellant repeatedly told Carrillo to say that Jessica pushed Oliver. Fearful of being deported, Carrillo told the lawyer that Oliver had fallen. After returning to appellant's home, they learned Oliver had died.

Carrillo went home. During the evening appellant called Carrillo and reminded her that Jessica had pushed Oliver. Appellant asked Carrillo to come that evening to appellant's sister-in-law's house since appellant's lawyer wanted to ask her additional questions. Appellant also stated Carrillo should not stay at home since the police would be coming there to question her.

Carrillo and Arrendondo went to appellant's sister-in-law's house. Appellant wanted Carrillo to spend the night. Fearful, Carrillo wanted Arrendondo to stay as well; however, Arrendondo departed. Appellant went to her nearby home. Later, Arrendondo returned to the home of appellant's sister-in-law. Carrillo's other roommates, Irma and Norma, accompanied her. The women told Carrillo she should go home, that her brother wanted to talk to her. As they started to leave, appellant returned. An argument began between Carrillo's roommates and appellant and appellant's brother-in-law. Appellant told Carrillo her brother could see her there. Appellant grabbed one of Carrillo's arms, Irma the other. Carrillo was able to get away from appellant and she departed with her roommates.

On the drive back to their apartment, Carrillo told the women that appellant had shaken Oliver. Later that evening when Carrillo again told her brother what had occurred, he told her to see an attorney. The next day Carrillo talked to a lawyer. She explained that when appellant told Oliver to come and he did not do so, she picked him up and carried him to the diaper changing area. After appellant changed his diaper, Oliver could not stand up. Carrillo explained she told the police that Jessica pushed Oliver because she was afraid if she told the truth she might be deported. Carrillo did not tell the attorney that appellant had shaken the child. The lawyer advised Carrillo to speak to the police.

That evening Carrillo talked to the mother of one of the children she helped care for at appellant's daycare center. Crying, Carrillo stated that Jessica did not push Oliver. She related that appellant was very upset when Oliver would not come and because of this, she shook him. After his diaper was changed, Oliver could not stand and stopped breathing. The following day Carrillo related this account of events to the police.

### 3. Shaken Baby Syndrome

The pediatric emergency room physician who treated Oliver believed his injury was consistent with having been shaken and inconsistent with a short fall. The medical examiner concluded the cause of Oliver's death was a nonaccidental trauma involving shaking and/or impact into a relatively soft object.

Dr. Randell Alexander, an associate professor of pediatrics and the director of the Center for Child Abuse at the Morehouse School of Medicine in Atlanta, Georgia, testified as an expert on shaken baby syndrome (SBS). Dr. Alexander explained the syndrome results when a child is violently shaken and the brain is damaged either by direct injury to brain cells or secondarily by damage to the vascular system of the brain's coverings resulting in intercranial bleeding and pressure. The violent shaking can also result in retinal hemorrhages. The doctor explained the brain and eyes are not designed to handle the rapid accelerations and decelerations of violent back and forth shaking.

The doctor noted there are clinical indications of such injury, including swelling of the soft spot on the head, unconsciousness or semiresponsiveness, nausea and difficulty with motor functions. The child might have trouble breathing, be irritable, have trouble sleeping and be unwilling to eat.
Dr. Alexander stated studies indicated that short falls do not cause serious brain injuries. In a small percentage of short fall cases, a minor skull fracture can occur and cause no internal injury. Short falls do not cause subdural bleeding. Neither do short falls cause direct brain cell injury. Such falls do not result in retinal hemorrhages.

The doctor reviewed Oliver's medical records. He concluded Oliver's death was the result of complications of SBS. Dr. Alexander believed the earlier subdural hematoma was evidence that Oliver had been shaken before. He did not believe the earlier injury had any significant affect on the later fatal injury. Nor did he believe Oliver's death was the result of a rebleed of the earlier hematoma. Rebleeding can be caused by minor trauma but rebleeds rarely occur in children. Rebleeding results, however, in slow bleeding and seldom causes clinical signs. Any clinical signs would be slow in developing.

Dr. Alexander concluded that based on his behavior on the morning of March 17, 1998, Oliver was not suffering from a serious brain injury. The symptoms displayed in the early afternoon of that day, however, were evidence of a serious brain injury. Those symptoms were not the result of a rebleed of the earlier subdural hematoma.

The doctor stated it was not significant that Oliver had no injury of his ribcage or neck and no bruising on his chest or arms. The doctor noted such findings are relatively rare in SBS cases.

On cross-examination Dr. Alexander agreed that there were some doctors who believed that shaking alone could not result in a fatal injury to a child.

B. Defense Case

The defense sought to discredit Carrillo's claim that appellant violently shook Oliver. The defense noted the accusation contradicted her earlier statements, that the details of her accusation varied and that she had an interest in diverting suspicion from herself and in cooperating with the authorities.

The defense also offered evidence that shaking a baby, even violently, could not have caused Oliver's injuries, that his death resulted instead from accidental trauma causing a rebleed of his earlier hematoma. Dr. Janice Carter-Lourensz, a pediatrician specializing in child development and sexual abuse, questioned whether physicians were by training and experience qualified to discuss the forces, velocities, etc., involved and to draw valid conclusions concerning the cause of head injuries in children.

The doctor stated a controversy exists in medicine concerning the cause of the injuries described as SBS. Some physicians believe the syndrome exists but only in particularly vulnerable children. They believe it is highly unlikely, given the biomechanics of the act, that a human being could exert sufficient force on a healthy child to cause a brain injury. The doctor stated that tests by biomechanical engineers and a pathologist supported this conclusion.

Dr. Carter-Lourensz also stated that retinal bleeding is not a sign of child abuse since it is seen in children who have not been abused. The doctor stated that many conditions could cause retinal bleeding, including prolonged cardiopulmonary resuscitation (CPR) and high intercranial pressure. She noted that Oliver was given CPR for 25 minutes and had high intercranial pressure.

The doctor also testified there was documentation of instances, and she was personally aware of...
cases, in which falls of four feet or less had resulted in fatal head injuries. She stated that while this was a controversial matter among physicians, biomechanists were uniform in the conclusion that it could occur and had experimental results to prove it.

The doctor explained that children who have suffered serious brain injuries can have lucid intervals in which they appear normal. Dr. Carter-Lourensz testified that different children reacted to serious brain injuries in different ways.

Dr. John Plunkett, a forensic pathologist, reviewed Oliver's medical records, including the autopsy report. The doctor concluded there was no medical evidence that Oliver was shaken violently on March 17, 1998.

The doctor stated that a subdural hematoma cannot be caused in a healthy child with no previous hematoma as the result of shaking alone. He explained in great detail that based on cadaver and live primate studies and on *383 studies attempting to model the violent shaking of babies (there have been no biomechanical studies dealing directly with the shaking of babies), the forces necessary to cause intercranial hemorrhaging cannot be produced merely by shaking a healthy child. Shaking as a cause of such injury was biomechanically impossible. The doctor stated that other persons in the medical and biomechanical community were of the same opinion. Dr. Plunkett had published an article expressing his views in the American Journal of Forensic Medicine and Pathology.

Dr. Plunkett further stated that impact injuries can cause subdural hematomas in healthy children with no history of an earlier hematoma, but there was no indication Oliver had suffered a serious impact injury. A minor impact to Oliver's head could, however, have caused a rebleed of his healing hematoma. Dr. Plunkett estimated that Oliver's earlier hematoma was two to three weeks old but could be as old as several months.

Referring to government statistics and scientific publications dealing with playground accidents, Dr. Plunkett concluded that short falls could result in serious injuries and death. The doctor also indicated that lucid intervals of hours and even days can occur in children who have suffered serious brain injuries.

Dr. Plunkett testified that Oliver's hematoma was consistent with a rebleed from his earlier hematoma. The injury to Oliver that resulted in his death was consistent with him falling to the ground. The doctor stated the respiratory arrest that resulted in Oliver's death could have been the result of a seizure caused by the earlier hematoma. A rebleed might have been caused by minor trauma. Someone picking Oliver up and shaking him might have caused that trauma.

**C. Prosecution Rebuttal**

Dr. Daniel Davis, a forensic pathologist, reviewed Oliver's medical records and concluded he died from a blunt force head injury as the result of being shaken. The doctor explained the mechanics of injuries caused to babies by being violently shaken. The doctor stated that retinal bleeding is not associated with CPR. Dr. Davis stated that the lack of injury to Oliver's neck did not contraindicate SBS since in the vast majority of cases such injuries are not seen. The doctor, citing studies, stated that Oliver's injuries were not consistent with a short fall. In the doctor's opinion the vast majority of forensic pathologists believe in the concept of SBS. *384*
Discussion

A. Exclusion of Evidence of Physical Abuse by Mother

Appellant argues the trial court erred when it excluded evidence that Oliver’s mother was prone to anger and violence and had physically abused him.

1. Background

In its written motions in limine the prosecution asked the court to admit, pursuant to Evidence Code section 1101, subdivision (b), evidence of prior acts by appellant showing that in dealing with children she was easily frustrated and prone to abusive conduct. The prosecution asked the court not to admit evidence that during a custody dispute between Oliver’s parents, the child’s father accused Oliver’s mother of being psychotic and of physically abusing the child. The prosecutor argued such evidence was not admissible to prove third party culpability.

At a pretrial hearing both issues were discussed at length. With regard to evidence of prior abuse by Oliver’s mother, the prosecution first argued that while the fact of the earlier brain injury and hematoma was relevant, and which were undoubtedly the result of abuse, the identity of the abuser was irrelevant. This was so since whether some earlier brain injury made it more likely Oliver would be injured by shaking was not a defense to the charged offense. Further, the prosecutor argued that the claim Oliver’s mother had abused him came from Oliver’s father during a contentious custody dispute. The prosecutor stated much of the father’s claim of abuse and injury to Oliver was based on alleged hearsay reports from medical personnel. Investigation of the declarants indicated the father’s claims were untrue. In any case the father later recanted the accusations.

The defense responded that Oliver’s father reported to the police and others seven months before Oliver’s death that his wife, after giving birth, was very emotional. She would become so frustrated with Oliver that she jerked and shook him. Counsel stated that Oliver’s father had not recanted his allegations but had become more vague in voicing them. Counsel noted this might be explained by the fact Oliver’s mother and father were suing appellant and seeking substantial damages.

The defense noted its theory was that Oliver died from the rebleed of an earlier hematoma, which rebleed could have been caused by minor trauma. Appellant argued that if the prosecution was allowed to present evidence of an earlier hematoma, which most likely occurred after Oliver was in appellant’s care, and if the prosecution offered evidence that Oliver had been healthy his entire life, the jury would inevitably be led to conclude it was appellant, and appellant alone, who was responsible for the earlier hematoma. The defense argued it should be allowed to show that his mother caused Oliver’s earlier brain injury. Defense counsel stated it would accept a stipulation that appellant was not responsible for the earlier hematoma.

The trial court stated it did not want to hold multiple confusing and time-consuming trials on the issue of claimed abuse by either appellant or Oliver’s mother. It refused to allow the prosecution to present evidence concerning appellant’s treatment of other children. The court also held that while the defense was entitled to show the fact of Oliver’s earlier brain injury, it could not present evidence that the child’s mother might have caused that injury. The court stated it was prepared to revisit the issue during trial.

At the time Oliver’s mother testified, the defense filed memoranda, arguing it should be allowed to cross-examine her concerning the evidence of earlier injuries and the allegation that she had jerked or shaken Oliver. Appended to the memoranda were exhibits indicating the father’s concern for Oliver’s
safety in light of the mother's emotional state, the general history of her violent actions and of her jerking or shaking the child. Other exhibits quoted the father concerning hearsay statements made to him about injuries to Oliver.

The defense argued that as the prosecution case was developing, it believed the People would argue or at least the jury would conclude that it was appellant who caused Oliver's earlier hematoma. The pattern of reasoning would be that if Carrillo stated appellant shook Oliver on March 17, it was reasonable to believe appellant shook the child on an earlier date causing the first hematoma. Defense counsel stated the issue was not one of third party culpability but simply whether appellant would be allowed a meaningful cross-examination of Oliver’s mother.

The trial court denied the defense request to cross-examine Oliver's mother concerning her prior conduct toward Oliver. The court reiterated that the fact of an earlier injury was relevant but who caused the injury was of questionable relevance. The court concluded the evidence was of questionable value because it came from an ex-husband during a divorce proceeding and it had since been recanted. It believed the matter was collateral, confusing and time-consuming.

During argument, the prosecutor told the jury there was no evidence that Oliver had been beaten the night before he collapsed at appellant's daycare center. The prosecutor told the jury: “A parent has an absolute duty not to hurt or injure their child. But when you go to work to maintain a living so that child can eat, then you have to ask somebody else to do it, so you have to delegate that duty.” During argument the prosecutor repeatedly referred to Oliver as a healthy and happy child who never had anything wrong with him except the usual ills of childhood. The prosecutor noted Oliver's earlier daycare workers testified the child “never had a scratch on him.” In talking about the medical concept of a lucid interval, i.e., an asymptomatic period following a brain injury, the prosecutor noted that defense counsel asked if a lucid interval could account for the lack of symptoms following an injury the night before Oliver collapsed. The prosecutor noted the defense pathologist stated it could. The prosecutor then rhetorically asked: “What happened to him the night before?”

2. Discussion

Appellant argues she was denied the right to present relevant evidence corroborative of her theory of defense when the trial court excluded, based on Evidence Code section 352, testimony that Oliver's mother had a history of abusive behavior directed at her former husband, other persons and Oliver. We agree.

a. Law

All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. (Evid. Code, § 351.) Evidence Code section 210 states that “relevant evidence” is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (People v. Scheid (1997) 16 Cal.4th 1, 13 [65 Cal.Rptr.2d 348, 939 P.2d 748].) Relevant evidence may be excluded pursuant to Evidence Code section 352 if the trial court in its discretion concludes “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (People v. Minifie (1996) 13 Cal.4th 1055, 1069-1070 [56 Cal.Rptr.2d 133, 920 P.2d 1337, 55 A.L.R.5th 835].) A trial court's decision to exclude evidence pursuant to Evidence Code section 352 will not be overturned
absent an abuse of that discretion. (Minifie, at p. 1070.)

A defendant may present evidence that another person committed the charged offense. “[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.” (People v. Bradford (1997) 15 Cal.4th 1229, 1325 [65 Cal.Rptr.2d 145, 939 P.2d 259].) The evidence must do more than merely show a motive or opportunity to commit the crime. (People v. Hall (1986) 41 Cal.3d 826, 833 [226 Cal.Rptr. 112, 718 P.2d 99].)

b. Analysis

We conclude the trial court erred in excluding evidence that Oliver’s mother, when angry or frustrated, had jerked and shaken the child.

The medical evidence in this case was conflicting and, given evidence of an earlier brain injury, allowed for multiple possible causes of Oliver’s death. Certainly the evidence allowed the jury to conclude that Oliver died as a result of violent shaking by appellant on March 17. It also allowed, however, for the possibility that the child died from a rebleed of his earlier subdural hematoma, which rebleed resulted from a minor trauma unoccasioned by a violent assault.

If the jury believed Carrillo’s account that on March 17 appellant violently shook the child and such act resulted in Oliver’s death, it could properly convict appellant of a violation of section 273ab. This is so even if Oliver’s death would not have occurred but for his earlier injury. (See People v. Wattier (1996) 51 Cal.App.4th 948, 953 [59 Cal.Rptr.2d 483]; People v. Stamp (1969) 2 Cal.App.3d 203, 211 [82 Cal.Rptr. 598].) The difficulty is that the jury had to believe Carrillo. Whatever the jury concluded about the medical evidence, if Carrillo was not believed, the prosecution had no case against appellant. The defense impeached Carrillo in a variety of ways. It noted she at first did not report a shaking, her later accounts of the incident were inconsistent and she had an interest in deflecting suspicion from herself and cooperating with the authorities.

Without the evidence that Oliver’s mother might have been the cause of the original hematoma, the jurors were left with a false impression that reasonably could have affected their evaluation of Carrillo’s credibility and ultimately their assessment of appellant’s core defense. The evidence strongly suggested that Oliver’s first injury, which prosecution evidence attributed to shaking, occurred soon after he began attending appellant’s daycare center. That conclusion was supported by medical testimony concerning the age of the original hematoma and the timing of Oliver's dizziness and seizure. The evidence at trial and the prosecution's argument suggested Oliver's home life was happy, safe and unremarkable. If Oliver's first injury did not occur at home, then it most likely occurred at daycare, a conclusion supported by the fact that appellant's home life was, as portrayed by the prosecution, safe, happy and nonthreatening.

The fact that Oliver’s earlier shake-induced injury likely occurred while he was in appellant’s care tended to corroborate Carrillo’s testimony that appellant violently shook him on March 17. That testimony reciprocally tended to support the conclusion that it was appellant who caused Oliver’s first injury.
Appellant was allowed to present her case that Oliver died from a rebleed from his earlier hematoma. In light of the evidence presented, she should also have been allowed to present evidence that it was Oliver's mother, and not her, who was the cause of that first injury. While the trial court was not required to allow the defense to present every piece of evidence suggesting that Oliver's mother was emotional or angered easily, it was an abuse of discretion to exclude evidence that she had physically abused Oliver. Such evidence showed more than a mere motive or opportunity. At least one defense theory was that Oliver's mother injured him, causing a subdural hematoma, and that the child died when the hematoma rebled as the result of minor trauma on March 17. Appellant should have been able to present evidence about and argue that Oliver's mother had abused him.

Since we find additional error, we reserve discussion of prejudice.

B. Mention of Polygraph Examination

Appellant argues her conviction should be reversed because a police officer revealed to the jury that Carrillo had taken a polygraph test. Appellant further asserts the trial court erred in refusing to allow testimony that Carrillo failed the test.

1. Background

The prosecution in its trial brief noted Carrillo took and passed a lie detector test. During the hearing on in limine motions, the trial court expressed concern that the prosecution might directly or indirectly reveal that fact. The prosecutor stated he did not intend to do so. He stated there would be evidence of an incident involving Carrillo and Detective McDonald in which the possibility that Carrillo would take a polygraph test was discussed. The prosecutor asked the trial court to order that he tell Carrillo and McDonald not to mention the word polygraph.

Defense counsel noted that, contrary to the prosecutor's representation, the polygraph test was inconclusive and tended to show falsity. Counsel noted that Evidence Code section 351.1 not only excludes evidence of polygraph results but any reference to polygraph examinations. The court ordered the prosecutor to ensure there be no mention of the examination by his witnesses.

The last witness in the prosecution's case was Police Detective Maria Rivera. Rivera participated in an interview at the police station in which Carrillo accused appellant of shaking Oliver. The detective authenticated a videotape of that interview. After the tape was played for the jury, the detective testified about how the interview was conducted. The prosecutor then asked: “After Christina Carrillo finished the interview, what happened?” The detective responded: “She agreed to take a polygraph.”

Defense counsel objected. At the close of the witness's testimony, counsel asked for a mistrial, noting the court's order that no mention be made of the polygraph examination and the violation of that order during the detective's testimony. The prosecutor stated he was shocked by the answer to his question. He stated he did not warn Rivera about avoiding mention of the polygraph examination believing a police detective would know not to do so. The prosecutor argued the reference to the examination was brief, did not reveal the result and did not require the court grant a mistrial.

The trial court noted the law considers polygraph examinations unreliable and, absent a stipulation, excludes any reference to them. The court concluded, however, that since no mention of the results, which were in dispute, was made, the reference to the examination was meaningless and
nonprejudicial. The court denied the motion for mistrial and concluded it best not to give a curative admonition at that time.

The defense requested, in light of the mention of the polygraph examination, that its own polygraph expert be allowed to testify that Carrillo’s test was inconclusive but tended to indicate falsity. Counsel noted the jury now knew Carrillo was given a polygraph examination by the police and could only conclude she passed it. The court noted the prosecution expert had a different opinion concerning the results of the test and would not allow testimony on the matter.

During the instruction conference, defense counsel renewed the motion for mistrial. In the alternative, counsel asked to present evidence concerning Carrillo’s examination results. The trial court denied the motion for mistrial and stated it would not permit evidence concerning Carrillo’s performance on the polygraph examination. The prosecutor stated that if the defense insisted on it, he had no objection to a curative admonition. The court considered the matter and decided not to resurrect the issue by telling the jury to disregard the mention of Carrillo’s polygraph examination.

2. Discussion

There is no dispute that inadmissible evidence was presented to the jury. Evidence Code section 351.1, subdivision (a), states in part, “the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding.” (People v. Kegler (1987) 197 Cal.App.3d 72, 86-89 [242 Cal.Rptr. 897].) Since the error is conceded, the issue is its significance. We conclude the error was serious. Carrillo’s credibility was crucial to the prosecution’s case. While it was possible for the prosecution to have partially lost the battle of experts and still convict appellant of a violation of section 273ab, the prosecution’s case could not tolerate a loss of the conflict over Carrillo’s credibility. Rivera’s comment had a high potential to affect the jury’s resolution of that issue.

The People argue, as the trial court concluded, that Detective Rivera’s mention of Carrillo taking a polygraph examination was essentially a technical error since no statement was made about its result. We disagree. The mention of Carrillo taking a polygraph test came at the worst possible time. The prosecution’s case had reached a crescendo when Rivera introduced the videotaped recording of Carrillo’s vivid statement to the police. Asked what happened after the statement, Rivera replied Carrillo agreed to take a polygraph examination. First, a juror might conclude that Carrillo’s apparent readiness to take a polygraph examination reflected her confidence in its result. A juror could also reasonably conclude the state would not base a serious prosecution on the testimony of a lone witness whose credibility it had cause to doubt. A serious danger exists that one or more jurors concluded that Carrillo passed the polygraph examination and that she was, therefore, worthy of belief.

So finding, we conclude nonetheless that the trial court acted properly in refusing the defense request to admit evidence that Carrillo’s test results were at best inconclusive. Such admission would violate Evidence Code section 351.1. More importantly, while admitting such evidence might have improved the defense’s tactical position, it would have merely further and improperly confused the issue
We conclude the improper mention of the polygraph test, in combination with the error in excluding evidence that Oliver’s mother had jerked or shaken the child, was prejudicial. Both errors substantially affected the crucial issue in the case-Carrillo’s credibility. We conclude it is reasonably probable that but for these errors a result more favorable to the defendant would have been reached and we reverse the judgment. (See People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

We address additional issues relevant to a retrial of this matter.

C. Scientific Evidence, Expert Opinion and Experiments *

D. Instruction on Lesser Included Offense

Appellant was charged with a violation of section 273ab, assault on a child with force likely to produce great bodily injury resulting in death. She contends that assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) is a lesser included offense of the charged crime and the trial court erred in denying her request to so instruct the jury.

1. Background

Appellant requested the trial court to instruct concerning what she argued were the lesser included offenses of simple assault and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). As to the section 245, subdivision (a)(1), lesser included offense, appellant argued that both sections 273ab and 245, subdivision (a)(1), require an assault by means of force likely to cause great bodily injury. Section 273ab, however, has the additional element that the assault result in death. Appellant argued that given the medical evidence, the jury could conclude that while she assaulted Oliver with the required force, the assault did not cause the child’s death. If the jury so found, they could find appellant guilty of section 245, subdivision (a)(1). The trial court concluded the elements of sections 273ab and 245, subdivision (a)(1), were different and appellant, while entitled to an instruction on simple assault, was not entitled to a lesser included offense instruction on section 245, subdivision (a)(1). *392

2. Discussion

A trial court must instruct concerning all lesser included offenses which find substantial support in the evidence. (People v. Barton (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531].) An offense is necessarily included in a greater offense when, for present purposes, under the statutory definition of the offenses the greater offense cannot be committed without necessarily committing the lesser. (People v. Hagen (1998) 19 Cal.4th 652, 667 [80 Cal.Rptr.2d 24, 967 P.2d 563]; People v. Joiner (2000) 84 Cal.App.4th 946, 971-972 [101 Cal.Rptr.2d 270].) To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, “evidence from which a rational trier of fact could find beyond a reasonable doubt” that the defendant committed the lesser offense. (People v. Berryman (1993) 6 Cal.4th 1048, 1081 [25 Cal.Rptr.2d 867, 864 P.2d 40].) Speculation is insufficient to require the giving of an instruction on a lesser included offense and a
lesser included instruction need not be given when there is no evidence that the offense is less than that charged. (People v. Mendoza (2000) 24 Cal.4th 130, 174 [99 Cal.Rptr.2d 485, 6 P.3d 150].)

(6b) The CJER handbook of mandatory criminal jury instructions states, without analysis, that section 245 is a lesser included offense of section 273ab. (CJER Mandatory Criminal Jury Instructions Handbook (CJER 2000) § 2.16, p. 25.) Respondent does not argue to the contrary.

Section 273ab requires the assault on the child be “by means of force that to a reasonable person would be likely to produce great bodily injury.” Section 245, subdivision (a)(1), requires the assault be “by any means of force likely to produce great bodily injury.” If the two elements are different, and we do not hold that they are, then it could only be because the force requirement in section 273ab is more restrictive than the force requirement in section 245, subdivision (a)(1). That is so since at least nominally the sections differ in that section 273ab includes a reasonable person qualification while section 245, subdivision (a)(1), does not.

Since under this reasoning the force requirement of the greater offense is more restrictive than the force requirement of the lesser offense, it is impossible to commit the greater without necessarily committing the lesser. Thus, even if there is a difference in the force requirement of the two assault statutes, it does not affect the determination of whether one is a necessarily lesser included offense of the other.

If on retrial the court finds substantial evidence of the lesser included offense, it should instruct on that crime. *393

E.-G.*

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H. Hardship Screening

(8) Appellant argues the trial court erred when over objection it allowed the jury commissioner to conduct the hardship screening of prospective jurors. She contends such procedure was unconstitutional since the process was not conducted in public, defendant and counsel were not present, had no opportunity to be heard or object and because no record was kept for review.7

1. Background

Before the start of voir dire the trial court indicated there would be 100 prospective jurors available for questioning who had been “preprocessed” by the jury commissioner, i.e., jurors who would be able to serve the three to four weeks the trial was expected to take. The defense objected to the procedure, arguing such screening was a part of the jury selection process and should be conducted by the court in the defendant’s presence. The defense’s concern was that given the nature of the charge, some prospective jurors would claim a hardship merely to avoid serving on the case.

The court replied that many employers would only pay the salary of jurors for five days of service. The court stated that in its experience, in trials lasting longer than five days many prospective jurors claimed service would be a financial hardship. The court stated it only intended the jury commissioner to

address claims of economic hardship and overruled the defense objection.

The defense requested that the court have the jury commissioner maintain a record of the number of jurors in the pool, the number excused and the *394 reason a prospective juror was excused. Counsel argued such records would be helpful in determining if the process resulted in a jury panel that did not reflect a cross-section of the community. The court stated it would ask if such records, including the gender and race of the prospective jurors excused, could be kept.

After the start of voir dire, the defense moved to strike the panel based on its claim that screening by the jury commissioner was improper. Counsel argued it was possible the process had skewed the makeup of the panel. Prior to the jury being sworn, the court heard the motion. The defense asked for the data concerning the prospective jurors excused. The court stated the jury commissioner told it that such information was not available.

Appellant argued she had the right to be present at all critical stages of the process. Jury selection was such a stage. She argued that excusing a prospective juror was not a mere administrative task but required judicial discretion. Appellant also argued the process denied her a jury drawn from a fair cross-section of the community.

The prosecutor noted that from the answers of the prospective jurors during voir dire the jury commissioner merely asked if serving would cause economic hardship or if a prospective juror had a planned vacation. He argued such inquiries were race and gender neutral and granting excuses based on such considerations would not skew the makeup of the panel.

Defense counsel argued that it did not appear that the panel represented a cross-section of the community. Counsel asserted that San Diego County is 24 or 25 percent Hispanic. Based on counsel's review of the surnames on the panel, he concluded 15 percent of the panel was Hispanic. Counsel also stated his belief that the panel had a higher percentage of older persons than was true of the community as a whole. Defense counsel argued that even if the selection process was race and gender neutral, allowing economic hardship excuses would result in fewer low-income or younger persons being on the panel.

The court denied the motion.

2. Relevant Statutes and Rules
Several Code of Civil Procedure sections and California Rules of Court rules apply to the excusal of jurors based on economic hardship. Code of Civil Procedure section 204, subdivision (b), states that an eligible person may be excused from jury service only for undue hardship upon himself or her or upon the public as defined by the Judicial Council. Section 218 of the Code of Civil Procedure requires all excuses be in writing and signed by the prospective juror. The section requires the jury commissioner to hear excuses in accordance with standards prescribed by the Judicial Council. It is within the discretion of the commissioner to accept a hardship excuse without a prospective juror appearing before him or her. Code of Civil Procedure section 194, subdivision (d), defines an “excused juror” as one “excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and polices.”

California Rules of Court, rule 860(b), defines general principles governing the granting of excuses. Subdivision (c) of rule 860 requires the juror seeking to be excused to state facts specifying the
hardship and why the hardship cannot be avoided by a deferral of service. Subdivision (d) of rule 860 provides in detail the bases on which a hardship excuse may be granted. Such excuses may be granted if the prospective juror has no reasonably available means of transportation, service would require excessive travel, the prospective juror has impairments that would make service potentially harmful, the juror is immediately needed for the protection of public health and safety or must care for a person who requires the juror's personal attention. The subdivision also states that an extreme financial burden is a basis to be excused and gives four factors, including the expected length of service, for determining whether the claimed hardship is sufficient.

3. Discussion

The issue is whether the screening procedure used here, carried out over appellant's objection, prejudiced any of her rights.

We find no merit in appellant's argument that allowing the jury commissioner to conduct hardship screening of the jury pool for this case denied her the right to be present at a crucial stage of the proceeding or to counsel. First, hardship screening of the jury pool, even when conducted by the trial judge, is not a crucial stage and appellant had no absolute right to be present. (People v. Ervin (2000) 22 Cal.4th 48, 72, 74 [91 Cal.Rptr.2d 623, 990 P.2d 506].) Neither do we think it is constitutionally significant that counsel was absent when the commissioner screened the pool to determine which prospective jurors would be financially unable to serve on this case. Appellant makes no complaint, and we find no case in which such a complaint was made, that it is constitutionally repugnant for the commissioner to conduct, in the absence of counsel or the defendant, the initial hardship screening utilized in excusing potential jurors from service. If that process is unobjectionable, then it is difficult to understand why allowing the jury commissioner to conduct, in the absence of counsel or the defendant, a financial hardship screening of the jury pool for the purposes of a particular case is improper.

We are more concerned with the failure of the trial court to require that records be kept concerning, for example, the number of jurors screened, the number excused from service and the reasons given by the excused prospective jurors in claiming financial hardship. In People v. Wheeler (1978) 22 Cal.3d 258, 273 [148 Cal.Rptr. 890, 583 P.2d 748], the court noted that excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community.

When prospective jurors are excused by the trial judge in open court, a record exists of the numbers excused and the reasons given. As we read Code of Civil Procedure section 218 and California Rules of Court, rule 860 (c), requests to be excused from jury service must be in writing, signed by the potential juror and placed on the court's record. The obvious purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool. No such record exists in this case.

As noted, the keeping of such a record is not for historical purposes. It is kept because it along with other evidence may be useful in demonstrating that the manner in which potential jurors are excused for hardship, either by the jury commissioner or trial court, improperly results in panels not representative of the community.

We conclude where there is a request, the trial court must require the jury commissioner to maintain a record of the hardship screening procedure.
I. Constitutionality of Section 273ab
Appellant argues section 273ab is void for vagueness as applied in this case and denies equal protection. Appellant argues the section is vague because it fails to give sufficient notice of the prohibited conduct. She argues the section denies equal protection since it treats a child's caregiver who simply assaults the child more harshly than a caregiver who murders the child.

1. Vagueness

Appellant argues that given the dispute among experts “whether shaking alone can cause, much less ‘likely to produce,’ great bodily injury (GBI) in a 13-month old, 30-plus pound child, and given the lack of a requirement for subjective intent to inflict GBI, [section 273ab] is void for vagueness.” Appellant argues that given the medical debate on whether shaking can cause a subdural hematoma in a 13-month-old child, “how is it that any reasonable person would believe that it is more probable than not (‘likely’) that GBI will result from brief but vigorous shaking of a [young child]?”

Statutes are presumed valid and must be upheld unless their unconstitutionality is positively and unmistakably demonstrated. With regard to vagueness, the question is whether the statute provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provides police and prosecutors with sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. (People v. Albritton (1998) 67 Cal.App.4th 647, 656-657 [79 Cal.Rptr.2d 169].)

It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect clarity in criminal statutes. Reasonable specificity exists if the statutory language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices.” (United States v. Petrillo (1947) 332 U.S. 1, 8 [67 S.Ct. 1538, 1542, 91 L.Ed. 1877]; see also People v. Deskin (1992) 10 Cal.App.4th 1397, 1400 [13 Cal.Rptr.2d 391].) Given these practical difficulties, one commentary has stated: “In practice, unconstitutional vagueness is a concept that only works on the extreme end of the vagueness continuum.... Arguments that a statute appears vague in the ordinary sense will not suffice to bring relief from the courts.” (2 Antieau & Rich, Modern Constitutional Law (2d ed. 1997) § 38.00, p. 429.)

There is nothing vague about section 273ab. In Albritton we stated “[section 273ab] gives plain notice that the proscribed act is an assault on a child under eight years of age with force that objectively is likely to produce great bodily injury.” (People v. Albritton, supra, 67 Cal.App.4th at pp. 657-658.) We noted that great bodily injury is clearly defined as “a significant or substantial physical injury.” (Id. at p. 658.) In this regard, section 273ab is analogous to the felonious assault described in section 245, subdivision (a)(1), which requires an assault “by any means of force likely to produce great bodily injury.” (People v. Albritton, supra, at p. 658.)

Contrary to the manner in which appellant casts the question, section 273ab is not an SBS offense. Appellant's observations concerning scientific disagreement about the validity of SBS are irrelevant to the issue of the requisite specificity of section 273ab. Section 273ab makes clear that it is unlawful for one with custody of a child to assault that child by “means of force that to a reasonable person would be likely to produce great bodily injury.” It is the jury's evaluation of the reasonable likelihood of some great bodily injury that is crucial, not the technical mechanism of any particular harm. While the existence or nonexistence of SBS or any other mechanism or injury might impact the issue of causation, or the sufficiency of evidence in a given case, it does not affect the basic specificity of
section 273ab.

2. Denial of Equal Protection

Appellant notes she was sentenced to prison for a term of 25 years to life-the same punishment imposed for first degree murder and longer than the sentence for second degree murder. She further notes that the intent required for a violation of section 273ab is no more than required for simple assault. She argues that to impose a term equal to that imposed for first degree murder and longer than that for second degree murder, i.e., those who intentionally kill a child, makes no sense and denies her equal protection.

a. Law

In order to establish a meritorious claim under the equal protection provisions of our state and federal Constitutions appellant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment.

The use of the term ‘similarly situated’ in this context refers only to the fact that ‘[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same’....’ There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The “similarly situated” prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.

If it is determined that the law treats similarly situated groups differently, a second level of analysis is required. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose.

Appellant was not denied equal protection since she is not similarly situated with those who murder children. A violation of section 273ab requires not only an assault on a child that results in death but also that the defendant have care or custody of the child. The element of care and custody in section 273ab creates a meaningful distinction between those committing that offense and murderers. Those who have the care and custody of children not only have a particular responsibility and occupy a
position of trust, they are also the persons most likely to kill children.

In any event we conclude that when legislation defines crimes or gradations of criminal activity, the distinction created need only satisfy the rational relationship test. (People v. Bell (1996) 45 Cal.App.4th 1030, 1046-1049 [53 Cal.Rptr.2d 156]; but see People v. Nguyen (1997) 54 Cal.App.4th 705, 717, fn. 6 [63 Cal.Rptr.2d 173].) For the reasons cited above, treating murderers and those who violate section 273ab differently bears a rational relationship to a legitimate state interest.

J. Sufficiency of Evidence

The judgment is reversed.

Kremer, P. J., and Haller, J., concurred.

A petition for a rehearing was denied January 7, 2002, and the opinion was modified to read as printed above.

Footnotes

1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Discussion parts C, E, F, G and J.

2 All further statutory references are to the Penal Code unless otherwise specified.

** See footnote 1, ante, page 370.

* See footnote 1, ante, page 370.

7 Section 194 of the Trial Jury Selection and Management Act (Code Civ. Proc., § 190 et seq.) defines various terms:

“(e) ‘Juror Pool’ means the group of prospective qualified jurors appearing for assignment to trial jury panels.

“(g) ‘Master list’ means a list of names randomly selected from the source lists.

“(h) ‘Potential juror’ means any person whose name appears on a source list.

“(i) ‘Prospective juror’ means a juror whose name appears on the master list.

“(k) ‘Qualified juror list’ means a list of qualified jurors.

“(m) ‘Source list’ means a list use as a source of potential jurors.

“(q) ‘Trial jury panel’ means a group of prospective jurors assigned to a courtroom for the purposes of voir dire.”

People v. Massie (1998) 19 Cal.4th 550 580, footnote 7 [79 Cal.Rptr.2d 816, 967 P.2d 29], defines a “venire” as “the group of prospective jurors summoned from [the jury pool] and made available, after excuses and deferrals have been granted, for assignment to a “panel.”’.”
See footnote 1, ante, page 370.
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<td>Expedited Trial Procedure</td>
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<td>Voluntary</td>
<td>Absent agreement, limited to 10 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of deposition time, per side; experts limited to one per side absent agreement or leave</td>
<td>Initial expedited trial conference within 30 days after agreement filed; pretrial motions require leave of court and may not exceed 3 pages; pretrial conference shall be held no later than 150 days after agreement approved</td>
<td>Unless otherwise ordered, trial is to be held no later than 6 months after the agreement is approved by the court</td>
<td>The judge sets limits for opening and closing with 3 hours per side for introduction of evidence</td>
<td>May be tried to a judge or a jury; the judge conducts voir dire</td>
<td>6 jurors and may proceed with 5</td>
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<td>U.S. District Court for the District of Minnesota Rules of Procedure for Expedited Trials</td>
<td>Voluntary</td>
<td>Expectation that Rule 26(a)(1) will be more vigorously followed and enforced; documents under Rule 26(a)(3) to be exchanged within 30 days of pretrial conference and all discovery within 120 days of the pretrial conference; discovery limited to 10 interrogatories, 5 requests for production, 5 requests for admission, and 2 depositions per party</td>
<td>Pretrial conference to be scheduled with magistrate within 30 days of the date the Complaint was served; pretrial order to be issued at pretrial conference</td>
<td>Trial to be held no later than 6 months after the pretrial conference; if the parties consent to trial before a magistrate judge, trial shall be held within 120 days of the date of the pretrial conference</td>
<td>8 hours per side</td>
<td>Only one expert witness may testify per party; written witness statements may be offered in lieu of direct testimony</td>
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<td>Voir Dire</td>
<td>Number of Jurors</td>
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<td>Transcript</td>
<td>High-Low Agreements Allowed</td>
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<td>D. Nev.</td>
<td>Short Trial Program</td>
<td>General Order 2013-01 and Short Trial Rules 1-26</td>
<td>Voluntary</td>
<td>Exchange initial disclosures within 7 days after Stipulation approved; parties must submit a Stipulated Scheduling Order and Discovery Plan within 30 days after appointment of judge and meet with judge to confer, exchange documents not previously produced; extent to which discovery is allowed is at discretion of judge</td>
<td>Subject to timely objections, documents admitted without necessity for authentication; joint evidentiary booklets created, to be submitted with joint pretrial memorandum</td>
<td>Joint pretrial memorandum due to judge 7 days prior before pretrial conference; pretrial conference held no later than 10 days before trial</td>
<td>Allowed up to 9 hours each to present the case unless a different time frame is stipulated to and approved, including voir dire, opening and closing</td>
<td>Trial to commence no later than 150 days from the date presiding judge is assigned</td>
<td>4, or 6 if good cause shown</td>
<td>Parties can quote directly from relevant depositions, interrogatories, requests for admissions, or any other evidence as stipulations by the parties; parties not required to present oral testimony</td>
<td>4, or 6 if good cause shown</td>
<td>Parties may agree the results are binding final and non-appealable; otherwise parties have the right to file a direct appeal</td>
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<td>W.D. Pa.</td>
<td>Pilot Program for Expedited Civil Litigation</td>
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<td>Voluntary</td>
<td>Exchange initial disclosures within 7 days after Stipulation approved if not already exchanged; Rule 26(a)(2) disclosures no later than 30 days prior to close of discovery; discovery to be completed no later than 90 days after the Expedited Trial Conference; discovery limited to 20 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of depositions, per side.</td>
<td>Documents may be admitted without authentication</td>
<td>Initial Case Management Conference serves as Expedited Trial Conference</td>
<td>Trial to be held no later than 6 months after the Expedited Trial Conference</td>
<td>Court to set time limits for voir dire, opening statements, and closing argument</td>
<td>3 hours per side, not including opening and closing</td>
<td>6 jurors, may proceed with 5</td>
<td>Testimony limited to one expert per side; parties may agree to submit expert reports in lieu of testimony</td>
<td>6 jurors, may proceed with 5</td>
<td>Binding with limited grounds for appeal</td>
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<td>Jurisdiction</td>
<td>Program Name</td>
<td>Applicable Statute/Rule</td>
<td>Voluntary or Mandatory</td>
<td>Discovery</td>
<td>Evidentiary Agreements</td>
<td>Pretrial Conference</td>
<td>Trial Date</td>
<td>Length of Trial</td>
<td>Judicial Officer</td>
<td>Voir Dire</td>
<td>Number of Jurors</td>
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<td>W.D. Wash.</td>
<td>Individualized Trial Program</td>
<td>Local Civil Rule 39.2</td>
<td>Voluntary; parties complete an “Agreement for Individualized Trial and Request for Approval”</td>
<td>Initial disclosures due in 7 days after agreement approved if not already exchanged; discovery to be completed no later than 90 days after the individualized trial conference; discovery limited to 10 interrogatories, 10 requests for production, 10 requests for admissions, and 15 deposition hours, per side</td>
<td>Individualized trial conference within 30 days of filing the agreement; joint individualized trial statement due 7 days before individualized trial conference; pretrial conference held no later than 150 days after agreement approved</td>
<td>Trial to be held no later than 6 months after the agreement is approved</td>
<td>3 hours per side, not including opening and closing</td>
<td>Includes a trial before a judge or a jury</td>
<td>7 jurors and may proceed with 6</td>
<td>Only one expert witness may testify per party</td>
<td>Binding with limited grounds for appeal</td>
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<td>Arizona, Maricopa County Superior Court</td>
<td>Short Trial Program</td>
<td>Affiliated with ADR program</td>
<td>Alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision; also used voluntarily</td>
<td>Uses abbreviated discovery process</td>
<td>Stipulations to documentary evidence and pretrial motions strongly encouraged; evidentiary notebooks</td>
<td>Telephonic conference to be held at least three days prior to short trial; 7 days prior to trial, a Joint Pre-Trial Memorandum should be sent to JPT</td>
<td>Short Trials generally scheduled within 90 days of referral</td>
<td>1 day jury trial; 2 hours per side with 10 minutes for opening and closing statements</td>
<td>Judge pro tempore oversees the trial only</td>
<td>Parties allocated 3 peremptory challenges</td>
<td>4 jurors</td>
<td>Limited to one live witness; parties may submit testimony by deposition transcripts or written affidavits</td>
<td>Binding with limited grounds for appeal</td>
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<td>California</td>
<td>Expedited Jury Trial</td>
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<td>Simplified Procedure for</td>
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### California Expedited Jury Trial Program

- **Jurisdiction:** California
- **Program Name:** Expedited Jury Trial Program
- **Applicable Statute/Rule:** Expedited Jury Trials Act (A.B. 2284 [Evans]; Stats 2010 ch. 674, eff. Jan. 2, 2010); Cal. Rules of Court 3.1545-3.1552
- **Voluntary or Mandatory:** Voluntary
- **Discovery:** The parties may follow existing rules and procedures or may modify the rules by joint stipulation; pretrial exchange between parties no later than 25 days prior to trial; supplemental exchange of evidence no later than 20 days before trial
- **Evidentiary Agreements:** Rules of evidence apply unless agreed to otherwise; parties allowed to enter into agreements governing the rules of procedure, including manner and method of presenting evidence; evidentiary notebooks encouraged
- **Pretrial Conference:** Pretrial conference to be held no later than 15 days prior to trial
- **Trial Date:** 3 hours per side
- **Length of Trial:** 3 hours per side
- **Judicial Officer:** Presiding judge is responsible for assignment; may assign civil court judge or a temporary judge to conduct expedited trial
- **Voir Dire:** One hour for voir dire, with 15 minutes for the judicial officer and 15 minutes per side; three peremptory challenges per party; joint form questionnaire encouraged
- **Number of Jurors:** 8 jurors, or fewer by stipulation
- **Witnesses:** Parties are encouraged to limit the number of live witnesses
- **Transcript:** Yes
- **High-Low Agreements Allowed:** Binding with limited grounds for appeal
- **Binding or Appealable:** Binding with limited grounds for appeal

### Colorado Simplified Procedure for Civil Actions

- **Jurisdiction:** Colorado
- **Program Name:** Simplified Procedure for Civil Actions
- **Applicable Statute/Rule:** Colorado Rule of Civil Procedure 16.1
- **Voluntary or Mandatory:** The Rule applies to all proceedings where a party claims $100,000 or less, although parties may elect to be excluded from the rule (no cause required); various case types are automatically excluded (e.g. domestic relations, class actions); recovery limited to $100,000
- **Discovery:** Automatic disclosures due 35 days after the case is at issue; depositions available only in lieu of trial testimony or to obtain and authenticate documents; no additional discovery unless as agreed to by parties
- **Evidentiary Agreements:** Juror notebooks
- **Pretrial Conference:** Trial settings, motions and trials given early trial settings
- **Trial Date:** No time limits
- **Length of Trial:** No time limits
- **Judicial Officer:** No time limits
- **Voir Dire:** No time limits
- **Number of Jurors:** No time limits
- **Witnesses:** No time limits
- **Transcript:** No time limits
- **High-Low Agreements Allowed:** No time limits
- **Binding or Appealable:** No time limits

Updated 9/26/13
## Short, Summary, and Expedited Civil Action Programs Around the Country

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Program Name</th>
<th>Applicable Statute/Rule</th>
<th>Voluntary or Mandatory</th>
<th>Discovery</th>
<th>Evidentiary Agreements</th>
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<th>Length of Trial</th>
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<tbody>
<tr>
<td>Florida</td>
<td>Expedited Trials</td>
<td>Florida Stat. § 45.075</td>
<td>Voluntary</td>
<td>Discovery</td>
<td>Rules of evidence apply unless agreed to otherwise</td>
<td>Case may be tried within 30 days of the 60 day discovery cut-off, if such schedule does not impose undue burden on the court calendar</td>
<td>Case may be tried within 30 days after the 60 day discovery cutoff if such schedule does not impose undue burden on the court calendar</td>
<td>1 hour jury selection</td>
<td>1 day jury trial; 3 hours per side inclusive of opening and closing statements</td>
<td>1 hour jury selection</td>
<td>1 day jury trial; 3 hours per side inclusive of opening and closing statements</td>
<td>1 hour jury selection</td>
<td>1 day jury trial; 3 hours per side inclusive of opening and closing statements</td>
<td>Parties are permitted to introduce written reports by experts instead of testimony; depositions excerpts and video permissible</td>
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<td>Nevada</td>
<td>Short Trial Program</td>
<td>Nev. Rev. Stat. Ann. § 38.250; Nev. Rev. Stat. Ann. § 67.060</td>
<td>Mandatory component of the ADR program in Clark and Washoe Counties; also used voluntarily in 2 other counties</td>
<td>Parties required to meet with judge for a mandatory discovery conference to exchange documents, identify witnesses, formulate discovery plan</td>
<td>Evidentiary objections to be submitted at time of pretrial memorandum; subject to timely objection, documentary evidence may be admitted without necessity of authentication or foundation of a live witness; joint evidentiary notebooks</td>
<td>Joint pretrial memorandum due to judge 7 days prior to pretrial conference; pretrial conference held no later than 10 days before trial</td>
<td>Trial to commence within 240 days of the stipulation into the program</td>
<td>Typically one day, with 3 hours per side</td>
<td>Judge pro tempore assigned by ADR Commissioner</td>
<td>Each side given 15 minutes voir dire</td>
<td>4 or 6 members (up to 8 if good cause)</td>
<td>Parties encouraged to use written reports in lieu of oral testimony in court; written reports by experts encouraged in lieu of live testimony</td>
<td>Parties may set high/low $3,000 cap on attorneys' fees and $500 cap on expert witness fees that can be recovered by a party</td>
<td>Parties may agree the results are binding; otherwise parties have the right to file a direct appeal</td>
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<td>New Hampshire</td>
<td>Summary Jury Trial</td>
<td>Rule 171 of the Superior Court of the State of New Hampshire</td>
<td>Voluntary</td>
<td>All evidence presented through the attorneys for the parties; exhibits must be marked and exchanged prior to trial and objections raised</td>
<td>Each side has 1 hour to present their case</td>
<td>6 jurors or fewer if stipulated</td>
<td>No record of proceeding</td>
<td>Counsel may stipulate that a consensus verdict will be deemed a final determination of the merits and that judgment will be entered; may also stipulation to any other use of the verdict that will aid in resolution of the case</td>
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<td>New Jersey</td>
<td>Expedited Jury Trial Program</td>
<td>Available through Civil Complementary Dispute Resolution Program</td>
<td>Voluntary</td>
<td>The parties meet prior to trial for a preliminary hearing at which time exhibits are entered into evidence and all objections heard and ruled on</td>
<td>Typically one to two days; time limits only on opening statements (15 minutes) and summations (30 minutes)</td>
<td>Six jurors, may proceed with 5</td>
<td>No limits on damages and final judgments appealable</td>
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<td>New York</td>
<td>Summary Jury Trial Program</td>
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<td>Voluntary</td>
<td>Generally relaxed rules of evidence, subject to determinations at evidentiary hearing</td>
<td>All documentary evidence exchanged prior to trial; evidentiary hearing prior to trial</td>
<td>Generally a one-day jury trial; 10 minute opening and closing and one hour presentation of case</td>
<td>No less than 6 jurors and one alternate unless stipulated otherwise</td>
<td>Live witnesses limited to two; portions of video may be played in lieu of actual appearances</td>
<td>Yes—recited in stipulation signed by attorneys</td>
<td>Right to appeal can be limited or waived; nonbinding SJTs used to inform settlement</td>
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<td>Oregon</td>
<td>Expedited Civil Jury Trial Program</td>
<td>Voluntary, the decision to accept or reject a case for designation is within the sole discretion of the presiding judge; if accepted, the case is removed from mandatory arbitration and all forms of required ADR</td>
<td>Discovery must be complete no later than 21 days prior to trial; discovery may proceed by stipulation (if not, 2 depositions, 1 set of requests for production; 1 set of requests for admission; all discovery requests served no later than 60 days before trial)</td>
<td>Encouraged to expedite trial</td>
<td>Initial case conference within 10 days of the expedited case designation with all trial counsel and self-represented parties required to appear; pretrial conference no later than 14 days before trial; pretrial motions not allowed without prior leave of court</td>
<td>Trial date set no later than 4 months from the date of the order</td>
<td>No time limits</td>
<td>Short voir dire</td>
<td>6 jurors, plus alternate(s), if any</td>
<td>Parties encouraged to limit live witness testimony</td>
<td>No limits on appeals</td>
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<td>South Carolina</td>
<td>Fast Track Jury Trial Process</td>
<td>Voluntary</td>
<td>The parties may agree to use streamlined rules of evidence</td>
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<td>A pretrial conference is typically held 10 days prior to trial during which the Special Hearing Officer rules on objections to documentary evidence previously exchanged and witness lists are exchanged</td>
<td>Trial set for a mutually convenient date</td>
<td>Generally a one-day jury trial</td>
<td>Special Hearing Officer chosen and compensated by the parties</td>
<td>6 member jury</td>
<td>Parties encouraged to limit live witness testimony</td>
<td>No record of proceeding unless either party elects to have a transcript of the proceeding, which shall be at that party's expense</td>
<td>Yes</td>
<td>Binding</td>
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<td>Texas</td>
<td>Expedited Actions</td>
<td>Texas Rule of Civil Procedure 169</td>
<td>Mandatory in all cases where all claimants affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages, penalties, costs, expenses, pre-judgment interest, and attorneys fees; Parties may not recover a judgment in excess of $100,000, excluding post-judgment interest</td>
<td>Discovery ends 180 days after the first request for discovery is served; discovery is limited to 6 hours of depositions/15 written interrogatories, requests for production, and admissions.</td>
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<td>Expedited Jury Trial</td>
<td>Rule 4-501</td>
<td>Rules of evidence apply unless the parties stipulate otherwise</td>
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<td>3 hours per side</td>
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The Implications of Implicit Associations for Achieving an Impartial Jury

Background materials for the ABA Jury Symposium October 2014

© Professor Sarah E. Redfield, UNH

CONCEPTUAL OUTLINE

Author’s note: The following outline and bibliography offer a general overview for participants’ future reference; within this context, the symposium presentation will focus with more particularity on the ABA Achieving an Impartial Jury Project and Toolbox.

Overarching Context

Bias is a value-laden word. Our legal system embraces antidiscrimination laws and rules of ethics that address demonstrated bias. We are loathe to think that we or our institutions, least of all our courts, are biased; and we are well-aware of the risks of speaking or acting in a biased way. When asked about our biases, we likely self-report that we are not biased and are not making biased decisions; and we honestly believe this to be the case. To do otherwise would be inconsistent with our sincerely held views.

Still, the long-recognized differences in treatment of certain groups and disproportionate representation of these groups in certain negative arenas ranging from school discipline to prison\(^1\) call into question these beliefs. We must ask how it is that the data shows such disproportionality if decisions along the way are made in good faith and without bias.

By defining and measuring the difference between our explicit self-reported bias and our unconscious implicit bias, emerging social and neuroscience offer a new approach to understanding the dissonance between such good-faith decisions and the data. This research suggests that while decisions are being made by people acting in good faith, they are often with bias—\textit{implicit} bias based in \textit{unconscious} associations. Research shows this to be the case even among judges.\(^2\)

\(^1\) For just one example, 36.5\% of those in state and federal prisons in 2012 were African Americans The Sentencing Project, Fact Sheet: Trends in U.S. Corrections, http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

Emerging research also suggests that debiasing is possible, and the first steps for debiasing are becoming aware of our unconscious response and becoming more mindful.

I. Implicit Bias contributes to well-documented different treatment and disproportionality in the legal system and other societal institutions.

A. Explicit attitudes and biases are those evaluations that are deliberately generated and consciously experienced as one’s own. Implicit attitudes reflect learned associations that can exist outside of conscious awareness or control (Redfield 2014).

B. Implicit bias is typically defined as an unconscious preference based in stereotypes or attitudes that operate outside of our conscious awareness (Kang Primer).

C. Part of all human behavior, implicit bias is a “lens through which a person views the world, a lens which automatically filters how a person takes in and acts in regard to information” (Marsh).

D. We are unlikely to recognize or self-report implicit biases, and even less likely to self-report where we are anxious or where issues are socially loaded such as sexual orientation or race (Pearson, Graham, Amodio 2003).

E. New research methods, which don’t rely on self-reporting, have inspired an explosion of research on implicit bias. The leading measure is the Implicit Association Test (IAT), Project Implicit available at https://implicit.harvard.edu/implicit/.

F. Under tight time parameters, the IAT measures associative knowledge, that is, those associations and links that cause one concept to be connected or activated by another. These are automatic associations, and they exist in many domains, e.g., a preferred association of women with families and men with careers, a preferred association with a particular racial or ethnic group (IAT, Greenwald 1998).

G. The underlying theory in this new research is that we will respond more accurately and quickly to associations that fit with our pre-formed mental templates or schemas, that is, we respond more quickly to acquired associations that are largely involuntary (Greenwald & Krieger, Nosek).

H. Implicit biases draw on the brain’s schema (Greenwald), some of which are helpful—tying our shoes for example, others not—race-biased police shooting for example (Redfield 2013, NAACP, Sen).

I. Implicit biases influence our decisions and actions (Banaji & Greenwald, Greenwald & Poehlman).

J. How smart or sophisticated you are doesn’t matter in terms of the operation of such biases, including decision-making heuristics (West).

K. Cumulated research on the IAT shows that most Americans respond more quickly to—are implicitly biased toward—European American as compared to African American, toward the abled as compared to the disabled (IAT, Nosek).

L. Research from physical science supports the social science and recognizes implicit bias and this dissociation between what we say and what we unconsciously reveal (Phelps 2000, Kubota, Amodio 2003).

M. There is a wealth of literature, including meta-analyses, on the IAT generally and on its relationship to explicit bias and its value as a predictor of same (Banaji & Greenwald, Greenwald & Poehlman, Pettigrew, Amodio).

N. “People may possess associations with which they actively and honestly disagree” (Nosek & Riskind).

O. While there is no blame in the quick, shortcut working of our brains, also not an excuse.

P. Motivation to be fair can make a difference (Kang, Dasgupta).

Q. Debiasing at critical decision points can contribute to a more fair result and can be achieved by becoming more mindful of when and how to activate more reasoned, less intuitive response (Redfield 2013).

II. Group dynamics are also critical to understanding implicitly biased responses.

A. “Social cognition research indicates that categorization of and preference for people based on group identity is a normal, fundamental process of the human brain. Our ability to categorize our experience, in fact, is an ‘indispensable cognitive device for understanding, negotiating, & constructing our social world’” (NJC). Processing of group identify information begins as early as three months (Kelly).

B. Psychology researchers link culture and decision making: “Decision making is a very private thing, individualized and personal. Yet it has a cultural dimension. The human brain does not acquire language, symbolic skills, or any form of symbolic cognition without the pedagogical guidance of culture and, as a result, most decisions made in modern society engage learned algorithms of thought that are imported from culture” (Donald).

C. We all are part of cultural groups, and cultural groups are one of the major categorization mechanisms that all humans use. Examples of traits that define cultural groups include race, ethnicity, religion, gender, sexual orientation, national origin, family or professional status, etc. Culture is also described as shared meanings and shared language or representational communications (ABA CJS).

D. We prefer our own, no matter how we define our own. For example, in a
now classic experiment, researchers showed that this group loyalty occurs even if factors that put you in a group are random and arbitrary, that is, the very act of categorization may be enough to create an in-group preference (Tajfel).

E. Preferential processing for ingroups is well documented (Ratner).

F. We more readily correctly recognize emotions of our ingroup (Elfenbein), including showing more empathetic response to ingroup members’ pain (Sirigu).

G. We view those in our group as better and more admirable. We view individuals’ skills favorably; we consider group members to be more competent, cooperative, confident, independent, intelligent, warmer, more affirming, tolerant, good-natured, sincere, and more concerned with group goals. Those in our ingroup will be more favorably remembered (Perdue, Pettigrew, Levinson, Osborne).

H. We tend to exaggerate differences between groups and view those in the outgroup as worse. We view outside individuals as not competent, not warm, and threatening; we may view them with contempt or pity (Fiske & Mccrae).

I. Our automatic group identification is significant; it is easy to see how it can impact a wide range of our behaviors and decisions; think about evaluation, admissions, class participation, engagement, hiring, retention, and promotion, as well as more general decision making. As described previously, we make connections when someone is labeled a certain way—American for example (Atwater, Redfield 2013).

J. So, too, group response and stereotype influence perceptions of events. Early research showed difference in perception of the same behavior (shove); when the “shover” was black, the behavior was perceived as more violent and was attributed to more dispositional, rather than situational, factors (Duncan). These differences in perception as early as middle school (Sagar).

K. Similarly, the attitudes of one’s group influence an individual group member’s attitudes. When we become aware that our attitudes differ from our groups’ attitudes, our attitudes tend to shift toward the norm of our peer group; this includes influence on our biases (Dasgupta, Bargh).

L. Interestingly, these dynamics come into play once we make a choice. When we have to choose between two alternatives that are initially equally attractive, after making a decision, we will tend to “evaluate the chosen alternative substantially more positively than the rejected alternative” (Gawronski). This seems to be true expressly and implicitly.

M. Implicit cognition and group identification give advantages and disadvantages, which are cumulative (Valian).
III. **Micromessaging is another aspect of implicitly biased responses.**

A. Micromessages, spoken and unspoken, are small, often unknown, often unintended (Rowe).

B. Micromessages can be affirmative or negative, but whether they are intended or not they have impact on the recipient and others (Rowe).

C. Like group preference, micromessages are cumulative, that is, there is an accumulation of advantage or disadvantage, the so-called Matthew-effect: “For whomsoever hath, to him shall be given, and he shall have more abundance; but whomsoever hath not, from him shall be taken away even that he hath.”

IV. **Debiasing is possible and necessary.**

A. Over two decades of persuasive research (e.g., Greenwald, Banaji & Greenwald, Kahneman, Vendantam, Casey NCSC) from both neuropsychology and neuroimaging (Lieberman) offer a view that departs dramatically from classic regulatory interventions and from the usual enforcement analysis of disparate impact or intent. The research supports instead initiatives that train us to engage in more intentional and mindful reflection to avoid implicit biases at critical decision points.

B. Research continues to mount as to effective approaches to interrupt and suppress reflexive responses in appropriate situations—debiasing (Devine, Dasgupta 2013, Dasgupta & Asgari).

C. Implicit biases are malleable, and it is this malleability that offers dramatic opportunities for addressing disproportionality (Dasgupta 2013).

D. Motivation to be less (implicitly) biased matters (Bartlett).

E. Becoming aware of implicit biases offers an opportunity to learn to be more reflective about our decisions and to take the intentional mindful steps necessary to debias them (Dasgupta 2013, Dasgupta & Asgari, Sen).

F. Mindfulness is key. Debiasing is possible where we make categories salient and train ourselves to be conscious of difference and individuate (NJC, Dasgupta, Redfield 2013).

V. **Summary Points**

A. While disproportionality issues have been intransigent, emerging social science and neuroscience research offers a new explanation and direction where change may now be possible.

B. Until now, people of good faith have, in all good faith, reported their commitment to nondiscrimination and decisions that are unbiased.

C. Now, social science shows us that, despite all good intention, unintended and unconscious biases and group loyalties—implicit bias—may be influencing critical in ways of which decisionmakers are often unaware, ways they would neither endorse nor express.
D. A different approach calls for replacing implicit bias with more intentional and mindful reflection.

VI. Quick Recommended Reading / Video List re: Implicit Bias

PowerPoint and training.


Books and articles


Video


- The Lunch Date, http://www.youtube.com/watch?v=epuTZigxUY8.

CITATIONS & BACKGROUND REFERENCES FOR OUTLINE


ABA Judicial Division. ABA Judicial Division, Perceptions of Justice Summit Report (March 14-15 2013).


Anwar. 2012_The Impact of Jury Race in Criminal Trials_The...ccess_Anwar.pdf.


Casey NCSC. Pamela M. Casey et al., Helping Courts Address Implicit Bias: Resources for Education (NCSC 2012).


CRDC. Department of Education, Office for Civil Rights, Civil Rights Data Collection, ocrdata.ed.gov#.


Dasgupta 2013. Nilanjana Dasgupta, Professor of Psychology University of Massachusetts, Amherst, Presentation, Debiasing Implicit Attitudes, Mind Science Conference (Chicago April 26, 2013).


http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls (Hispanic not included in this data set.)


Richeson 2013. Dr. Jennifer Richeson, Professor of Psychology, Northwestern University, Presentation, Equal Justice Society Mind Science Conference, April 25, 2013, Chicago, IL.


Implicit bias - exposing it requires proper questioning.

In civil cases, there was, starting in the 1980s, a multi-decade, multimillion dollar public relations and advertising campaign by the tobacco companies, and insurance industry, coordinated with the American Tort Reform Association and the US Chamber of Commerce.

The attack on rights of injured plaintiffs was three pronged. First, change public opinion, and that of potential jurors. Second, change the laws to restrict the rights of claimants. Third, attack judges and intimidate them from maintaining traditional tort liability, restricting the ability of claimants to get a fair jury trial, and get appeals judges to overturn adequate jury verdicts and to affirm dismissals and summary judgments which would preclude a jury trial from happening at all.

As an attorney representing injured people as well as insurance companies and insureds over the past 32 years, I have seen the effects.
Strong opinions, and implicit bias, have been created in jury venires that require extensive questioning to uncover, and to determine the extent of the bias on the ability of jurors and juries to be fair.

Jury selection was once getting to know the potential jurors, and carefully choosing language to describe your case in a favorable light. Over time, the campaign of the defense interests made it harder and harder to obtain fair juries to the injured claimants. Also, traditional preconceptions about juries from demographic factors such as race, ethnicity and gender had been used to formulate strategies for use of peremptory challenges. Case law began to disallow the use of those factors in jury selection.

**IMPROPER PEREMPTORY CHALLENGES**

In Florida, the Supreme Court started addressing this problem in 1984. State v. Neil, 457 So. 2d 481 (Fla 1984):

"In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Court held that distinctive groups cannot be systematically excluded from venires because petit juries must be selected from a representative cross-section of the community. No one is entitled to a jury of any particular composition, and it is possible that the cross-section requirement might have to give way before article I, section 16's guarantee of an impartial jury.[12] "A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased." Smith v. Balkcom, 660 F.2d 573, 583 (5th Cir.1981). It may even
be possible that, on the peculiar facts of a particular case, no member of some distinct group could be impartial. If this occurs, an attorney should be able to state with certainty that this is so and that peremptories have been exercised because of empathy or bias.[13]"

In Batson v. Kentucky, 476 US 79 Supreme Court 1986, the Court in addressing the same problem held:

“...In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E. g., Whitus v. Georgia, 385 U. S., at 549-550; Hernandez v. Texas, 347 U. S., at 482; Patton v. Mississippi, 332 U. S., at 469. [25]

It is so ordered.”

The law has continued to develop in Florida to prevent the striking of jurors for improper racial or ethnic considerations. Frazier v. State, 899 So. 2d 1169 (Fla 4th DCA 2005) looked at the applicable law:

“...Juror Gongora, a prospective juror from Colombia, South America was selected as the next juror without objection from the state. The state then attempted to use a peremptory strike against Juror Daniel, a black woman from the U.S. Virgin Islands. Again, the state based the strike on the fact that the
juror was from a country known for drug trafficking. The court, however, disallowed this strike. When jury selection ended, appellant preserved his objection to the peremptory strike of Anderson by renewing his objection before the jury was sworn. See Joiner v. State, 618 So.2d 174 (Fla.1993).

It is well-settled in Florida that peremptory challenges may not be used to exclude prospective jurors solely because of their race or ethnicity. See State v. Neil, 457 So.2d 481 (Fla.1984); State v. Alen, 616 So.2d 452 (Fla.1993). In Alen, the Florida Supreme Court extended Neil to protect cognizable ethnic groups from discriminatory use of peremptory challenges. The court held that the use of peremptory challenges against jurors based solely on their membership in an ethnic group is prohibited. After analyzing the various factors that determine whether a particular group constitutes a cognizable class entitled to Neil protection, the court recognized Hispanics as a cognizable ethnic group.

Although Neil prohibited racial discrimination in jury selection based on the defendant's right to an impartial jury under article I, section 16 of our state constitution, Alen and later Florida cases held that discriminatory peremptory challenges also violate the equal protection clauses of the state and federal constitutions. See Alen, 616 So.2d at 454 (citing Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)); see also Abshire v. State, 642 So.2d 542,
544 (Fla.1994) (holding that excluding women from jury solely because they were women violated prospective jurors' and defendant's right to equal protection).

In Hernandez, the United States Supreme Court suggested that the discriminatory use of peremptory strikes against Hispanics would violate the Equal Protection Clause. There, the Court summarized the three-step process established in Batson, 476 U.S. at 105-107, 106 S.Ct. 1712, for evaluating an objection to a peremptory strike. 500 U.S. at 352, 111 S.Ct. 1859. In the second step of the Batson process, the strike's proponent must offer a race-neutral explanation for the peremptory challenge. Id. The Supreme Court explained that "in evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." Id. at 359, 111 S.Ct. 1859 (emphasis added). Because a trial court's ruling on the race-neutrality of an attorney's explanation is a question of law, federal appellate courts review the ruling de novo. See Stubbs v. Gomez, 189 F.3d 1099, 1105 (9th Cir.1999); United States v. McCoy, 23 F.3d 216, 217 (9th Cir.1994); United States v. Uwaezhoike, 995 F.2d 388 (3rd Cir.1993); 1173*1173 United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir.1991)."

**CHALLENGES FOR CAUSE**

Florida has adopted a reasonable doubt standard to have the trial courts excuse prospective jurors for
Club West contends that the trial court should have excused Ms. Stratos for cause because of the uncertainty surrounding her impartiality. We agree. We note at the outset that the question of whether a prospective juror is competent to serve as a juror is a mixed question of law and fact and will not be disturbed on appeal unless the trial court's decision is manifestly erroneous. Singer v. State, 109 So.2d 7, 22 (Fla. 1959); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA), review denied, 407 So.2d 1106 (Fla. 1981). The court in Singer pointed out, however, that this standard is tempered by the rule that if there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

109 So.2d at 23-24; accord Hill v. State, 477 So.2d 553, 556 (Fla. 1985); Jefferson v. State, 489 So.2d 211, 212 (Fla. 3d DCA), review denied, 494 So.2d 1153 (Fla. 1986); Leon, 396 So.2d at 205; see Fla.R.Civ.P. 1.431(c)(1); cf. Sydleman v. Benson, 463 So.2d 533, 533 (Fla. 4th DCA 1985) ("Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality."). Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent
change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some scepticism. See, e.g., Johnson v. Reynolds, 97 Fla. 591, 599, 121 So. 793, 796 (1929); Singer, 109 So.2d at 24. The test to be applied by the court is whether the prospective juror is capable of removing the opinion, bias or prejudice from his or her mind and deciding the case based solely on the evidence adduced at trial. Singer, 109 So.2d at 24; State v. Williams, 465 So.2d 1229, 1231 (Fla. 1985). A juror's assurance that he or she is able to do so is not determinative. Singer, 109 So.2d at 24; Smith v. State, 463 So.2d 542, 544 (Fla. 5th DCA 1985); Leon, 396 So.2d at 205.

Based upon the rules set out above, we hold that the trial court abused its discretion in denying Club West's motion to excuse Ms. Stratos for cause. Ms. Stratos initially acknowledged that she was uncertain whether she could be impartial because of her previous favorable and profitable experiences with Raytheon. In fact, after she disclosed her feelings about the defendant, and counsel for Club West asked her whether he would "be starting with one strike against [him]," she replied: "Maybe. I have to be honest. Maybe." Although she later indicated that she could be impartial, because of her equivocal answers, serious doubt remained concerning her ability to be impartial. Consequently, the trial court should have excused her for cause and it clearly abused its discretion by refusing to do so. See Jefferson, 489 So.2d at 211 (conviction reversed where juror gave equivocal answers regarding her ability to be impartial because of her husband's career in law enforcement);
Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986) (conviction reversed where jurors in a sexual battery case had answered on voir dire that they were unsure of their ability to be impartial because of their prior experiences), review denied, 506 So.2d 1043 (Fla. 1987); Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118 (Fla. 1st DCA) (trial court abused its discretion by refusing to excuse juror where juror was ambivalent as to whether she could be impartial when the defendant's attorney was her son's "best friend."), review denied, 497 So.2d 1218 (Fla. 1986); Highlands Ins. Co. v. Lucci, 423 So.2d 947 (Fla. 3d DCA 1982) (trial court's failure to excuse juror who felt that she could not be impartial deprived defendant of a fair trial). Accordingly, we reverse and remand this cause for a new trial."

Attached is a memorandum of law used in civil jury trials.

Law Professor Sarah Redfield will be describing her perspectives related to implicit bias.
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U.S. District Courts, Southern and Middle Districts of Florida (1983)
U.S. Court of Appeals, Eleventh Circuit (1983)
United States Supreme Court (1987)
Florida Bar Board Certified Civil Trial Lawyer since 1989
Florida Bar Board Certified in Business Litigation Law since 1997
Civil Trial and Civil Pretrial Practice - National Board of Legal Specialty Certification

PROFESSIONAL

- Adjunct Professor, University of Miami School of Law: Trial Advocacy and Litigation Skills Programs - Pre-trial, Trial and Advanced Trial Skills courses, 1989 -2014
- Martindale-Hubbell AV Rated (highest) over 20 years, and Listed in Registry of Preeminent Law Firms in Civil Trial, Insurance Defense and Personal Injury
- Selected as a Leading Florida Attorney by a survey of Florida Lawyers conducted by the American Research Corporation in Personal Injury, and Personal Injury Defense.
- Excellence in Professional Education Award, PESI., 1998
- South Florida Interprofessional Council (President, 1989-90)
- Dade County Bar Association (Executive Comm., 1989-90; Board of Directors, 1983-6, 1989-92 and 2007-8; Chair, Judicial Evaluation Comm., 1991-3; Race Director, Law Day Run, 1982-91; Features Editor, Bar Bulletin 1983-4, Civil Litigation Comm., 1997)
- The Academy of Florida Trial Lawyers (Vice-Chair, Judicial Comp.1989, EAGLE RUN Race Director, 1988, lecturer)
- The Association of Trial Lawyers of America – now AAJ (Judge, Trial Advocacy Competitions)
- Fellow, Roscoe Pound Institute (2002), ATLA Leaders Forum 2003-08
- Lecturer, University of Miami School of Medicine, 1993-95
- Lecturer, What Attorneys Need to Know About Traumatic Brain Injury, Dade County Trial Lawyers Association for Miami Children's Hospital (1994)
- Lecturer: Legal Considerations for Special Events Planning, NYU, 1989-90
- Lecturer: Insurance Fraud, Alison Seminars, Miami, (1997)
- Member, Florida Advisory Committee on Arson Prevention
- American Business & Insurance Attorneys and Insurance Law List
- Guardian ad litem – US Dist Ct. - Ford/Firestone- South America
- 11th Judicial Circuit: Special Master: discovery disputes; Guardian ad litem and Special Guardian, Put Something Back Program, Pro Bono service recognition, Attorney Member of Foster Care Review Panel
EDUCATION - PROFESSIONAL

UNIVERSITY OF MIAMI SCHOOL OF LAW
- Juris Doctor, cum laude - 1982
- Trial Advocacy Program, Outstanding Advocate, 1982
- International Academy of Trial Lawyers Advocacy Award Winner
- Omicron Delta Kappa, 1981
- Who's Who Among Students in Colleges and Universities, 1981
- Bar and Gavel Honorary Society, President
- Student Bar Association, Senator
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EDUCATION - UNDERGRADUATE

VANDERBILT UNIVERSITY
- Bachelor of Arts in Economics/Chemistry - May, 1978
- Class Vice President, Honor Council - Member and Advisor
IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 09-025532 (26)

WALLACE MOSLEY, a minor
by and through his guardian,
JACQUELINE WEAVER,

Plaintiff,

vs.

EARL JUNIOUS LLOYD,

Defendant.

VOIR DIRE: THE CENTERPIECE OF A FAIR TRIAL

Plaintiff, WALLACE MOSLEY, through counsel, serves this his Memorandum of Law
for the Court entitled “Voir Dire: The Centerpiece of a Fair Trial,” and states as follows:

The fair and impartial jury, as guaranteed by the Sixth Amendment to the United States
Constitution, as well as the Florida Constitution, is crucial to the administration of justice under
our legal system. Singer v. State, 109 So. 2d 7 (Fla. 1959). The fundamental necessity of a fair
and impartial jury was heralded by early court decisions as the judges initiated an effort to secure
and safeguard the integrity of the jury trial. See, e.g., O’Connor v. State, 9 Fla. 215, 222 (Fla.
1860) (“jurors should if possible be not only impartial, but beyond even the suspicion of
partiality”) (emphasis added); Johnson v. Reynolds, 121 So. 793, 796 (Fla. 1929) (“[i]f there is
a doubt as to the juror’s sense of fairness or his mental integrity, he should be excused”).

Current case authority has returned to these fundamental precepts and backed them with
practical steps to revive and revitalize the fair and impartial jury in its purest form. In Rodriguez
v. Lagomasino, 972 So. 2d 1050 (Fla. 3d DCA 2008) the plaintiff appealed a judgment entered on a defense verdict in an automobile accident case, on the grounds that the trial court erred by failing to strike two jurors for cause. Id. at *1. The Third District agreed that both jurors should have been stricken for cause and reversed for a new trial. Id.

In doing so, the Third District explained that the trial court had denied a new trial because it believed the responses given by the two jurors at issue rehabilitated them and that the challenges for cause were not appropriate. Id. at *6. Finding this decision to be in error, the Third District held as follows: “We respectfully disagree that these jurors were rehabilitated and believe that both jurors should have been stricken for cause.” Id. Quoting from Nash v. General Motors Corp., 734 So. 2d 437, 440 (Fla. 3d DCA 1999), the Rodriguez court reiterated long established Florida law providing that “[w]hen any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused.” Id. (Emphasis added.)

In Rodriguez, one of the two jurors at issue (Mr. Gutierrez) had been sued as a result of a similar accident which caused his insurance rates to double, and he expressed negative feelings about the claim made against him and his wife. Id. Although that juror later stated that he would “be in the middle” as opposed to favoring one party over the other from the start, “that statement was insufficient to indicate unequivocally that [the juror] could set aside his feelings and be fair and impartial in this case.” Id. at *6-7. The other juror at issue in Rodriguez (Mr. Hillberry) expressed his beliefs that there should be caps on damages because our society is litigious, and “there have been a lot of frivolous lawsuits that cost millions of dollars to corporations and individuals, and basically that would be attributed to a rise in our cost
of living,” including higher insurance rates. Id. at *3-4. Though the juror said he “doubted” these thoughts would come into play if he were selected for the panel, he supposed that they could, and said it was a “possibility.” Id. at *5. The Third District found that the juror was thus “not rehabilitated from his statement that his beliefs regarding damages would possibly come into play during deliberations … [and] remained equivocal about his impartiality.” Id. at *7.

Because the plaintiff’s challenges for cause were denied as to these two potential jurors, the plaintiff in Rodriguez was forced to use his last peremptory challenge to strike Mr. Gutierrez, and then requested and was granted an additional peremptory challenge to strike Mr. Hillberry, preventing the plaintiff from using a peremptory challenge to strike another person who ended up on the jury. Id. at *5-6. The Third District concluded its decision in Rodriguez as follows:

As a result of the court’s failure to strike either of these jurors for cause, plaintiff was forced to use peremptory challenges and then had to accept Ms. Wilson, an objectionable juror, because he had exhausted his peremptory challenges. This court has consistently held that “it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges.”

Id. at *7 (quoting Jefferson v. State, 489 So. 2d 211, 212 (Fla. 3d DCA 1986), rev. denied, 494 So. 2d 1153 (Fla. 1986)) (other citations omitted) (emphasis added).

The Third District again made it clear that any reasonable doubt as to juror impartiality must be resolved in favor of granting a challenge for cause, to not only ensure a fair jury, but also to preserve each party’s right to equally affect the ultimate jury selected through the use of peremptory challenges. The remainder of this memorandum will highlight other Florida decisions rooted in traditional case law which demonstrate how courts can assure the impartiality of the jury, which is the touchstone of our system of jury trials. Court must assure that the parties, through their counsel’s jury selection, and the use of challenges for cause (the principal
way in which the constitutional right to an impartial jury is implemented), are permitted to secure an impartial jury and thus the foundation for a fair trial.

Fla. Stat. §913.03(10) provides, in pertinent part, that an individual juror may be challenged for cause if “[t]he juror has a state of mind regarding the defendant, the case, the person alleged to have been injured ... that will prevent the juror from acting with impartiality.” Fla. R. Civ. P. 1.431(c)(1) provides that upon motion of any party, the court shall examine a prospective juror under oath to determine if that prospective juror has any bias or prejudice, as well as any relationship to the parties, attorneys, others who are blamed in the pleadings or similar claimants. “If it appears that the juror does not stand indifferent to the action ... another shall be called in that juror’s place.” See Fla. R. Civ. P. 1.431(c)(1).

The juror’s “voir dire” responses are the fundamental source for investigating even the slightest hint of a ground of impartiality. The testimony or opinion derived from the potential juror’s own conscience is relevant, competent and primary evidence on the issue of impartiality. 33 Fla. Jur. 2d Juries §149. The individual juror is not, however, the judge of his own freedom from bias. The question is a matter of the Court’s discretion. 47 Am. Jur. 2d Jury §210; Smith v. State, 463 So. 2d 542, 544 (Fla. 5th DCA 1985) (“a juror’s statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence”). Note, however, that any other competent evidence may be introduced to support a challenge for cause. Fla. R. Civ. P. 1.431(c)(1).

**VOIR DIRE: General Requirement of Impartiality**

As a standard for the Court’s exercise of discretion, the original and primary test used to determine jury competency is whether the juror can lay aside any bias or prejudice and render his
verdict solely upon the evidence presented and the instructions on the law given by the court. Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984), cert. denied, 469 U.S. 873 (1984).

The principle of rehabilitation underlying this test has been questioned almost from the test’s inception. As early as 1929 in Johnson, supra, 121 So. at 796, the Florida Supreme Court asserted that “[i]t is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning, declares his freedom from its influence.” Further, along these same lines, the Florida Supreme Court emphasized that the standard test must be applied utilizing the Singer rule, which requires that if there is a basis for any reasonable doubt as to a potential juror’s impartiality, he or she should be excused. Singer, supra, 109 So. 2d at 23-24, cited in Hill v. State, 477 So. 2d 553, 555 (Fla. 1985).

The Singer rule is evident in several other Florida decisions. In the instance where the prospective juror vacillates between assertions of partiality and impartiality, a reasonable doubt has been created which would require that the juror be excused. Plair v. State, 453 So. 2d 917 (Fla. 1st DCA 1984). Although manifest error must be present before the trial court’s ruling on a challenge for cause can be reversed, courts have been more freely overturning such decisions based on the Singer rule. See also Smith v. State, supra, 463 So. 2d 542; Leon v. State, 396 So. 2d 203 (Fla. 3d DCA 1981). In Sydleman v. Benson, 463 So. 2d 533 (Fla. 4th DCA 1985), the Fourth District cautioned that “the impartiality of the finders of fact is an absolute prerequisite to our system of justice. Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.” (Emphasis added.) The strict “reasonable doubt” standard governing whether a juror should be excused for cause (equally applicable to
civil and criminal cases) "does not appear to leave room for 'broad' discretion" on the part of the trial court. Pacot v. Wheeler, 758 So. 2d 1141, 1142 (Fla. 4th DCA 2000).

The case of Sikes v. Seaboard Coast Line Railroad Co., 487 So. 2d 1118 (Fla. 1st DCA 1986), rev. denied, 497 So. 2d 1218 (Fla. 1986), provided an opportunity to re-examine the merits of using the challenge for cause to preserve the mental integrity of the jury. In Sikes, a defense attorney (who played a marginal role in the actual trial) was a close family friend of a prospective juror, who upon examination admitted that she did not think she would be fair, and that she probably might give more weight to the defense by virtue of her acquaintance with said lawyer. Id. at 1119. In response to the trial judge's questioning, she promised that she would try to be fair. Id. On appellate review, the Sikes court held that it was "manifest" error to deny the challenge for cause in this instance. Id. at 1121.

Similarly, in Johnson, supra, 121 So. at 796, it was held as error not to strike a juror who was a friend of the plaintiff's attorney. The juror initially said he would be embarrassed not to side with his friend on the plaintiff's side, but later said he could be fair and impartial and render a verdict according to the evidence. The Johnson court ruled that this switch in answers was insufficient to rehabilitate the potential juror, and he should have been excused. Id. The more recent Sikes decision reiterates Johnson and chronicles the revitalization of safeguards for the impartial jury, emphasizing the significance of the reasonable doubt standard set forth by the Singer rule and questioning the entire propriety of rehabilitating the partial juror.

Other more current decisions have seized upon this point and indicate a policy shift toward stricter standards regarding the jury competency test and the nature of rehabilitating the partial juror. Courts no longer seem satisfied that a potential juror is able to "lay aside" his or her prejudice: "Where a juror initially demonstrates a predilection in a case which in the juror's
mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties’ attorneys or the judge, is properly viewed with some skepticism.” Club West, Inc. v. Tropigas of Florida, Inc., 514 So. 2d 426, 427 (Fla. 3d DCA 1987), rev. denied, 523 So. 2d 579 (Fla. 1988).

The fact that the trial judge extracts a commitment from a prospective juror that he will “try to be fair” or even will be fair does not eliminate the prejudice or the grounds for the challenge. Leon v. State, supra; Sikes v. Seaboard, supra; Robinson v. State, 506 So. 2d 1070 (Fla. 5th DCA 1987). Instead, Florida courts have urged that a juror be able to completely reject his or her prejudice and completely free himself or herself from bias. Unless the juror’s impartiality has been forthrightly and unequivocally asserted in the case, he or she should be excused by the court. Auriemma v. State, 501 So. 2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So. 2d 1043 (Fla. 1987); Robinson, supra.

Another Third District case, Levy v. Hawk’s Cay, Inc., 543 So. 2d 1299, 1300 (Fla. 3d DCA 1989), has also recognized that when jurors have a negative attitude toward the legal system, due to previous experiences with lawsuits, there exists “reasonable doubt as to their impartiality,” and the failure to excuse such jurors for cause constitutes reversible error. Moreover, if the answer by a prospective juror is equivocal, as opposed to unequivocal, it raises a reasonable doubt as to the juror’s ability to render a fair and impartial verdict, warranting an excusal for cause. Jones v. State, 660 So. 2d 291 (Fla. 2d DCA 1995) (citing Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994)).

**THE TREND IN VOIR DIRE: A Specific Example**

The case of Lavado v. State, 469 So. 2d 917 (Fla. 3d DCA 1985), quashed, 492 So. 2d 1322 (Fla. 1986) provides an appropriate example of this trend in application. In Lavado, the
appellate court ruled that the trial court’s refusal to permit prospective jurors to be questioned on voir dire as to their ability to entertain a defense of voluntary intoxication was not an abuse of discretion where the trial court gave appropriate instructions on voluntary intoxication, and there was no showing that the jury, having been sworn to follow those instructions, failed to do so. Id. at 918. In a vigorous dissent, Judge Pearson asserted that the District Court’s ruling was “as wrong as it would have been had it approved a ruling which denied counsel the right to question prospective jurors altogether.” The dissent further stated as follows:

If he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication. Despite this, the majority approves a ruling which precluded counsel from asking the prospective jurors about their bias or prejudice against this defense. ... I believe the majority is ... wrong....

Id. at 919.

The Supreme Court, in reviewing the District Court’s decision, agreed with Judge Pearson, reversed the District Court, and offered as its singular opinion that “[w]e can add nothing to Judge Pearson’s comprehensive, articulate, and logical dissenting opinion, and therefore adopt it in its entirety as our majority opinion.” Lavado v. State, 492 So. 2d 1322, 1323 (Fla. 1986). With this statement, Judge Pearson’s thorough and progressive analysis of the “meaningful voir dire” warrants closer scrutiny. Most importantly, Judge Pearson’s dissent – now the law of the Florida Supreme Court – relies primarily on the United States Supreme Court’s ruling in Rosales-Lopez v. United States, 451 U.S. 182 (1981) in opining that a “meaningful voir dire” is critical to effectuating one’s constitutionally guaranteed right to a fair and impartial jury:

What is a meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore “should be so
varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require . . ." [Citations omitted.] Thus, where a juror’s attitude about a particular legal doctrine (in the words of the trial court, “the law”) is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions.

Id. at 919-20.


Courts have held similarly critical—or even less critical—information to be “material.” See De La Rosa, 659 So. 2d at 241 (involvement in prior, completely unrelated lawsuits was material); Dery v. State, 68 So.3d 252 (Fla. 2d DCA 2010) (holding that juror took an internet course in forensic science several years before trial was material); Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984) (holding that juror’s nephew was a corrections officer at facility where incident occurred was material); Smiley v. McCallister, 451 So.2d 977 (Fla. 4th DCA 1984) (holding that juror had a son-in-law who was in a car accident was material in a case involving a car accident). Villalobos v. State, 3D13-614, 2014 WL 3610925 (Fla. Dist. Ct. App. July 23, 2014)

SPECIFIC EXAMPLES:
APPROPRIATE SUBJECTS FOR INQUIRY DURING VOIR DIRE

A. Prohibition of Strikes Based on Race

On numerous occasions, the Florida Supreme Court, and many other Florida courts, have held that striking jurors based on their race deprives the parties of their guaranteed right to trial before a jury of their peers made up of a fairly selected cross-section of people from the local community. In Jefferson v. State, 595 So. 2d 38 (Fla. 1992), the Florida Supreme Court held that a challenge used to strike a black juror was racially motivated and, as such, the trial judge
correctly denied the use of a peremptory challenge on that prospective juror. In Jefferson, 595
So. 2d at 40-41, the following legal principles were acknowledged:

... an individual venireperson has the constitutional right not to be
excluded from jury service on the basis of race. Powers v. Ohio, 113 L.
Ed. 2d 411, 111 S. Ct. 1364 (1991) ... [additional citations omitted].

The elimination of potential jurors by discriminatory criteria is an invalid
exercise of peremptories and does not assist in the creation of an impartial
jury. Such discrimination in the "selection of jurors offends the dignity of
persons and the integrity of the courts." Powers, 111 S.Ct. at 1366.

When the trial court determines that a party is making an improper
discriminatory challenge, it is, in effect, making a determination that the
party was attempting to exclude an otherwise qualified and impartial juror.

In addition, the Supreme Court in Jefferson also addressed the specific procedure by
which trial judges should cure the error that occurs when a racial strike has been made by one of
the parties, to wit: the challenged juror should be empaneled on the jury:

We ... do not see a constitutional barrier to the remedy of seating
the improperly challenged venireperson in the instant case. To the
contrary, under the facts of this case, the remedy of seating the
improperly challenged juror is in greater accord with judicial
economy and the advancement of public confidence in our system
of justice.

...

... under certain circumstances and in the absence of prejudice to
one of the parties, proceeding with the improperly challenged juror
may be the more appropriate remedy.

"It is the right to an impartial jury, [footnote omitted] not the right
to peremptory challenges, that is constitutionally protected." See
Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712
(1986) [other citation omitted].

Id.
The seminal case addressing the racially motivated striking of jurors is State v. Neil, 457 So. 2d 481, 486-87 (Fla. 1984). That case detailed how such matters should be handled:

A party concerned about the other side’s use of peremptory challenges must make a timely objection [footnote omitted] and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors’ race. [Footnote omitted.] The reasons given in response to the court’s inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

See also Melbourne v. State, 679 So. 2d 759, 763 (Fla. 1996) (“hold[ing] that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner”); Harrison v. Emanuel, 94 So. 2d 759 (Fla. 4th DCA 1997), rev. denied, 700 So. 2d 685 (Fla. 1997); Hall v. Dace, 602 So. 2d 512 (Fla. 1992).


Florida courts have recognized that a prospective juror’s occupation can, in some circumstances, be the foundation of a genuinely race-neutral reason to exercise a peremptory challenge. See Cobb v. State, 825 So.2d 1080, 1084 (Fla. 4th DCA 2002). It is true that the majority of potential jurors work, and this fact carries a real risk that a strike based on occupation alone could be used pretextually as a “facially” race-neutral reason to strike practically any juror. See Files v. State, 613 So.2d 1301, 1304 (Fla.1992).
However, "our supreme court has charged Florida's trial judges with the primary responsibility for striking the 'delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges.'" *Cobb*, 825 So.2d at 1086.


The Florida Supreme Court also addressed the procedure for considering peremptory challenges, Discriminatory exercise of peremptory challenges based on race or ethnicity violates a defendant's rights to equal protection and to be tried by an impartial jury under the United States and state constitutions. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 86–7, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *Melbourne*, 679 So.2d at 763, this Court recognized that the three-step guideline for resolving an allegation of discrimination in peremptory challenges which was set out in *State v. Neil*, 457 So.2d 481, 486–87 (Fla.1984), has been simplified in subsequent cases. This Court explained the considerations at each step in the process:

*5 A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral, and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3) ... Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination. *Poole v. State*, SC11-1846, 2014 WL 2882864 (Fla. June 26, 2014)

Racially based challenges are prohibited in civil as well as criminal cases, according to the US Supreme Court, in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 615, 111 S. Ct. 2077, 2080, 114 L. Ed. 2d 660 (1991):

A private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. Just as in the criminal context, see *Powers*, supra, all three of the requirements for third-party standing are satisfied in the civil context. First, there is no reason to believe that the daunting barriers to suit by an excluded criminal
juror, see id., at 414, 111 S.Ct., at 1372, would be any less imposing simply because the person was excluded from civil jury service. Second, the relation between the excluded venireperson and the litigant challenging the exclusion is just as close in the civil as it is in the criminal context. See id., at 413, 111 S.Ct., at 1372. Third, a civil litigant can demonstrate that he or she has suffered a concrete, redressable injury from the exclusion of jurors on account of race, in that racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the proceeding in doubt. See id., at 411, 111 S.Ct., at 1371. Pp. 2087-2088.


B. Prohibition Against Striking All Women

It is inappropriate for any lawyer to strike members of a particular panel of potential jurors based on their gender or physical traits. Specifically, the courts of this state have held that if a lawyer attempts to strike all women from a potential panel of jurors, that is inappropriate, should not be allowed by the trial judge, and may result in a reversal if such issue is brought up on appeal. An example of this is provided by Mazzouccolo v. Gardner, McLain & Perlman, M.D., P.A., 714 So. 2d 534, 535 (Fla. 4th DCA 1998), in which “[d]uring voir dire, defense counsel used three peremptory strikes on women,” and “Plaintiffs’ counsel made a timely, gender-based objection.” See also State v. Holiday, 682 So. 2d 1092 (Fla. 1996). The Mazzouccolo court recognized that the “same procedures apply to gender-based challenges as to race-based challenges.” Id.

C. Scope of Permissible Questions: Damages, Insurance, etc.

1. Questions Concerning a Prospective Juror’s Views on Damages

In Sisto v. Aetna Casualty and Surety Co., 689 So. 2d 438 (Fla. 4th DCA 1997), the Fourth District Court of Appeal, in an opinion authored by current Florida Supreme Court Justice Pariente, held that the trial court abused its discretion by prohibiting plaintiffs’ counsel from
asking a panel of prospective jurors any questions about their views on damages, including non-
economic damages. On this subject, the appellate court noted as follows:

In this case, the trial court did not just limit the scope of counsel’s questions on the sensitive subject of non-economic damages; it completely prevented any inquiry about the jurors’ views concerning personal injury lawsuits and damage awards. In so doing, the trial court interfered with the right of plaintiffs’ counsel to conduct a reasonable examination and prevented any meaningful voir dire examination on the subject of damages.

...

In a personal injury case where the issues of permanent injury and past and future non-economic damages are hotly contested, allowing counsel to inquire about an individual’s views on the sensitive area of non-economic damages is essential to a party’s right to conduct a reasonable examination. ... a prospective juror’s attitude about personal injury lawsuits is an appropriate subject for inquiry.

...

The prejudice [caused by the trial court’s refusal to permit any inquiry of the prospective jurors concerning their views on damages] was not cured by the trial court’s asking the jurors the general, generic question of whether they would follow the law.

Id. at 439-40 (emphasis added).

2. Questions Concerning Following the Law on Pain and Suffering

The Fourth District Court of Appeal in Pacot v. Wheeler, supra, 758 So. 2d 1141, held that the trial court committed error in denying challenges for cause of jurors who professed that they would have difficulty following the law regarding the awarding of monetary compensation for pain and suffering. The Pacot ruling reaffirmed that if there is any reasonable doubt about a juror’s impartiality, or if it is a close call, the juror should be dismissed for cause:

The test to be applied in determining whether a challenge for cause should be granted is “whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court.” [Citation omitted.]
Furthermore, as we have stated, “close cases should be resolved in favor of dismissing a juror.” [Citation omitted.]

It is clear that “difficulty,” or a “problem,” or “trouble,” in following the law is not the same as an outright refusal. Nevertheless, we have also held that inability or difficulty in putting a juror’s feelings aside so that she might be fair to the defendant is sufficient to require the trial court to grant a challenge for cause. [Citation omitted.]

Id. at 1142.

A recent case citing Pacot held, G Pelham v. Walker, 135 So. 3d 1114, 1116-17 (Fla. Dist. Ct. App. 2013),:

In Pacot v. Wheeler, 758 So.2d 1141, 1142 (Fla. 4th DCA 2000), jurors stated during voir dire that they would have difficulty following the law regarding damage awards for pain and suffering. The Fourth District held that the trial court abused its discretion in denying cause challenges to the jurors where the jurors were not rehabilitated. The potential juror in this case, Juror G, agreed that she was defense-oriented and expressed concern with awarding noneconomic damages, thereby indicating that the defense would be starting the case with an advantage over the plaintiff. See Hill v. State, 477 So.2d 553, 556 (Fla.1985) (“A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.”); Weinstein Design Grp. v. Fielder, 884 So.2d 990, 995 (Fla. 4th DCA 2004) (holding that jurors should have been dismissed for cause where they agreed that one party was starting the case off with “an edge”); Jaffe v. Applebaum, 830 So.2d 136, 138 (Fla. 4th DCA 2002) (holding that juror should have been dismissed for cause where his answers indicated that plaintiffs would be starting off with a “half strike *1117 against them”). Some of Juror G’s answers were equivocal, but she was “absolutely” certain when she stated that she was defense-oriented. The subsequent questions asked by both attorneys did not serve to rehabilitate Juror G. Even though Juror G later said that she could be fair and that she could follow the law, she never “recanted or receded from [her] earlier expressed view” that she was “absolutely” defense-oriented and believed that noneconomic damages are punitive to the defense. See Algie v. Lennar Corp., 969 So.2d 1135, 1138 (Fla. 4th DCA 2007) (holding that juror,
who believed that every slip-and-fall victim was “at least partially responsible and that this would factor into his decision[,]” was not rehabilitated; even though he subsequently stated that he could be fair, he “never recanted or receded from his earlier expressed view”). In light of Juror G’s answers regarding her work experience and how it affected her view on noneconomic damages, we imagine that it would have been difficult, if not impossible, to rehabilitate her so that she could sit as a fair and impartial juror in this particular case. See Jaffe, 830 So.2d at 138 (noting that neither party attempted to rehabilitate juror who expressed bias towards defense surgeons but concluding “that any attempt to rehabilitate [the juror] would have been futile in light of his responses to [plaintiffs’ counsel’s] questions”); Club W., Inc. v. Tropigas of Fla., Inc., 514 So.2d 426, 427 (Fla. 3d DCA 1987) (holding that her prior equivocal answers required that juror be dismissed for cause and noting that juror’s subsequent change in opinion, arrived at after further questioning, should be “viewed with some skepticism”). With regard to the issue of rehabilitating a potential juror, the Florida Supreme Court said it best:

It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929).

We conclude that Juror G’s answers during voir dire demonstrated a reasonable doubt about her ability to be impartial and that the trial court therefore abused its discretion in denying Pelham’s challenge for cause to Juror G. Pelham v. Walker, 135 So. 3d 1114, 1116-17 (Fla. Dist. Ct. App. 2013)

In another case considering Pacot, Gootee v. Clevinger, 778 So. 2d 1005, 1009-10 (Fla. Dist. Ct. App. 2000)

the court observed,

The excerpts from voir dire set forth above show that Davis was doubtful whether she would be able to be fair. The best she was able to do, even after insistent pressing from the trial judge was: “Yes, I can be fair whether I like it or not.” Primm was candid in expressing her inability to perform a juror’s responsibility. It is reversible error to force a party to use peremptory challenges on *1010 persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory
challenges and an additional challenge is sought and denied. Hill v. State, 477 So.2d 553, 556 (Fla.1985). See also Pacot v. Wheeler, 758 So.2d 1141, 1142 (Fla. 4th DCA 2000); Straw v. Associated Doctors Health and Life, 728 So.2d 354, 355 (Fla. 5th DCA 1999); Massad v. State, 703 So.2d 1134 (Fla. 5th DCA 1997); Tizon v. Royal Caribbean Cruise Line, 645 So.2d 504, 505 (Fla. 3d DCA 1994); Jenkins v. Humana, Inc., 553 So.2d 201 (Fla. 5th DCA 1989); Club West, Inc. v. Tropigas, Inc., 514 So.2d 426 (Fla. 3d DCA 1987). When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the law announced at trial, he should be excused.


3. **Questions as to a Prospective Juror’s Views/Relations with Insurers**

   In some instances, it is appropriate and even necessary to question members of a venire on their views, relationships, and business dealings with insurance companies. Florida courts have consistently instructed as to the appropriateness of these types of questions in certain cases.

   In Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981), the plaintiffs’ counsel attempted to ask a panel of prospective jurors whether if they rendered a verdict for the plaintiff, it would have “any influence on your personal life, especially with regard to insurance.” In reaching its decision, the Court reasoned as follows:

   This Court has consistently held that plaintiffs are entitled to question prospective jurors about any financial interest they may have in an insurance company to determine whether they would be biased or prejudiced.

   ...

   ... the defendant’s right not to have the subject of insurance mentioned to the jury was abolished by our landmark case, Shingleton v. Bussey, 223 So.2d 713 (Fla.1969), ....

   ...

Thus the plaintiff’s interest in receiving a fair trial by an impartial jury is no longer counter balanced by the defendant’s interest in
not having the subject of insurance mentioned to the jury. It would not have been an abuse of discretion if the judge had allowed the appellants’ attorney to question the jurors about whether they felt there could be a relationship between the decision they would have to render and the amount of premiums they would have to pay. [Citation omitted.] “[T]he impact of monetary award in negligence cases upon automobile liability insurance rates may be a proper subject for exploration upon voir dire examination of a jury panel.” [Citation omitted.] Since there is no longer any reason for not mentioning insurance in front of jurors, an attorney may question prospective jurors about any possible prejudice or bias they may have whether it be for or against insurance companies.

That is not to say that parties have an absolute right to ask any questions they want on voir dire concerning a potential juror’s possible bias for or against insurance companies. Parties only have the right “to conduct a reasonable examination ….” Fla.R.Civ.P. 1.431(b). The extent to which parties may examine prospective jurors on voir dire lies within the trial judge’s discretion.

Id. at 1330-31.

QUESTIONS THAT RAISE ANY DOUBT ABOUT A POTENTIAL JUROR NECESSITATE STRIKING THAT PERSON FROM THE VENIRE

Many Florida cases instruct as to when a juror must be stricken during “voir dire” questioning. The following highlights two such cases which provide guidance in common courtroom situations regarding jurors whose answers to “voir dire” questions raise a doubt as to whether or not they can be fair and impartial jurors:

Van Poyck v. Singletary, 715 So. 2d 930, 931 (Fla. 1998):

If a reasonable doubt exists as to whether a juror can possess an impartial state of mind in the discharge of his or her duties, that juror is incompetent to serve and must be excused for cause. ... it is reversible error when a challenge for cause is improperly denied, and the defendant then exhausts his peremptory challenges on venirepersons who should have been dismissed for cause and a request for additional peremptory challenges is denied.
Goldenberg v. Regional Import & Export Trucking Co., Inc.,
674 So. 2d 761, 763-64 (Fla. 4th DCA 1996):

"Impartiality of the finders of fact is an absolute prerequisite to our system of justice." Williams v. State, 638 So. 2d 976, 978 (Fla. 4th DCA 1994), review denied, 654 So. 2d 920 (Fla. 1995). ... "This court applies a 'reasonable doubt' standard to juror qualifications: i.e., if there is a reasonable doubt about a juror's impartiality, then the juror should have been dismissed for cause." [Citations omitted.]

... Juror ... expressed a definite bias against individuals with relatively minor injuries who seek damages for pain and suffering. She freely volunteered the opinion that people with minor injuries who sued for pain and suffering were often being dishonest. Even in response to a direct question from the trial court as to whether she could be fair and reasonable under the circumstances, whether the injury suffered was major or minor, Juror ... stated only that she was "a fair person." Thus, Juror ... never indicated she could be fair and impartial.

"... efforts at rehabilitating a prospective juror should always be considered in light of what the juror had freely said before the salvage efforts began." [Citations omitted.]

Close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality. [Citations omitted.] We continue to adhere to the proposition that in close cases a juror should be excused for cause so that the impartiality of the jury is not compromised.

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing was served by electronic mail this 30th day of July 2014 to John H. Richards, Esq., (servicefl@boydlawgroup.com), Boyd, Richards, Parker & Colonnelli, P.L., attorneys for
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By: ____________________________

DAVID L. DEEHL
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Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror’s or potential juror’s Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors’ or potential jurors’ presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have with regard to information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as “websites.”

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as “electronic social media” or “ESM.” Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.
another’s ESM will be denoted as an “access request,” and a person who creates and
maintains ESM will be denoted as a “subscriber.”

Depending on the privacy settings chosen by the ESM subscriber, some
information posted on ESM sites might be available to the general public, making it
similar to a website, while other information is available only to a fellow subscriber of a
shared ESM service, or in some cases only to those whom the subscriber has granted
access. Privacy settings allow the ESM subscriber to establish different degrees of
protection for different categories of information, each of which can require specific
permission to access. In general, a person who wishes to obtain access to these protected
to a request to the ESM subscriber asking for permission to do so. Access
depends on the willingness of the subscriber to grant permission.2

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror’s website or ESM that is available without
   making an access request where the juror is unaware that a website or ESM has
   been reviewed;

2. active lawyer review where the lawyer requests access to the juror’s ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM
   feature of the identity of the viewer;

**Trial Management and Jury Instructions**

There is a strong public interest in identifying jurors who might be tainted by
improper bias or prejudice. There is a related and equally strong public policy in
preventing jurors from being approached ex parte by the parties to the case or their
agents. Lawyers need to know where the line should be drawn between properly
investigating jurors and improperly communicating with them.3 In today’s Internet-
saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not
   address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion,
   key elements like the ability of a subscriber to control access to ESM or to identify third parties who review
   a subscriber’s ESM are considered generically.
3. While this Committee does not take a position on whether the standard of care for competent
   lawyer performance requires using Internet research to locate information about jurors that is relevant to the
   jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This
   comment explains that a lawyer “should keep abreast of changes in the law and its practice, including the
   benefits and risks associated with relevant technology.”  *See also* Johnson v. McCullough, 306 S.W.3d 551
   (Mo. 2010) (lawyer must use “reasonable efforts” to find potential juror’s litigation history in Case.net,
   Missouri’s automated case management system); N. H. Bar Ass’n, Op. 2012-13/05 (lawyers “have a
general duty to be aware of social media as a source of potentially useful information in litigation, to be
competent to obtain that information directly or through an agent, and to know how to make effective use
of that information in litigation”); Ass’n of the Bar of the City of N. Y. Comm. on Prof’l Ethics, Formal
Op. 2012-2 (“Indeed, the standards of competence and diligence may require doing everything reasonably
possible to learn about jurors who will sit in judgment on a case.”).
For this reason, we strongly encourage judges and lawyers to discuss the court’s expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers’ review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court’s expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. See, e.g., In re Holman, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer’s client was “serious crime” warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror’s Internet presence.
A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). See also In re Myers, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his “jury selection team” phone venire member’s home); cf. S.C. Ethics Op. 93-27 (1993) (lawyer “cannot avoid the proscription of the rule by using agents to communicate improperly” with prospective jurors).

Passive review of a juror’s website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer’s behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer’s jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b). 5

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror’s electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b). 6 This would be akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror’s ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

5. Or. State Bar Ass’n, Formal Op. 2013-189 (“Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website”; N.Y. Cnty. Lawyers Ass’n, Formal Op. 743 (2011) (lawyer may search juror’s “publicly available” webpages and ESM); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass’n, Op. E-434 (2012) (“If the site is ‘public,’ and accessible to all, then there does not appear to be any ethics issue.”). See also N.Y. State Bar Ass’n, Advisory Op. 843 (2010) (“A lawyer representing a client in pending litigation may access the public pages of another party’s social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation”); Or. State Bar Ass’n, Formal Op. 2005-164 (“Accessing an adversary’s public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary”); N.H. Bar Ass’n, supra note 3 (viewing a Facebook user’s page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party’s public Facebook page may be viewed by lawyer).

6. See Or. State Bar Ass’n, supra note 5, fn. 2, (a “lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so”); N.Y. Cnty. Lawyers Ass’n, supra note 5 (“Significant ethical concerns would be raised by sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog, or ‘following’ a juror’s Twitter account”); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra note 3 (lawyer may not chat, message or send a “friend request” to a juror); Conn. Bar Ass’n, Informal Op. 2011-1 (friend request is a communication); Mo. Bar Ass’n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). But see N.H. Bar Ass’n, supra note 3 (lawyer may request access to witness’s private ESM, but request must “correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer’s involvement” in the matter); Phila. Bar Ass’n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness’s private ESM, but may ask the witness “forthrightly” for access).
relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2, concluded that a network-generated notice to the juror that the lawyer has reviewed the juror’s social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of “communication” from Black’s Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed “the process of bringing an idea, information or knowledge to another’s perception—including the fact that they have been researched.” While the ABCNY Committee found that the communication would “constitute a prohibited communication if the attorney was aware that her actions” would send such a notice, the Committee took “no position on whether an inadvertent communication would be a violation of the Rules.” The New York County Lawyers’ Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY’s opinion and went further explaining, “If a juror becomes aware of an attorney’s efforts to see the juror’s profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.”

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror’s information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, supra, note 3.
8. N.Y. Cnty. Lawyers’ Ass’n, supra note 5.
features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay, or burden a third person...” Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name. The recommended instruction states in part:

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case... You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+ , My Space, LinkedIn, or YouTube... I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that “jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media.” As a result, the authors recommend jury instruction on social media “early and often” and daily in lengthy trials.

9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., More from the #Jury Box: The Latest on Jurie and Social Media, 12 Duke Law & Technology Review no. 1, 69-78 (2014), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.
11. Id. at 66.
12. Id. at 87.
Analyzing the approximately 8% of the jurors who admitted to being “tempted” to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission’s proposal, to expand on a lawyer’s previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer’s client to also include such conduct by any person.13

Model Rule 3.3(b) reads:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000’s stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge").

Reporter's Explanation of Changes, Model Rule 3.3.14

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is fraudulent or criminal.15 While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).16


15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror...").

16. See, e.g., U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).
While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer’s assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer’s affirmative duty to act is triggered only when the juror’s known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer’s belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror’s public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror’s ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.
SOCIAL MEDIA

Ethics Opinions

- CAL 2012-185: Social Networking
- San Diego County Bar Association Ethics Opinion 2011-2: Has an attorney violated his ethical obligations by making an ex parte "friend" request to a represented party?
- ABA Formal Opinion 482: Judges Use of Electronic Social Networking Media
- ABA Formal Opinion 480: Lawyer Reviewing Jurors' Internet Presence
- California Judges Association Judicial Ethics Committee Opinion 99: Judges' Participation in Online Social Networking
- New York State Bar Association Ethics Opinion 972 (2013): Listing in Social Media
- Oregon State Bar Formal Opinion 2013-189: Accessing Information about Third Parties Through a Social Networking Website

Articles

- Let Technology Reduce Your Legal Malpractice Risks, The Recorder, September 2014, Randy Evans, Shari Klevens and Suzanne Y. Badawi
- Lawyers can look up jurors on social media but can’t connect with them, ABA ethics opinion says, ABA Journal, April 2014, Terry Carter
- Guidelines Explain How Ethics Rules Apply to Lawyers’ Use of Social Media Networks, Bloomberg BNA, March 2014
- Social Media Ethics Guidelines, New York State Bar Association Commercial and Federal Litigation Section, March 2014
- Judge removed from divorce case after sending one party a Facebook friend request, ABA Journal, January 2014, Stephanie Francis Ward
- Legal Ethics. Social Media. and the Jury, Orange County Bar Association, November 2013, Carol J. Buckner
- Lawyer’s response to client’s bad Avvo review leads to disciplinary complaint, ABA Journal, September 2013, Debra Cassens Weiss
- Web offers pearls of wisdom, but also legal tangles, California Bar Journal, August 2013, Diane Karpman
- Legal Ethics Is Playing Catch-Up to Create Social Media Guidelines for Lawyers, Judges, ABA Journal, August 2013, James Rodgers
- Lawyers, but Not Law Firms, May List Their ‘Specialties’ in Social Media Profile, Bloomberg BNA, August 2013, Samson Hatle
- Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media, St. Mary’s Law Journal, June 2013, John G. Browning
- Social Media and Attorney Advertising, California Lawyer, June 2012, Josh King
- From the Chat Room to the Courtroom: Social Media Postings as Evidence, California Bar Journal, May 2012, Wendy Patrick
- What Are “Friends” For?, Ethics Hotline, December 2011, Wendy Patrick
- Ethical Informal Discovery of Social Media, Los Angeles County Bar Association - County Bar Update, May 2011, Carol J. Buckner
- Juries Gone Wild - An epidemic of juror blogging, texting, and tweeting infatuated judges and defense counsel—and fuels motions for recusal, California Lawyer, April 2011, Pamela MacLean
- With "Friends" like these, California Bar Journal, June 2010, Wendy Patrick

Online Participatory MCLE Programs

- Cyberethics, Precariously Friending, and the new "Face" of Legal Practice - Ethical Implications for Lawyers in Cyberspace and Social Media, Criminal Law Section (1.0)
- Ethics on the Outside: Electronic Communication and Professional Responsibility - Can They Coexist?, Committees on Professional Responsibility and Conduct (1.5)
- Hazards of Transmissions: The Ethics When Technologies "Dye"; Law Practice Management & Technology Section (1.0)
- Jury Selection in the Digital Age, Criminal Law Section (2.5)
- Lawyering on the Outside: Electronic Communications & Social Networking vs. Ethics & Professional Responsibility, Office of Professional Competence (1.0)
- Legal Advertising: Ethical Implications for Lawyers in Cyberspace and Social Media, Committees on Professional Liability and Conduct (1.5)
- Legal Ethics, Social Networking, and Cyberethics, Criminal Law Section (1.0)
- Leveraging Technology to Win in Court, Law Practice Management & Technology Section (1.0)
- Privacy of Internet. Social Media and Mobile Transactions Under Federal and California Law, Antitrust & Unfair Competition Section and Intellectual Property Law Section (1.0)
- Social Media and International Legal Ethics: Tweeting About Your Practice Across Borders, International Law Section (1.5)
- Social Media in the Workplace: Different Workplaces, Different Rules, California Young Lawyers Association (1.0 / 0.5 Ethics)
- Social Media: Balancing Benefits and Ethical Burdens, Law Practice Management & Technology Section (1.0)
- Social Networking and Professional Responsibility: Can they Co-Exist?, Office of Professional Competence (1.5)
- The Legal Pandor’s Box called Facebook and Social Networking, Solo & Small Firm Section (1.0)
- Title: A Brave New World - Internet and Ethics, Labor & Employment Law Section (1.0)
- With "Friends" Like These - The New "Face" of Legal Practice: Ethical Implications in Cyberspace and Social Media, Committees on Professional Responsibility and Conduct (1.5)
The Association of the Bar of the City of New York Committee on Professional Ethics

Formal Opinion 2012-2:
JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror’s website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror’s social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney’s use of social media websites to research potential or sitting jurors?

OPINION

1. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (see American Bar Association Formal Opinion 319 (“ABA 319”)), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venue but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (see WSJ Law Blog (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. State v. Abdi, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (Juror’s Tweets Upend Trials, Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see id.) and other courts now include jury instructions on juror use of the internet. (See New York Pattern Jury Instructions, Section III, infra.) However, 79% of judges who responded to a Federal Judicial Center survey admitted that “they had no way of knowing whether jurors had violated a social-media ban.” (Juror’s Tweets, supra.) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal “communication.” Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the
“Rules”), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.\(^1\)

The Committee believes that the principal interpretive issue is what constitutes a “communication” under Rule 3.5. We conclude that if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney’s Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for not conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff’s counsel investigated the juror’s civil litigation history using Missouri’s automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.\(^2\) Although the court upheld plaintiff’s request for a new trial based on juror nondisclosure, the court noted that “in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage.” \textit{Johnson v. McCullough}, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that “litigants should endeavor to prevent retrials by completing an early investigation.” \textit{Id.} at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge “acted unreasonably” by preventing plaintiff’s counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff’s counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff’s attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court’s ruling was not prejudicial, the Superior Court stated that “there was no suggestion that counsel’s use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of ‘fairness’ or maintaining ‘a level playing field.’ The ‘playing field’ was, in fact, already ‘level’ because internet access was open to both counsel.” \textit{Carino v. Muenzen}, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).\(^3\)

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a “friend request” to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to “friend” a party, even if the “friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication” and is therefore prohibited by the rule against \textit{ex parte}
communications with represented parties. In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party’s social networking personal webpage, which is accessible to all website users, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly permitted." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers’ Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not 'friend' the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." Id. NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.5

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a “Communication”?
Any research conducted by an attorney into a juror or member of the venire’s background or behavior is governed in part by Rule 3.5(a)(4), which states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.” The Rule does not contain a mens rea requirement; by its literal terms, it prohibits all communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney’s purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a “communication” to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror’s social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of “communicate” and “communication,” which are not defined either in the Rule or the American Bar Association Model Rules.  

Black’s Law Dictionary (9th Ed.) defines “communication” as: “1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception. 2. The information so expressed or exchanged.” The Oxford English Dictionary defines “communicate” as: “To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across.” Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines “communication” (for the purposes of discovery requests) as: “the transmittal of information (in the form of facts, ideas, inquiries or otherwise).”

Under the above definitions, whether the communicator intends to “impart” a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the “transmission of,” “exchange of” or “process of bringing” information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the “sender” was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), infra.

Although the text of Rule 3.5(a)(4) would appear to make any “communication”—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.
More specifically, and based on the Committee’s current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow the attorney’s research or actions. However, other services may be more difficult to navigate depending on their functionality and each user’s particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites’ social functionality. An attorney may not, for example, send a chat, message or “friend request” to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a “communication” would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms’ settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation. In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney’s associations or membership in a network or group in order to access a juror’s information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror’s personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating any Rule “through the acts of another.” Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney’s benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (“PBA 2009-02”) concluded that if an attorney uses a third party to “friend” a witness in order to access information, she is guilty of deception because “[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’ pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit.” (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to “friend” an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys may not shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no “communication” occurs, the Committee notes the potential impact of jury research on potential jurors’ perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.
In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee’s view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, infra, great benefit that can be derived from detecting instances when jurors are not following a court’s instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.” Although the Committee concludes that an attorney may conduct jury research on social media websites as long as “communication” is avoided, if an attorney learns of juror misconduct through such research, she must promptly notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.9

On this issue, the Committee notes that New York Pattern Jury Instructions (“PJI”) now include suggested jury charges that expressly prohibit juror use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: “please do not discuss this case either among yourselves or with anyone else during the course of the trial.... It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial... For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom.” Moreover, PJI 1:10 states, in part, “in addition, please do not attempt to view the scene by using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties...” New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney’s 2002).

The law requires jurors to comply with the judge’s charge10 and courts are increasingly called upon to determine whether jurors’ social media postings require a new trial. See, e.g., Smead v. CL Financial Corp., No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror’s posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror’s conduct is misconduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a “conversation,” it may not always be obvious whether a particular post is “connected with” the trial. Moreover, a juror may be permitted to post a comment “about the fact [of] service on jury duty.”11

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless “(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not
to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service.” Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that “lawyers may communicate with jurors concerning the verdict and case.” (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that “it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror” to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. “Communication,” in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney’s research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is the process of bringing an idea, information or knowledge to another’s perception—including the fact that they have been researched. In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

1. Rule 3.5(a)(4) states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”

2. Missouri Rule of Professional Conduct 3.5 states: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that “if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court’s supervisory control over the jury selection process would, as a practical matter, be obliterated.” (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court’s ruling from the public file.

4. California Rule of Profession Conduct 2-100 states, in part: “(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 (“NYCBA 2010-2”) and SDCBA 2011-2 (both addressing social media “communication” in the context of the “No Contact” rule) were helpful precedent for
the Committee’s analysis, the Committee is unaware of any opinion setting forth a definition of “communicate” as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation,” and also states “a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” (Rule 8.4(c), (a).)

8. New York City Bar Association Formal Opinion 2012-1 defined “promptly” to mean “as soon as reasonably possible.”

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee’s purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. People v. Clarke, 168 A.D.2d 686 (2d Dep’t 1990) (holding that jurors must comply with the jury charge).

11. US v. Fumo, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) aff’d, 655 F.3d 288 (3d Cir. 2011) (“[The juror’s] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.”) (internal citations omitted).

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November 2013 - Legal Ethics, Social Media, and the Jury

As you look at the panel of prospective jurors in the courtroom, you certainly would like to know more about them in order to ascertain how they might view your client and your case. You are curious about the potential biases prospective jurors might hold, and concerned about whether your voir dire opportunities will uncover significant areas of prejudice. Mindful of your ethical obligations, you steer clear of direct contact with the jurors. During jury selection, you conduct your voir dire on behalf of your client. Asking whether anyone in the venire knows your adversary or her family, the panel remains silent. When you ask the jurors whether any of them has a Facebook account, one juror in particular answers no. Another juror acknowledges having a Facebook account, but shares little further information. You may think, “Nothing remarkable there.”

Fast forward. After an adverse verdict against your client, you learn that not one, but two, of the jurors are Facebook friends with the adverse party. Both jurors more or less concealed that information during the voir dire. Now you are talking about a new trial, and the judge is considering whether you should have investigated the jurors’ Facebook accounts during jury selection. Next time, to learn more about your jurors earlier, can you, or must you, in order to fully address your client’s interests, investigate your prospective jurors’ social media?

Ethical Duties Toward Jurors

Several core ethical concerns bear on this scenario, including the duty of competence, the duty of honesty, and prohibitions on communication with jurors. These intersect with the power (and mystery) of technology. Lawyers’ professional responsibilities include a duty to perform work competently, that is, with diligence,
learning, and skill. Cal. R. Prof. Conduct 3-110. Recent revision to the American Bar Association rule on competence requires lawyers to both understand the basic features of technology and to be informed regarding the risks and benefits associated with the use of relevant technology. Model Rules of Prof'l Conduct R. 1.1 cmt 6 (2012). Under the California rules, the duty of competence includes acquiring sufficient learning and skill before performance is required. Cal. R. Prof. Conduct 3-110. The duty of competence may require lawyers to conduct an online investigation of jurors, including looking at social media. To do that, lawyers must understand how to utilize social media without violating prohibitions on contacting jurors.

Ethical restrictions on lawyer contact with jurors preclude communicating, directly or indirectly, with anyone the lawyer knows to be a member of the jury venire, and with any juror during trial. Cal. R. Prof. Conduct 5-320. California's ethics rules also prohibit lawyers from directly or indirectly conducting an out-of-court investigation of a juror or venire member in a manner likely to influence the person's state of mind in connection with jury service. Id. In addition, lawyers have a duty to report to the court any improper conduct by a member of the venire or a juror. Id. While post-trial communication with jury members after the discharge of the jury generally is permissible under California's rules, lawyers may not make comments to members that are intended to harass or embarrass jurors or to influence a juror's actions in future jury service. Id.

The third major relevant area of ethics for our purposes is the duty of honesty. California law makes attorney deceit a misdemeanor. Cal. Bus. & Prof. Code § 6128(A). In addition, impersonating another actual person by electronic means can be a misdemeanor. Cal. Penal Code § 528.5. California law prohibits lawyers from engaging in acts involving dishonesty, whether as an attorney or otherwise, and requires that lawyers employ such "means only as are consistent with truth." Cal. Bus. & Prof. Code § 6106; Cal. Bus. & Prof. Code § 6088 (d). Finally, lawyers directing a third party's investigatory efforts have an ethical duty to supervise non-lawyers working under their direction to assure that such subordinates operate in an ethical manner. See Cal. R. Prof. Conduct 3-110, Discussion.

**Vetting the Venire**

As a competent lawyer, do you have a duty to conduct online research regarding potential jurors? Courts have begun to endorse online investigation regarding jurors during the jury selection process, but some judges have expressed reservations. One court held that the trial judge should have permitted a lawyer to use his computer to conduct research on the venire panel. *Carino v. Muenzen*, A-5491-08T1, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010). In another case where a juror concealed information about her litigation history during questioning in the *voir dire* phase of the trial, the court indicated that a party must use reasonable efforts to investigate jurors' litigation backgrounds during jury selection, or prior to the jury's being empanelled, and report relevant information to the court. *Johnson v. McCullough*, 306 S.W.2d 551, 558-59 (Mo. 2010) (juror concealed information concerning her litigation history during *voir dire*, but information was readily available through automated case record service). However, the practice of scrutinizing jurors' social media, while becoming more commonplace, may not yet have risen to the level of an affirmative duty. See *Sluss v. Com.*, 381 S.W.3d 215 (Ky. 2012) (two jurors may have been Facebook friends with the mother of the victim during trial, and made misrepresentations during *voir dire*, from which the factual scenario described above is loosely derived).

Two ethics opinions from New York address the lawyer's duty of competence in connection with this issue, and are not so equivocal as the cases just referenced. Both agree that the duty of competence requires that lawyers research social media of jurors and potential jurors, but only so long as no prohibited "communication" occurs. N.Y. County Formal Opn. 743 (2011); N.Y. City Bar Formal Opn. 2012-2 (2012). This guidance indicates that lawyers may read public postings on jurors' social media pages before and
during trial, with several important provisos discussed below. In addition, a lawyer has a duty to research and understand the mechanics of any social media service or website that that lawyer uses to conduct such research, in order to avoid inadvertent prohibited communication with jurors. *Id.*

Bearing in mind that lawyers are prohibited from communicating with jurors, both New York opinions indicate that a lawyer may not “friend” jurors on Facebook, or otherwise connect with jurors or potential jurors through social media. The term “communication” is construed in the broadest possible sense, including any messaging a juror may receive as a result of a lawyer’s viewing of the juror’s social media pages, and including automated communication generated by the technology following contact with the site, without regard for the lawyer’s intent to communicate. This is consistent with the San Diego County Bar’s ethics opinion indicating that a “friend” request is at least an indirect, and therefore prohibited, communication. *San Diego County Bar Legal Ethics Opn. 2011-2 (2011)* (discussing prohibited contact with adverse parties). Just viewing a person’s social media site can leave a record of the visit. For example, a juror may receive notice that particular persons have visited the juror’s LinkedIn page, or receive a communication from the social media service that, for an extra fee, the juror can see everyone who has visited the person’s site for a certain period of time. Broadly construed, this would violate the prohibition on communication.

In addition, lawyers may not subscribe to jurors’ Twitter accounts, nor send Tweets to jurors, since following a juror on Twitter would result in a notification to the juror, resulting in improper communication. Chats and messaging with jurors or potential jurors via social media are also off limits for lawyers. The key issue here is gaining an understanding of the social media site you are visiting to determine what actions of the lawyer or her proxy will result in a juror learning of the contact. Such contact runs the risk of improperly influencing or intimidating a juror.

Both New York ethics opinions also caution lawyers not to use deceitful contact in viewing a juror’s social networking sites, and advise lawyers not to have proxies contact jurors using deception or misrepresentation when conducting jury research. Despite this common-sense application of the rules against deceit, some lawyers have adopted false personas online and other lawyers have directed third parties (such as their paralegals) to do so. John G. Browning, *Keep Your “Friends” Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 St. Mary’s Journal of Legal Malpractice & Ethics 204, 225, 228-29 (2013) (discussing prosecutors’ posting under pseudonyms online and attorneys’ delegating online investigation to paralegal). The use of deception through “over-zealous efforts to effectuate a legal strategy” reflects a disregard of ethical duties that can constitute moral turpitude. *See In re Maloney, 4 Cal. State Bar Ct. Rptr. 774 (2005)*; Cal. Bus. & Prof. Code § 6106.

Juror tweeting and blogging during trial is difficult to detect, and yet, can lead to mistrials. *N.Y. City Bar Formal Opn. 2012-2*. Courts have adopted a range of practices to prevent use of social media by jurors, including use of jury instructions and admonitions, frequent reminders, use of posters, confiscation of devices, warnings about penalties (fines and contempt), distribution of copies of warnings, and asking jurors to sign formal statements of compliance. Meghan Dunn, *Juror’s Use of Social Media During Trials and Deliberations—A Report to the Judicial Conference Committee on Court Administration and Case Management*, 8-9 (2011) available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf). While detected conduct is relatively rare, should a lawyer become aware via social media that a juror is Tweeting, posting, or blogging about a case, or otherwise discussing the case via social media, the attorney’s ethical obligation is to advise the court regarding such activity.
Gone are the days when lawyers tried to discern juror predilections based on mere observations of their tee-shirt slogans and the type of reading materials jurors brought with them into the courtroom. In today’s digital environment, analysis of social media in investigation of potential jurors can yield important information relevant to possible bias and prejudice of jurors. Monitoring social media of jurors during trial may reveal misconduct by empanelled jurors. Navigating the social media maze proves challenging as the functionality of technology changes. Competent lawyers will utilize this resource appropriately and inform themselves regarding the extent to which the investigation of jurors through social media would generate a “communication” with jurors, as construed in the broadest sense, to avoid ethical violations.

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Indiana Model Civil Jury Instruction 101-Duty of Jurors Admonishment

Members of the Jury:

You have been selected as jurors and have taken an oath to well and truly try this case.

Keep an open mind. Do not make a decision about the outcome of this case until you have heard all the evidence, the arguments of counsel, and my final instructions about the law you will apply to the evidence you have heard.

Your decision must be based only on the evidence presented during this trial and my instructions on the law. Therefore, from now until the trial ends, you must not:

- Conduct research on your own or as a group,

- Use dictionaries, the Internet, or any other resource to gather any information about the issues in this case,

- Investigate the case, conduct any experiments, or attempt to gain any specialized knowledge about the case, or

- Receive assistance in deciding the case from any outside source.

You also must not:

- Use laptops or cell phones in the courtroom or in the jury room while discussing the case,

- Consume any alcohol or drugs that could affect your ability to hear and understand the evidence,

- Read, watch, or listen to anything about this trial from any source whatsoever, including newspapers, radio, television, or the Internet,

- Listen to discussions among, or receive information from, other people about this trial, or
- Visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

Finally, you must not:

- Talk to any of the parties, their lawyers, any of the witnesses, or members of the media. If anyone tries to talk to you about this case, you must tell the bailiff or me immediately.

You may discuss the evidence with your fellow jurors during the trial, but only in the jury room, and only when all of you are present. Even though you are permitted to have these discussions, you must not make a decision about the outcome of this case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else.

In this age of instant electronic communication and research, I want to emphasize that in addition to not talking face to face with anyone else about the case, you must not communicate with anyone or post information about the case, or what you are doing in the case, by any means, including telephone, text messages, email, internet chat rooms, blogs, or social websites, such as Facebook, MySpace, or Twitter.

You also must not Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the parties, witnesses, lawyers, or Judge.

During the trial, you may tell people who need to know that you are a juror, and you may give them information about when you will be required to be in court. But you must not talk with them or others about anything else related to the case. After your service on this jury is concluded, you are free to talk with anyone about the case or do whatever research you wish.

I want you to understand why these rules are important.

Our law does not permit jurors to talk about the case with anyone except fellow jurors. The law also does not permit jurors to allow anyone to talk to them about the case. The reason for this is that only jurors are authorized to render a verdict. Only you have been found to be fair, and only you have promised to be fair--no one else has been so qualified.

Our law does not permit you to visit a place discussed in the testimony because you cannot be sure that the place is in the same condition as it was on the day in question. Also, even if it were in the same condition, once you go to a place to evaluate evidence in light of what you see there, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, law, or person related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair for you to base your decision on some reporter's view or opinion, or upon information that you acquire outside the courtroom from a source that cannot be challenged or cross-examined by the parties.

These rules are designed to help guarantee a fair trial, and our law accordingly provides for serious consequences if the rules are not followed.

I trust that you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know that you will do so.
Comments

Each time the jury is allowed to separate, the trial court is required to admonish jurors concerning their conduct. Ind. Code § 34-36-1-5. The Committee has expanded this instruction to specify several prohibitions and to explain the reasons for those prohibitions.

This instruction represents an attempt to reconcile Ind. Jury Rule 20(a)(8) and Ind. Trial Rule 47(B). Indiana Jury Rule 20(a)(8) requires a court to instruct the jury “that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.” Ind. Trial Rule 47(B) states in part, however, “If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.”

The admonition concerning drugs and alcohol is based upon Schultz v. Valle, 464 N.E.2d 354, 357 (Ind. Ct. App. 1984), which held that a verdict is invalid per se if a juror consumed an alcoholic beverage after deliberations began.

In cases where a jury view is anticipated, the provisions relating to visiting places in this Instruction should be modified accordingly.
Social media has been lauded for its power to enrich our social and professional networks with good reason. At the same time, there are serious risks and liabilities associated with the Internet and social media, particularly for legal professionals and their clients. To begin with, there are risks and liabilities covered by the rules of professional ethics, confidentiality, defamation, copyright, and trademark, not to mention legitimate concerns over privacy and safety. In addition, there exists genuine apprehension about social media’s effect on time management. Social media research is time consuming and requires new skills to be learned along with timely awareness of new technologies. Finally, there is a real danger of damage to reputation from negative reviews or online campaigns launched against an individual or company. These concerns are daily issues for all Internet users to manage.

Legal professionals need to become more knowledgeable about the best use of social media research – not just for their own sake but also to better serve their clients. Reputation monitoring and opinion mining is becoming progressively more important for legal professionals. It has become common for Internet users to Google themselves. Fifty-seven percent (57%) of adult Internet users now use search engines to find information about themselves online.¹ However, if you are a legal professional or a corporate litigant it may not be enough to simply type your name into Google. For a litigator who is going to trial, even more attention and analysis is required to keep up with the demands of social media and its impact on the jury pool. Information available online is readily accessible to jurors. You need to do in-depth research to find out what the jury pool has access to regarding you and your client.

PUBLIC OPINION GONE WILD

Social media provides many new ways for people to publicize their opinions, and the prepared litigator needs to be aware of those opinions. A few examples readily highlight the relevance of social media research and analysis in the litigation context.

Social media research can be used to measure public opinion on hot button issues that may arise in your case as it progresses to trial. Consider all of the recent litigation related to the financial sector and the economic downturn. A 2009 Harris Poll provides data on the public’s opinions of the 60 most visible companies in the United States. It is no surprise that the financial sector received the lowest reputation scores. In the last few years, Americans have experienced more job loss, increased foreclosure rates, and bankruptcies. They have used social media to express their anger and frustration, not only towards the financial sector, but also

¹ Source: Pew Internet & American Life Project, Reputation Management and Social Media, Washington, DC, May 2010
towards professionals and corporations in general. All nature of opinion has been increasingly expressed on numerous blogs, in an explosion of online groups and forums, and through an abundance of news readers’ comments in the daily online news outlets. Mining this vast resource of opinion data provides valuable insight into the public’s attitudes and beliefs about case-related issues.

Research should also be done into any negative social media related to your client. Consumer reviews, viral videos, online flame wars, flash mobs, and spontaneous Twitter or Facebook protests have empowered stakeholders and activists to operate on a wider scale and have broader influence than ever before. Activists and angry stakeholders lurk in every corner of the Internet threatening to send out viral videos and initiate online campaigns and protests. Negative messages like these can affect professional reputation, company status, and have a powerful impact on the jury pool. Although consumer review and rating sites such as Amazon.com, Consumerist, Yelp, Ripoff Report, Complaints Board, Avvo, and Merchants Circle etc. have been popular for over a decade, ratings and reviews not limited to just consumer issues any more. Many sites include reviews and opinions of companies and businesses, including doctors, lawyers and other professionals. Monitoring these sites along with the multitude of other online opinion forums is a necessary part of trial research. Professionals need to be aware of the potential for harm in negative online reviews.

BP’s oil spill and the reaction to it provide a timely case study on the use of social media. BP’s response to the environmental disaster in the Gulf caused a barrage of negative feedback online. Critics and activists used social media to express their concerns and protests in unique ways. During the first month of the crisis, the official BP Twitter account, @BP_America, had only about 18,000 followers. A much more popular Twitter parody account, @BPGlobalPR, had over 187,000 followers and sent out more frequent satirical tweets about BP’s failed efforts to stop the flow of oil, including skeptical comments about the PR efforts and messages mocking Tony Hayward, BP CEO. Other activists sent out spoof TV ads, which quickly went viral; “BP Spills Coffee” has received over 10 million views on YouTube.

The “Boycott BP” group on Facebook is followed by over 800,000 people who have provided more than 90,000 links to detrimental information and photos about the company and the event.

BP worked to manage the intensity of social media activism. It responded with a variety of its own social media strategies, including reportedly spending $1 million on Google Adwords to ensure favorable search engine placement of their ads and PR efforts. They also created an informative website, “Gulf of Mexico Response Information” (www.BP.com), invested at least $5 million in TV ads, and created an official BP YouTube channel, a BP Facebook page, and a BP Flickr account.

SOCIAL MEDIA ANALYSIS INFORMS FORMAL JURY RESEARCH AND TRIAL STRATEGY

We’ve covered the risks of social media thus far, but it also has a significant potential upside for you and your clients. The biggest potential social media holds for legal professionals as a tool is for trial research through in depth social media analysis, which involves rigorous study of news media and Internet communications that may influence your potential jury pool’s attitudes, beliefs, and understanding of case-specific issues. The valuable data gathered online can inform many aspects of trial practice, including opposition research, witness research, jury selection, venue analysis, change of venue studies, online panel review, and much more. Social media analysis is most effective for supporting trial practice when it includes a study of opinions and attitudes in a potential jury pool. It is no longer enough to rely on a clipping service to keep track of what is being said about you, or your client. These days the task of monitoring public opinion is much more robust, including tracking influence and authority in blog conversations, harvesting numerous readers’ comments, sifting through rapid real-time comments, and taking into account the array of reviews and ratings from all corners of the Internet. Especially with large amounts of information, this requires advanced search techniques and qualitative and quantitative tools to measure sentiment and mine opinions. Social science methods, such as content analysis techniques, can provide reliable quantitative results of the data found online.

Last year there was a tsunami of appeals and mistrials due to juror misconduct on Facebook, Twitter and Google. There will be more. Preparing for Googling jurors means knowing everything a potential juror could be exposed to. Prior to and during trial, attorneys must assume that jurors could look up key definitions on Wikipedia, use Google to research trial participants, including the lawyers, as well as search for geographical locations and the history of the case. Part of the trial team’s new due diligence is being informed about what is available online. For example, motions in limine are potentially much less effective if excluded evidence is online. Recent trials have demonstrated that there is a danger of juror exposure to potentially inadmissible evidence, undisclosed information, and excluded facts that are easily obtained and shared. Not to mention that opposing parties could plant information and misinformation. By properly monitoring social media, there is less potential for foul play and jury contamination. Litigators can benefit from in-depth social media analysis and
expert tracking of opinions and sentiment about their case issues. Social media due diligence before and during trial requires sophisticated search techniques and analytical methods. Ultimately, formal jury research is the best study of jurors’ preexisting attitudes, opinions and beliefs. However, your jury research will be much more targeted after performing effective social media analysis. There is no substitute for a rigorous social science based survey or strategy development through a mock trial, but now we also need to be aware of what case-related information is available to the jury pool, what they could have been exposed to, and what they could potentially seek out online. Social media analysis combined with jury research is your best preparation for today’s jury 2.0.

### Glossary of Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tbody>
<tr>
<td>Viral Video</td>
<td>A video that becomes popular through Internet sharing.</td>
</tr>
<tr>
<td>Online Flame War</td>
<td>A heated discussion on message boards or through online comments sometimes inciting or attacking other commentators.</td>
</tr>
<tr>
<td>Flash Mob</td>
<td>A large group of people who assemble suddenly in a public place, usually organized through social media, or viral emails.</td>
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<tr>
<td>Social Media Marketing</td>
<td>Use of social media to promote a business or service.</td>
</tr>
<tr>
<td>Social Media Research</td>
<td>Basic Internet research including Google.</td>
</tr>
<tr>
<td>Social Media Analysis</td>
<td>A rigorous study of news media and Internet communications which influence the potential jury pool’s attitudes and beliefs as well as how they understand specific case issues. Social Media Analysis utilizes sophisticated qualitative and quantitative tools to inform jury research and trial strategy.</td>
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Some Rules of Thumb for Voir Dire and Jury Selection

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• Rules of thumb, not hard and fast rules because every voir dire, jury and case is unique.

• Be careful about giving up the wheel to the jury consultant during jury selection.

• On the other hand, depart from the approach you and your jury consultant agreed upon only if you can articulate why you should.

• Be wary of putting all your eggs in a very attractive basket • your ability to predict that a certain juror will be influential is likely to be more accurate than your prediction that juror will favor your side.
Business cases are typically complex and involve concepts unfamiliar to the average juror. Because of this, winning a business jury trial requires understanding the psychology of jurors and how jurors will use the testimony they hear at trial to reach their verdict. Jury psychology provides the basis for understanding how jurors will react to the facts of your business trial.

While jury psychology can be applied to all aspects of the trial including jury selection, opening statements, order of proof, witness preparation, demonstrative evidence, closing arguments, jury instructions, jury interrogatories and post-trial interviews, this article will focus specifically on openings and jury selection. Openings will be considered first, for it is only after understanding the psychology of how your case will be presented to the jury that you can consider what types of jurors will be most favorable and unfavorable and how to identify those jurors during voir dire.

What is Jury Psychology?

Jury psychology involves empirical research into how jurors do their job. This involves studying the attitudes and predispositions jurors bring to court, how jurors perceive the testimony and evidence they receive during the trial, how their previous attitudes and predispositions serve as cognitive filters through which they interpret what they hear at trial and how they subsequently reach their verdicts. In order to understand the psychology of jurors, it is necessary to understand how they feel about being jurors, how they feel about the parties in the litigation, how they feel about the lawyers, witnesses and judge and how they feel about the law that they are asked to apply to the case. These things can be studied through a variety of research techniques designed specifically for studying litigation.

At DecisionQuest, we have conducted research on over 18,000 real and mock jurors. Our post-trial interviews with actual jurors have confirmed that our research with mock jurors provides valid information on how actual jurors react at trial. The research techniques we employ include various types of trial simulations, juror attitude studies involving controlled experimental conditions and juror attitude polls. Some of the implications of this work for openings and jury selection are discussed below.

Opening Statements

Our research indicates that in the vast majority of cases jurors very much want to reach what they consider to be the right verdict. They will work very hard to be sure that they are not making a mistake. As part of this process, the jurors recognize that they have not been given the whole story at trial. Thus, they fill in the gaps with information from their own lives and experiences.

In your opening and throughout your case, you must give the jurors the information they need to help them...
reach the "right" verdict. This involves giving them a story of the case which is consistent with the jurors' own life experiences and which prevents them from bringing into their reasoning extra-judicial experiences which are inconsistent with your positions.

Using Themes

Psychological research has shown that presenting your case using key themes is the best way to win jurors over to your position. Human learning takes place through organizing complex events into simple concepts. Most business trials are quite complex for the average juror. Thus, it is important to present a few key issues for the jurors to focus on and around which to organize all the testimony they will hear. If the jurors accept your few key concepts, they will attempt to fit all further information they receive at trial into those concepts. If the information they receive fits, as yours will, it will be accepted. If the information does not fit and you have developed themes inconsistent with your opponent's case, the information will be rejected.

In a contract dispute involving the failure to close a major real estate transaction, the jurors were confronted with complex financial reasons for the failure to close. The buyer maintained that the failure to close was a breach of the good faith provision of the memorandum of agreement because the seller, after receiving a better offer after signing the M.O.A., avoided attending negotiation sessions (necessary to transform the M.O.A. into a final sales contract) until the deadline for closing had passed.

When we originally presented this case to mock jurors, they found a variety of valid business reasons for the seller's failure to close. However, after all of the complex facts were grouped into three simple themes, the mock jurors found strongly in favor of the buyer. The simple themes were: 1) A deal is a deal; 2) He had a better offer; and 3) Where was the seller when it was time to negotiate in good faith?

In another recent case, an extremely complex antitrust matter involving manipulation of a commodities market, our mock jurors had trouble separating losses in the marketplace caused by manipulation of the market from losses caused by normal market forces. In addition, the jurors tended to equate speculation in commodities with gambling and to believe that any losses incurred were to be accepted, just as gambling losses are to be accepted and are not recoverable. However, when presented with the simple theme that the "roulette wheel was rigged," the mock jurors quickly understood that investors had a right to a fair and non-manipulated market. In a five-month trial, the theme that the "roulette wheel was rigged" was sounded from opening through closing and resulted in a $100-million-dollar-plus verdict. In post-trial interviews, the actual jurors stated that the main factor in their verdict was understanding that "the roulette wheel had been rigged" in the market.

Trial Simulations

The above opening themes were developed through the use of trial simulations. By presenting the basic issues of a case to mock jurors, it is possible to learn what the actual jurors will think are the key issues in the case and how to present those issues most favorably. While experienced trial lawyers are adept at reducing complex cases to clear issues, it is still important to get the input of mock jurors. Simply put, lawyers think differently than jurors do. This is not surprising as lawyers have self-selected into the field of law. In addition, they have then gone through three years of rigorous professional training which is as much training in a way of thinking as it is in learning professional skills. Thus, counsel often view trial issues far differently than do lay jurors.

Trial simulations provide more than just the themes to be used in openings. They allow researchers to evaluate how the psychological and legal issues in a case will interact with the jurors' attitudes and life experiences to yield a verdict. Thus, all elements of the case can be studied for maximum juror impact.

While there are a great variety of trial simulation techniques, including full mock trials, the most simple and cost-efficient technique is a focus group. A focus group is a small group of mock jurors who are presented with the key issues in a case and then discuss their reactions to those issues.

In conducting a focus group, selection of a proper research site is an important first step. While the research should ideally be conducted at the same location as the trial, it is occasionally necessary for reasons of confidentiality to find a site in a nearby, but similar, location. The facility for conducting the research is also important. While it is frequently done, it is not a good idea to invite mock jurors to a law office for this research. Jurors, as are all people, are influenced by their surroundings and will produce biased results due to their perceptions of the law firm.

At DecisionQuest, we use research facilities with one-way mirrors which allow counsel and researchers to observe everything that occurs in the mock jury room. In communities where a one-way mirror is not available or for cases which cannot be studied in
our own research facility, it is advisable to use a video camera to provide a live feed to a monitor in a nearby room.

When recruiting mock jurors, it is important to only use people who are qualified to serve as jurors in the venue of interest. The members of the mock panel should include a representative sampling of ages, occupations, socioeconomic classes and other such demographic factors. We recommend against trying out your case on office staff, friends and spouses who are not typical of the jury pool and whose perceptions of you will bias their response to the case issues.

We typically present the case to the mock jury through the use of mock openings. These can either be live which is exciting to the mock jurors or on videotape which allows better control of the material presented. In either case, it is essential to present balanced openings, giving full and proper weight to your opponent's case. The research is invalid if you present your best evidence and a weak case for the opposing side. In selecting counsel to present the mock openings, beware of having a junior associate represent opposing counsel while you, as senior lead counsel, present your case. This lack of balance in power will be noted by the mock jurors.

It is valuable to videotape the mock jury's deliberations. This allows a detailed analysis later, and makes it possible for those who did not attend the session to observe the jurors' responses.

Finally, we recommend that a skilled jury psychologist should take part in the jury's discussion. It is an error to simply allow the jurors to deliberate to a verdict. They frequently become stuck on minor points, waste time on extraneous information, misinterpret important evidence and reach a verdict without discussing major themes. While all of that provides valuable information for trial counsel, there is much additional information that can be obtained.

The jury researcher can guide the jurors forward to new points, can clear up misconceptions and can probe the underlying beliefs and attitudes expressed by the jurors. Also, hypothetical situations and alternative trial scenarios can be presented to assess the jury's possible reactions. The goal of the research is not the verdict (although the verdict is important) but what factors produced that verdict.

When time and budget permits, successive focus groups can be conducted to refine openings and test trial themes until the most advantageous approach is found. It is also possible to present the mock openings to large groups of jurors which can then be separated into several separate juries for additional data collection.

Jury Selection

As noted above, jury selection follows from your research on trial themes. After you have identified the key psychological and legal issues in your case and how you will present them to the jury, you can determine what types of jurors will be most favorable and unfavorable to your case presentation.

The first step in jury selection is a thorough preparation for voir dire. You should research the nature of the jury pool from which you will be drawing, and learn what the jury panel will probably look like. Several years ago we were involved in an antitrust action which centered around government deregulation. Opposing trial counsel used an analogy for the rural jury based on the impact of airline deregulation. Unfortunately, none of the jurors used airline services or were aware of the impact of deregulation. That lawyer had failed to understand the nature of his jury pool.

Another step in preparation is to learn the type of voir dire conducted by the judge you will appear before. This will include what types of questions will be allowed, who will conduct the questioning (Court or counsel), whether the questioning will be on a group or individual basis and how challenges for cause and peremptory challenges will be exercised.

Finally, you should decide if pre-voir dire motions would be useful in an effort to improve the conditions of voir dire for this specific case. The first of these to consider is a change of venue. While a change of venue is more difficult to obtain in civil than in criminal cases, the motion may be granted given sufficient evidence of juror bias.

There are two additional benefits to a change of venue motion. The first is that, while the Court may not grant the motion, it will be sensitized to the bias you have brought to its attention and may give you more favorable voir dire questioning and leeway on challenges. The second advantage is that the empirical research you have conducted to support the change of venue motion will be useful to you for trial strategy and jury selection.

Other motions to improve the conditions of voir dire may include requesting written juror questionnaires, individual voir dire on sensitive issues and special jury panels. Written questionnaires are especially useful as they have been shown to reveal juror biases which are not usually discovered during oral voir dire. Jurors are more candid when writing their answers than when being asked to respond in front of a large group of strangers in open court. In addition, sensitive areas of questioning are more easily covered in the privacy of writing.

If you are allowed to question the jurors during voir dire, it is important to do so in a way that establishes a favorable rapport with them. Jury selection is the jurors' introduction to the case. It is their first opportunity to view and evaluate you and the opposing counsel. If you can make a favorable impression now, the jurors will be more receptive to your presentations during trial.
There are several ways to establish rapport and make a favorable impression on the jurors. The first is by being helpful, such as explaining the questioning procedure and the mechanics of what is going on. Jurors are unfamiliar with the trial process and are anxious about having been subpoenaed for jury selection and being in court. Typically, jurors do not know what is going to happen to them and do not even know if they will be allowed to go to the bathroom or have lunch. If you are able to reduce some of their anxiety by providing this type of information to them, you will appear to be both knowledgeable and helpful. In addition, you should be respectful, polite and sincere. Jurors will appreciate your professionalism and will carry this impression with them into trial.

Finally, psychological research has shown that self-disclosure is a social cue or signal to others that it is proper to reveal things about themselves. That is, if you tell the jurors some personal information about yourself, they are then more likely to tell you personal information about themselves. The best way to do this is to tell them who you are, how long you have been practicing law, why you are asking them these questions and why it is so important for you to hear their answers.

During the questioning, it is also important to introduce the jurors to your case and condition them to your themes. Jurors do not recognize the adversarial nature of voir dire and have not yet developed the evaluative mindset they will use during trial. Because you are not bound to the rules of evidence, it is possible to tell the jurors your side of the story as part of your questioning. In addition, you can use your questions to introduce the jurors to some of your key themes and to desensitize or "inoculate" the jurors against the negative aspects of your case.

Where permitted, it is also important to obtain favorable pledges from jurors. It does have an impact on jurors when you ask them to promise you that they will be open-minded, apply the proper burden of proof and consider the elements of your case. This is effective for several reasons. The first is that you are asking jurors to endorse statements upon which they have had no prior opinion. That is, they have never thought about the burden of proof, so if you get them to agree to hold your opponent to a certain burden, the jurors will accept their statement of endorsement as if it were their own long-held opinion. Secondly, people find it difficult to go back on publicly-made statements. They believe that others have heard them make this pledge and will judge them negatively if they later go back on their promises.

The most important aspect of voir dire is the exercising of challenges to remove jurors who are unfavorable to your case. In order to do this, you must develop profiles of jurors who will be favorable and unfavorable and develop voir dire questions which will provide you with the information you need to identify those jurors during voir dire.

It is often useful to conduct pre-trial research such as juror attitude studies or opinion polls which allow the correlation of juror demographics and attitudes with favorable and unfavorable positions on the case issues. However, this type of research requires proper scientific sampling of the jury pool and the development of questions in the research which will be useful at voir dire.

It is not useful, for example, to discover through pre-trial research that jurors with obsessive-compulsive disorder are bad for your case, as you will not be able to identify these jurors during jury selection.

In considering characteristics of jurors, it is important to get beyond simple demographics such as age or gender, and examine the jurors’ life experiences. This is because, as noted above, jurors fall back on their own experiences to understand the story they are being told at trial. Thus, it is important to look at what there is about this juror's life experiences that will predispose the juror to view your case favorably or unfavorably.

In business litigation, the juror's own work experience is often an important key. What is the juror's occupation? What level of employment has the juror attained? If a managerial or supervisory position, how responsible is the position and what are the duties? What type of company does the juror work for, and are the policies of that company similar or dissimilar to your client's?

However, it is important not to stereotype jurors on the basis of occupation. Many people are highly intelligent and analytical but have occupations that do not reveal these intellectual traits. In addition, jurors can hold biases that will impact your case that are totally independent of their occupations. Thus, you must also inquire over as many aspects of the juror's life as the court will allow, especially concerning the juror's own experiences with the business issues at trial.

Finally, the jurors who are seated are often not pleased about having been selected for jury duty. They often rationalize their misfortune by believing they were chosen because they were special and in some way superior to the jurors who were challenged. You should capitalize upon this both during voir dire and trial by letting the jurors know that you are seeking fair-minded, independent, hardworking and generally superior people and are pleased to have them on your jury.

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