# Table of Contents

## Agenda

## Speaker Roster

## Speaker Biographies

### Twitter, Google and Blackberry, Oh My! Jurors and the Electronic Highway

- **Judges: Instructions and Other Reactions**
  - **Hon. Donald Shelton**

- **New Media and the Courts: The Current Status and a Look at the Future**
  - **Paula Hannaford-Agor**

- **Google Mistrials**
  - **Paula Hannaford-Agor**

### Judicial Intrusions During Jury Deliberations

- **Jury Trial Principles 14 – 16**
  - **Hon. Ricardo Urbina**

- **Taking a Stand: Thinking Outside the Jury Box**
  - **Hon. Ricardo Urbina**

### The Progress of Jury Reform in the States

- **Jury Pool Diversity in New York State**
  - **Prof. Valerie P. Hans**

- **Final Version of Passed Bill**
  - **Prof. Valeria P. Hans**

- **Jury Diversity Bill Now**
  - **Prof. Valeria P. Hans**

  - **Prof. Valerie P. Hans**

- **Jury Management in Indiana**
  - **Hon. Theodore Boehm**

- **Indiana Rules of Court: Jury Rules**
  - **Hon. Theodore Boehm**

- **New Jersey Rules of Court**
  - **Dennis Drasco**

- **Juror Basics**
  - **Dennis Drasco**
Taking A Stand on Taking the Stand:
The Effect of a Prior Criminal Record on the Decision to
Testify and on Trial Outcomes  
Prof. Valerie P. Hans

The Impact of Prejudice Screening Procedures on
Racial Bias in the Courtroom
Prof. Regina Schuller
THURSDAY, OCTOBER 21

9:30-10:30am REGISTRATION

10:30 - 11:00am WELCOME AND OPENING REMARKS

Professor Stephen Saltzburg
Chair, ABA Commission on the American Jury Project

11:00 - 1:00pm TWITTER, GOOGLE AND BLACKBERRY, OH MY!
JURORS AND THE ELECTRONIC HIGHWAY

Honorable Donald Shelton
Washtenaw Co. Michigan Circuit Court

Paula Hannaford-Agor
National Center for State Courts

Professor Shari Diamond
Northwestern University School of Law
American Bar Foundation

Patricia Refo
Snell & Wilmer, Phoenix, AZ

1:00 - 2:30pm LUNCH

Presentation of the Jury Impact Award

2:30 – 4:30pm JUDICIAL INTRUSIONS DURING JURY DELIBERATIONS

Honorable Ricardo Urbina
United States District Judge, Washington, DC

Professor Paul Butler
George Washington University School of Law

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Trout Cacheris

Gerald F. Ivey
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

Moderator
Professor Stephan Landsman
DePaul University College of Law

4:30pm RECEPTION
Friday, October 22

8:00-9:00am  Registration

9:00 - 11:00am  The Progress of Jury Reform in the States

Honorable Theodore Boehm
Indiana Supreme Court

Professor Valerie Hans
Cornell University

Dennis Drasco
Lum Drasco & Positan LLC

Honorable Jaqueline Connor
Los Angeles Superior Court

11:00-11:15am  Break

11:15am - 1:00pm  Frontiers in Jury Research

Professor John Gastil and Prof. Cindy Simmons
University of Washington

Professor Nancy King
Vanderbilt University Law School

Professor Stephen Saltzburg
George Washington University Law School

Professor Regina Schuller
York University, Canada
Prof. Valerie Hans
Cornell Law School
149 Myron Taylor Hall
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901 New York Avenue, NW
Washington, DC 20001-4413
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202.408.4400 Fax
gerald.ivey@finnegan.com

Honorable Donald E. Shelton
Washtenaw County Trial Court
PO Box 8645
Ann Arbor, MI 48107
734.222.3399 Phone
shelton@ewashtenaw.org

Prof. Nancy King
Lee S. and Charles A. Speir Professor of Law, Alexander Heard Distinguished Service Professor
Vanderbilt University Law School
131 21st Avenue S.
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615.343.9836 Phone
615.322.6631 Fax
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Prof. Regina A. Schuller
242 Behavioural Science Building
York University
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Prof. Stephan Landsman
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DePaul University
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Prof. Cindy Simmons
Department of Communication
University of Washington
Box 353740
Seattle, WA 98195-3740
206.384.1288 Phone
simmonsc@uw.edu

Patricia Refo
Snell & Wilmer
400 E Van Buren St #1900
Phoenix, AZ 85004-2202
602.382.6290 Phone
prefo@swlaw.com
Theodore R. Boehm

Theodore R. Boehm was appointed to the Indiana Supreme Court by Governor (now Senator) Evan Bayh in 1996. He grew up in Indianapolis, received his A.B. from Brown University in 1960, summa cum laude, and graduated magna cum laude in 1963 from Harvard Law School, where he was an editor of the Harvard Law Review. He served as a law clerk to Chief Justice Earl Warren of the United States Supreme Court. In 1964 he joined the Indianapolis law firm of Baker & Daniels where he became a partner in 1970 and managing partner in 1980. In 1988 Justice Boehm joined General Electric as General Counsel of GE Appliances and in 1989 became Vice President and General Counsel of GE Aircraft Engines. In 1991 he joined Eli Lilly and Company and returned to Baker & Daniels in 1995. Justice Boehm was Chairman and CEO of the organizing committee for the 1987 Pan American Games in Indianapolis, and was the first President and CEO of Indiana Sports Corporation, President of the Penrod Society, and a principal organizer of the Economic Club of Indianapolis. He is a member of the Nominating & Governance Committee of the United States Olympic Committee and currently serves as Chair of the Indianapolis Cultural Development Commission and director of Metropolitan Indianapolis Public Broadcasting, Inc., and Indianapolis Convention and Visitors Association. He is married and has four grown daughters and six grandchildren.
Paul Butler

Title: Associate Dean for Faculty Development and Carville Dickinson Benson Research Professor of Law

Education
B.A., Yale University; J.D., Harvard University

Biographical Sketch
Professor Butler teaches in the areas of criminal law, civil rights, and jurisprudence. His scholarship has been published in the Yale Law Journal, Harvard Law Review, Stanford Law Review, and UCLA Law Review, among other places. He was awarded the Distinguished Faculty Service Award three times by the GW graduating class and has been a visiting professor at the University of Pennsylvania Law School. In 2003, he was elected to the American Law Institute.

Professor Butler’s scholarship has been the subject of much attention in the academic and popular media. He has authored chapters in several books, written a column for the Legal Times, and published numerous op-ed articles, including in the Los Angeles Times, the Washington Post, and Dallas Morning News.

He lectures regularly for the ABA and the NAACP, and at colleges, law schools, and community organizations throughout the U.S. He clerked for the Honorable Mary Johnson Lowe of the U.S. District Court in New York, and then joined the law firm of Williams & Connolly in Washington, D.C., where he specialized in white collar criminal defense and civil litigation.

Following private practice, Professor Butler served as a federal prosecutor with the U.S. Department of Justice, where his specialty was public corruption. His prosecutions included a U.S. Senator, three FBI agents, and several other law enforcement officials. While at the Department of Justice, Professor Butler also served as a special assistant U.S. attorney, prosecuting drug and gun cases.
Plato Cacheris

EDUCATIONAL BACKGROUND

1973  University of Southern California, International Relations and Economics
1976  University of Southern California Law School  Juris Doctor
Admitted to the State Bar of California December 22, 1976; State Bar Number 70479
Admitted to the United States District Court, Central District August 18, 1982

PROFESSIONAL BACKGROUND

1977-1986  Los Angeles District Attorney's Office
1986    Judge, Los Angeles Municipal Court
        Appointed by Governor George Deukmejian October 6, 1986
1988    Judge, Los Angeles Superior Court
        Appointed by Governor George Deukmejian April 25, 1988

AWARDS AND HONORS 1986 TO PRESENT

2000 Judge of the Year, Criminal Section Los Angeles County Bar Association
2000 Judge of the Year, Century City Bar Association
2006 Outstanding Jurist of the Year, Los Angeles County Bar Association
2006 Lawdragon’s Leading 500 Judges Nationwide
2007 Included in Top 100 California Leading Lawyers by Daily Journal

PUBLICATIONS

Jury Service in Los Angeles County Los Angeles County Bar Los Angeles Litigator Winter 2001
One Day One Trial in Los Angeles California Litigation, State Bar of California Volume 18, Number 1, 2005 (April 2005)
Jurors Need to Have Their Own Copies of Instructions Los Angeles Daily Journal February 25, 2004
Ups, Downs and All, Serving on Juries Forum, Los Angeles Daily Journal May 17, 2005
CEB California Trial Practice: Civil Procedure During Trial. Chapter 1: “Handling Trials Efficiently” Co-Author April 2007
Perspectives From the Bench: One Day One Trial and What It Means to You CAALA The Advocate Magazine October 2007
Perspectives From the Bench: What Are Jurors Thinking? CAALA The Advocate Magazine June 2008
Perspectives From the Bench: Mandatory Settlement Conferences CAALA The Advocate Magazine 2009
CEB California Trial Practice: Civil Procedure Before Trial: Judicial Perspectives Opening Statements and Jury Deliberations 2009
PROFESSIONAL ORGANIZATIONS, COMMITTEES

California District Attorney's Association, Co-Chair/Co-Founder Sexual Assault Committee 1981-1982
Los Angeles County Bar Association, Chair, Sexual Assault Committee 1981-1982

Office of Criminal Justice and Planning, State Advisory Committee for the California Sexual Assault Services and Prevention Program 1980-1983
Member, Ad Hoc Committee to Draft Rules for Criminal Trials, Superior Court 1994
Los Angeles Superior Court Grand and Trial Jury Committee Vice Chair 1989 to 2000
Los Angeles Superior Court Trial Jurors Committee Chair 2000 to 2006
Los Angeles Superior Court Legislation Committee 1989
Los Angeles Superior Court Personnel and Budget Committee 1991, 1993
Member, Los Angeles Superior Court Task Force on Fairness and Equality 1994-1995
Member, Nominating Committee, California Judge's Association 1995
Member, Los Angeles Superior Court Ad Hoc Plan Oversight Committee, 1996-2000
Board of Directors, Carlthorp School, Santa Monica 1993-1998
Los Angeles Superior Court Criminal Court Committee 1997
Chair, Los Angeles Superior Court Pro Per Committee 1991 to 2001
Ad Hoc Committee on Death Penalty Appeals 1992
Chair, Written Questionnaire Committee, L.A. Superior Court 1992; member 1993, 1994
Member, Jury Deliberation Project, American Judicature Society 1997 to 1999
Los Angeles Superior Court Services/Sheriff Committee 1999
Member, Judicial Council Task Force on Jury System Improvement 1998 to 2006
Member, Media Committee, Los Angeles Superior Court, 1998 to 2000
Member, Hung Jury Advisory Committee, National Center for State Courts, 1999-2000
Member, Los Angeles County Bar Task Force on Jury Service Practices 2003
Vice Chair, Education Committee, California Continuing Judicial Studies 2004 to 2006
Member, AOC Committee on Pro Per Litigants 2004
AOC Steering Committee on Jury Rules Proposals 2005 to present
Member, ABA Commission on Juries 2004 to present
Member AOC Joint Working Group on Jury Administration and Management 2007 to present
Board Member, Association of Business Trial Lawyers July 2008 to 2010
Commission on Judicial Performance Special Master 2007 to present
Los Angeles Superior Court ADR Committee 2009 to present

PROFESSIONAL PRESENTATIONS

Faculty, Criminal Law and Procedure Institute, CJER 1992
Faculty, Los Angeles Superior Court Trial Management Conference 1993
Faculty, National Institute for Trial Advocacy 1993
Panel Member, Bench and Bar Panel on PACE Attorney Claims 1993
Faculty, Conference on Sexually Abused Children, Stuart House 1993
Faculty, Criminal Law and Procedure Institute, Capital Cases, CJER 1994
Faculty, Continuing Judicial Studies Program, Capital Cases, CJER 1995
Faculty, Continuing Judicial Studies Program, Trials Course, CJER 1995
Faculty, 1997 Criminal Law and Procedure Institute, CJER
Moderator, Panel on Civility, Los Angeles County Bar, November 1995
Panelist, Domestic Violence, Association of Probation Women 1997
Panelist, Sex Crimes Legislation, Women Lawyers Association of Los Angeles, 1997
Panelist, Media in the Courts, Women Lawyers Association of Los Angeles, 1997
Panelist, Summit Conference Multi Disciplinary Approach to Child Sexual Abuse, 1998
Panelist, Rutter Group Program on Criminal Law, 1998
Guest Speaker, Crime Talk TV, Los Angeles, One Day One Trial, 1999
Speaker: Jury Innovations: Next Steps, Conference of Chief Justices, Texas February 2000
Speaker: Jury Reforms CrimeTime Television Show, April 11, 2000
Speaker: Jury Issues: KJLH-FM Jacque Stevens Show, May 2000
Speaker, KSFO Barbara Simpson Show: Jury Reforms May 14, 2000
Presentation: Jury Innovations, Los Angeles County Bar Inn of the Court, June 7, 2000
Speaker Speaker: KZLA-FM Jury Innovations The Sunday Show, July 9, 2000
Jury Reform Presentation, Criminal Courts Bar Association, September 11, 2000
Faculty, Continuing Judicial Studies: Jury Issues, 8 Hour Program, Monterey, January 2001
KABC Talk Show: Jury Issues: February 2001
Speaker, “Presenting a Trial,” Los Angeles County Bar Association March 10, 2001
CJER CJSP “Jury Reforms” Eight Hour Training, Costa Mesa April 2001
CJER CJSP Faculty: Death Penalty Trials August 2001
Guest, KPCC Radio “Talk of the City” One Trial Jury Service August 8, 2001

Faculty, CJER Continuing Judicial Studies: Jury Issues. Monterey January 2002
CJER 2002 Civil Law and Procedures Institute: Jury Issues San Diego, March 1, 2002
Speaker, Court Clergy Conference: Jury Issues March 20, 2002
Speaker, Radio Show on One Day One Trial KJLH May 4, 2002
Faculty, Georgia Jury Summit, Augusta, Georgia May 9-11, 2002
Guest *KFI Bill Handel on the Law* radio show One Day Trial Service August 2002
San Diego Superior Court, Judicial Training on Jury Issues December 2002
Guest KROQ “Jury Service” on *Open Line* live morning show December 15, 2002
Faculty, Pro Per Cases and Difficult Defendants, Los Angeles Superior Court April 2003
CEB Panel: CACI Jury Instructions January 16, 2004
CJA 2004 Midyear Conference: Panelist on Pro Per Defendants/ Judicial Demeanor May 2004
Guest KROQ “Jury Service” June 27, 2004
Guest on “Pacesetters Program” KTLA Television Jury Sanctions July 13, 2004
Guest, KFI and KNXFM on Jury Sanctions July 2004
Guest, KABC, Jury Issues July 28, 2004
Panelist, Access to Justice Symposium, Mock Trial, Loyola Law School October 2004
Guest, Jury Sanctions, *AirTalk with Larry Mantle* KPPC89.3 FM October 20, 2004
Faculty, 2005 Statewide Judicial Branch Conference *Jury Management* September 2005
Faculty, 2006 Winter Continuing Judicial Studies Program, Three Day *Jury Management Course*
Los Angeles Superior Court Mandatory Civil Training: Jurors Panel February 2006
Faculty, CJER Criminal Law Institute; Innovative Jury Practices, March 2006
Special Presenter: Jury Innovations. ABOTA Meeting, April 5, 2006
Beverly Hills Bar Association Bench Bar Program: Jury Presentation April 20, 2006
Inns of Court West Los Angeles Panelist: Characteristics of Effective Attorneys June 1, 2006
Alumni Judge’s Panel Discussion, USC Law School, June 10, 2006
Faculty, California CJER Judge’s College: Jury Management June 15, 2006
Juries: “Putting It All Together” Three Day Program, CJSP San Diego, August 2-4, 2006
Faculty, CEB Program “Successful Civil Jury Instructions” Los Angeles August 5, 2006
Panelist “Elder Abuse” Consumer Attorneys Association of Los Angeles, Nevada September 2006
Program, Juries: “Where Do We Go From Here?” Texas Jury Summit, Houston October 4, 2006
Panelist, ABA Jury Symposium SMU, Dallas October 26-27, 2006
Jury Overview: Presentation to Japanese judges for Japan’s Jury Conversion in 2009; March 2007
Faculty: Jury Reforms. Fresno County Superior Court, Carmel, March 17, 2007
Faculty, Jury Innovations, Alaska Judicial Conference and Bar Convention, Anchorage May 4, 2007
Judge’s College, Berkeley California; Faculty: Jury Management (mandatory course) June 15, 2007
CJER Faculty: “Media and High Profile Cases” Anaheim September 27, 2007
Panel: Managing Difficult/High Profile Clients: Stories from the Front Line. ABTL April 22, 2008
Faculty: CJSP State of the Art in Jury Management. Manhattan Beach, August 6-8, 2008
Faculty: ABTL Conference Judicial Perspectives Hawaii September 27, 2008
Faculty: Jury Strategies  Association of Business Trial Lawyers Conference October 17, 2008  
Faculty: CJSP Hot Topics in Evidence: Juror Questions, La Jolla October 22, 2008  
Los Angeles Inns of Court Litigation Section: Brown Bag hour with lawyers January 2009  
Master of Ceremonies: Judicial Enrobing for Los Angeles Superior Court April and June 2009  
Santa Monica Bar Association Presentation ADR and Settlement Conferences June 24, 2009  
ABTL: Moderator Cultural Considerations in Cross Border Litigation Colorado Springs October 2009  
Beverly Hills Bar Association panel Picking a Jury in Times Like These. February 10, 2010  
Panelist, ASCDC Annual Seminar: Ethics of Pleadings and Discovery, Los Angeles, March 4, 2010  
Panelist: Jury Voir Dire Battle of the Titans. ABTL March 9, 2010  
Presentation: Jury Innovations in a Difficult Economy California State-Federal Judicial Council June 2010

**Judicial Assignments**

**Los Angeles Municipal Court 1986-1988**  
West Los Angeles Division 98 October 1986  
Metropolitan Courthouse Division 75 November 1986  
Central Arraignment Courts Division 82 December 1986  
Metropolitan Courthouse Division 75 January to June 1987  
West Los Angeles Divisions 90, 95, 99 June to December 1987  
West Los Angeles Division 99 January to April 1988

**Los Angeles Superior Court 1988 to present**  
Pasadena 1988  
Central Criminal 1989 - 2002  
Santa Monica (West District) May 2002 to present

**Current Assignment:** West District Department I Civil Trials  
(310) 260-3629  1725 Main Street, Santa Monica, California 90401
Shari Seidman Diamond

Shari Seidman Diamond is the Howard J. Trienens Professor of Law and Professor of Psychology at Northwestern University School of Law and is a Research Professor at the American Bar Foundation. She holds a law degree from the University of Chicago and a PhD in social psychology from Northwestern University. A leading empirical researcher on the jury process and legal decision-making, including the use of science by courts, she has published extensively in both law reviews and behavioral science journals. (www.law.northwestern.edu/faculty/fulltime/diamond/diamonShCV.pdf). Her publications on juries and on surveys have been cited by the U. S. Supreme Court, as well as by other federal and state courts.

She practiced law at Sidley Austin Brown & Wood in the areas of Litigation and Intellectual Property. She has also taught at the University of Chicago, Harvard, and the U. of Illinois at Chicago, served as editor of the Law & Society Review, and was president of the American Psychology-Law Society. She has lectured widely to scholarly and judicial audiences, and has served as an expert witness in American and Canadian courts on matters concerning juries, trademarks, and deceptive advertising. As a member of the ABA’s American Jury Project, she helped draft the Principles for Juries and Jury Trials adopted in 2005 and served on the executive committee of the American Jury Project Commission of the Seventh Circuit Bar Association. She was recently appointed to the Seventh Circuit Committee on Pattern Criminal Jury Instructions.

Professor Diamond’s recent research on real civil jury deliberations grew out of the controversy surrounding an innovative instruction telling jurors that they are permitted to discuss evidence during breaks in the trial rather than only during jury deliberations. The result was a unique field experiment in which cameras recorded jury deliberations. Publications from the project have appeared in the Arizona L. Rev., Court Rev., Harvard J. of Law & Public Policy, Judicature, Northwestern U. L. Rev., Vanderbilt L. Rev. and Virginia L. Rev.
Dennis J. Drasco

Dennis Drasco is a Certified Civil Trial Attorney in New Jersey and is listed in The Best Lawyers in America, New Jersey Super Lawyers, Chambers USA - America's leading lawyers in Business and Who's Who in American Law. He is a New Jersey Court Approved Mediator.

He is a member of the House of Delegates of the American Bar Association and former Chair of the ABA Section of Litigation, having served as Chair of the Section in 2004-2005. He was previously Vice-Chair and Chair-Elect. The Section of Litigation is the largest Section in the ABA with over 70,000 members.

He previously served as a member of its Council and as Co-Chair of the Condemnation, Land Use & Zoning and Construction Litigation Committees, where he wrote articles and served on several programs as a panelist, including programs entitled "ADR in Construction Litigation", "When the Banker Becomes Builder", and "Environmental Contamination on the Construction Site" and chapters in two books published by the ABA on Condemnation Practice.

He also delivered the summation in a mock trial entitled "Design/Build Construction Disputes" for the ABA Forum on the Construction Industry and the opening statement and summation in a mock trial/mediation sponsored by the American Bar Association Dispute Resolution Section. He participated in the ABA Section of Litigation videos "73 Ways to Win" (2001), "64 Ways to Improve Your Law Practice (And Life)" (2002) and "Ethical Issues: 40 Solutions for litigation" (2005).

He has been a member of the ABA Coalition For Justice and served as the Section of Litigation Liaison to the Standing Committee on Judicial Independence and the Commission on Public Financing of Judicial Campaigns. In 2004-2005, he was Co-Chair of the American Jury Project and is currently Chair of the Commission on The American Jury. He has been Co-Chair of the Section of Litigation Coordinating Committee on Diversity, Task Force For The Minority Trial Lawyer, its Strategic Planning Committee, and Co-Chair of a NITA Program to teach legal services attorneys trial skills.

He also was a Division Director and Co-Director of Divisions before being elected to move into the Chairs of the Section. Additionally, he served as a speaker on programs entitled "Procurement Law and International Arbitration", "Are Trials Vanishing?" and "Federal Practice for State Court Practitioners" sponsored by the New Jersey State Bar Association. A past Member of the Editorial Board of New Jersey Lawyer, the magazine, he authored articles entitled "How to Get From the War Room to the Courtroom: The Basics for Civil Trial Preparation", 152 New Jersey Lawyer 32 (1993) and Construction Contracts: Arbitration as a Means of Dispute Resolution in New Jersey, 219 New Jersey Lawyer 22 (2003)

He is currently President of the Association of the Federal Bar of New Jersey. In 2000, he received the Essex County Bar Association's Civil Trial Attorney Achievement Award and in 2006 received a "Professional Lawyer of the Year" award from the New Jersey Commission on Professionalism in the Law.

He is an active Member of the ABA Forum on the Construction Industry, the New Jersey State Bar Construction and Public Contracts Law Section and the ABA TTIPS Life, Health and Disability Committee and has authored articles on ERISA litigation.

He is currently Chair of the Essex County Bar Association's Judicial Selection Committee and past Chair of its Joint Medical-Legal Committee and Annual Conference.

He is a Master in the Seton Hall Law School Inn of Court and was elected a Fellow of the American Bar Foundation in 2002. He has served on many civic and charitable boards, including the United Way of North Essex and the Essex County Legal Service Foundation.

He is admitted to practice in New Jersey, New York, the United States District Court for the District of New Jersey, the Southern and Eastern Districts of New York, the United States Tax Court, the Second and Third Circuit Court of Appeals, and the Supreme Court of the United States.

Dennis specializes in the trial of complex commercial, construction, condemnation, insurance, medical malpractice and legal malpractice cases in Federal and State Court in New York and New Jersey and the mediation and arbitration of those cases in ADR forums.

Areas of Practice:
- Business Litigation
- Construction Law
- Eminent Domain
- Ethics & Professional Responsibility
- Health & Health Care Law
- Insurance Law
- Land Use & Zoning
- Legal Malpractice
- Litigation & Appeals
- Medical Malpractice
- Motor Vehicle Accidents -- Plaintiff
- Personal Injury -- Defense
- Personal Injury -- Plaintiff
- Products Liability Law
- Professional Malpractice Law
- Toxic Torts

Litigation Percentage:
100% of Practice Devoted to Litigation

Certification/Specialties:
Civil Trial, New Jersey Supreme Court

Bar Admissions:
- New Jersey, 1973
- New York, 1982
- U.S. Court of Appeals 3rd Circuit, 1973
- U.S. Court of Appeals 2nd Circuit, 1991
- U.S. District Court District of New Jersey, 1973
- U.S. District Court Southern District of New York, 1985
- U.S. District Court Eastern District of New York, 1989
- U.S. Tax Court, 1985
- U.S. Supreme Court, 1978

Education:
Rutgers, The State University of New Jersey School of Law - Newark, Newark, New Jersey, 1973
J.D., Doctor of Jurisprudence
Fordham College, 1970
BA

Representative Cases:

- *Shell Oil vs. Trailer & Truck Repair Co.*, 828 F2nd 205 (3rd Cir. 1987) (1987)

Representative Clients:

- TACP (Toshiba America Consumer Products LLC)
- Guardian Life Insurance Company

Honors and Awards:

- The Best Lawyers in America
- New Jersey Super Lawyer
- Chambers USA, America's Leading Lawyers for Business
- Who's Who in American Law
- Essex County Bar Association's Civil Trial Attorney Achievement Award, 2000
- New Jersey Commission on Professionalism in the Law - Professional Lawyer of the Year, 2006

Professional Associations and Memberships:

- House of Delegates of the American Bar Association
- Member
- ABA Section of Litigation, 2004 - 2005
- Chair
- Association of the Federal Bar of New Jersey, 2008-2009
- President
- American Bar Foundation
- Fellow
- American Bar Association - Section of Litigation
- Fellow
John Gastil

John Gastil is a Professor in the Department of Communication at the University of Washington, where he specializes in political deliberation and group decision making. Gastil received his B.A. in political science from Swarthmore College in 1989 and his Ph.D. in communication from the University of Wisconsin-Madison in 1994. In the 1990s, Gastil worked on campaigns for federal, state, and local office in California and New Mexico.


The National Science Foundation has supported numerous large-scale research programs in which Gastil has served as a principal or co-principal investigator. The Jury and Democracy Project rediscovered the jury system as a valuable civic educational institution. Gastil has also contributed to the Cultural Cognition Project, which explores the cultural underpinnings of attitudes toward various public policy issues. Most recently, Gastil has worked with Australian colleagues to study the flow of ideas and arguments through the Citizens’ Parliament held in Canberra in 2009 and he has designed a means of evaluating the 2010 Oregon Citizens’ Initiative Review process, an unprecedented attempt for a stratified random sample of voters to prepare voter pamphlet analyses for use by the wider electorate.
Paula L. Hannaford-Agor
Director, Center for Jury Studies
National Center for State Court

Paula L. Hannaford-Agor, the Director of the Center for Juries Studies, joined the Research Division of the National Center in May 1993. In this capacity, she regularly conducts research and provides technical assistance and education to courts and court personnel on the topics of jury system management and trial procedure; civil litigation; and complex and mass tort litigation.

Specific research efforts include:

- A national survey of judges, lawyers, and jury managers on existing jury improvement efforts;
- A national study of civil bench and jury trials in 46 large, urban courts in 2001;
- A multi-site examination of the frequency and causes of hung juries in felony cases;
- An analysis of judicial removal of jurors for cause and attorney use of peremptory challenges in the Superior Courts of California;
- A compilation of innovations in jury management technology; and
- An evaluation of the impact of Arizona Civil Rule 39(f) permitting jurors in civil cases to discuss the evidence among themselves.

She has authored or contributed to numerous books and articles on the American jury including *Jury Trial Innovations* (2d ed. 2006), *The Promise and Challenges of Jury System Technology* (NCSC 2003), and *Managing Notorious Trials* (1998). She is faculty for the ICM courses *Jury System Management* and *Promise and Challenges of Jury System Technology*. As adjunct faculty at William & Mary Law School, she teaches a seminar on the American jury.

Ms. Hannaford-Agor received the 2001 NCSC Staff Award for Excellence. In 1995, she received her law degree from William & Mary Law School and a Masters degree in Public Policy from the Thomas Jefferson Program in Public Policy of the College of William and Mary.
Valerie P. Hans

Valerie P. Hans is Professor of Law at Cornell Law School, where she teaches torts, social science and law, and a seminar on the contemporary American jury. She holds a Ph.D. in Psychology from the University of Toronto. She conducts empirical studies of law and is one of the nation’s leading authorities on the jury system. She has carried out extensive research and lectured and written widely about the jury and jury reforms. Her books on the jury include *American Juries: The Verdict* (2007, coauthored with Neil Vidmar), *The Jury System: Contemporary Scholarship* (2006); *Business on Trial: The Civil Jury and Corporate Responsibility* (2000); and *Judging the Jury* (1986, also coauthored with Neil Vidmar). She is a member of the New York Jury Demographics Working Group sponsored by the Office of Court Research, State of New York.
Gerald F. Ivey

Gerald Ivey has extensive experience in the areas of civil litigation and trial advocacy. He concentrates his practice primarily on jury trial patent cases involving biotechnology, medical devices, and mechanical products. Mr. Ivey has acted as lead trial counsel in jury cases for biomechanical devices, including cardiovascular stents, pharmaceutical products, such as glaucoma, arthritis, and autoimmune medications, and internet and computer hardware and software technologies. He has tried more than 60 cases to juries in federal and state courts.

Mr. Ivey was previously a partner at another law firm where he served as trial counsel on major product liability cases involving a variety of claims such as brake failure and loss of steering in automobiles; claims of sudden acceleration and crashworthiness in motorcycles and all terrain recreational vehicles; and electrical system failures in different products such as elevators, automobiles, and computer monitors. Over the years, Mr. Ivey has also handled numerous cases involving medical malpractice claims, general wrongful death actions, commercial, construction, and employment litigation.

Highlights

Serves as co-director and lecturer at the University of Virginia Law School Trial Advocacy Institute.

Adjunct professor instructing third-year law students in trial advocacy at the George Washington University Law School since 1993.

Instructor at the George Washington University Law School/D.C. Bar Association College of Trial Advocacy.

Lecturer at various ABA, PLI, and DRI programs.

Professional Recognition

Selected by his peers for inclusion in The Best Lawyers in America, 2009-2011.


Received the Honorable William J. Brennan, Jr. Award for Outstanding Trial Advocacy Skills, 2002.

Professional Activities

American Bar Association

Defense Research Institute

District of Columbia Bar Association (Board of Directors for the Interest on Lawyers’ Trust Accounts Committee)
Career Summary:

**Vanderbilt University Law School:**
Lee S. & Charles A. Speir Professor of Law (since Spring 2003)
Associate Dean of Research and Faculty Development (July 1999 to December 2001)
Professor of Law (since Fall 1996)
Associate Professor (1994-1996)
Assistant Professor (1991-1994)

Courses taught:
Criminal Law, Criminal Procedure: Adjudication, Criminal Procedure: Investigation; White Collar Crime Seminar, Criminal Law Seminar, Civil Procedure, Evidence

Awards and grants:
2010 - Alexander Heard Distinguished Service Professor Award – awarded each year to one full-time faculty member at Vanderbilt University whose research has made distinctive contributions to the understanding of problems of contemporary society
2006 – $247,000 National Institute of Justice grant to lead study -- Habeas Litigation in U.S. District Courts -- completed August 2007 (with F. Cheesman & B. Ostrom of the National Center for State Courts), report available [here](http://www.ncjrs.gov) at NCJRS
2005 - Chancellor's Award for Research at Vanderbilt, for research on jury sentencing with R. Noble
2003 – Distinguished Faculty Award, Vanderbilt University
2001 -02 FedEx Research Chair, Vanderbilt University Law School

**Advisory Committee for the Federal Rules of Criminal Procedure** -- Assistant Reporter, October 2007 to present

**Northwestern University Law School**, Visiting Scholar, Chicago, IL, October, 2002

**University of Michigan Law School**, Visiting Professor of Law, Ann Arbor, MI, Fall 1998

**Honorable Michael F. Cavanagh**, Chief Justice of the Michigan Supreme Court, Judicial Clerk, Lansing, MI, 1988-90

**Honorable Douglas W. Hillman**, Chief Judge of the United States District Court for the Western District of Michigan, Judicial Clerk, Grand Rapids, MI, 1987-88

**Varnum, Riddering, Schmidt & Howlett**, Summer Associate, Grand Rapids, MI, 1987

**Jenner & Block**, Summer Associate, Chicago, IL, 1986

**Delta County Prosecutor’s Office**, Assistant Prosecutor/Intern, Escanaba, MI, 1985

**Education:**
University of Michigan, J.D. magna cum laude, 1987
Henry M. Bates Memorial Scholarship, Order of the Coif, Managing Editor, Mich. L. Rev. 1986-87
Oberlin College, B.A. Government, 1983

**Publications - Books, Monographs, and Book Chapters:**
KING, CHEESEMAN & OSTROM, HABEAS LITIGATION IN U.S. DISTRICT COURTS, FINAL REPORT (supported by Award No. 2006-JJ-CX-0020, National Institute of Justice, Office of Justice Programs, United States Department of Justice) (August 2007)
LAFAVE, ISRAEL, KING, & KERR, CRIMINAL PROCEDURE (Thomson-West 3d ed. 2007) (seven-volume treatise covering state and federal criminal procedure) (on WESTLAW as database CRIMPROC) (also coauthored prior edition)

LAFAVE, ISRAEL, KING, & KERR, CRIMINAL PROCEDURE (Thomson-West 5th ed. 2009 & annual supplements) (hornbook) (also coauthored prior editions)


KAMISAR, LAFAVE, ISRAEL, KING, & KERR, MODERN CRIMINAL PROCEDURE (Thomson-West 12th ed. 2008 & annual supplements) (this text also published annually in two paperback volumes: BASIC CRIMINAL PROCEDURE and ADVANCED CRIMINAL PROCEDURE) (also coauthored prior editions)

ISRAEL, KAMISAR, LAFAVE & KING, CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT (Thomson-West 2009) (published annually) (also coauthored prior editions)

WRIGHT, KING, & KLEIN, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL (selected volumes) (West 3d ed. 2003 & supplements through 2004) (on WESTLAW as database FPP)


Ethics for the Ex-Juror: Guiding Jurors after the Trial, in JURY ETHICS (Kleining & Levine, eds., Paradigm Press 2005)


Publications: Articles, Essays, and Symposia: (* designates peer-reviewed journal)

Right Problem; Wrong Solution, 1 Cal. L. Rev. Circuit ___ (forthcoming 2010) (with J. Hoffmann)


Reasonableness Review After Booker, 43 Houston L. Rev. 325 (2006) (sentencing symposium)


Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 Stanford L. Rev. 293 (2005) (special sentencing issue)


Silencing Nullification Advocacy Inside the Jury Room and Outside Courtroom, 65 U. Chi. L. Rev. 433 (1998)


Publications: Book Reviews and Other:


Should Juries Nullify Laws They Consider Unjust or Excessively Punitive?, Insight on the News, May 24, 1999, pp. 25-27

Why Should We Care How Judges View Civil Juries?, 48 DePaul L. Rev. 419 (1998)


Affirmative Action in Jury Selection, 26 Vanderbilt Lawyer 17 (1996)


Issue editor, —The Jury: Research and Reform, Vol. 79 No. 5 Judicature (March-April, 1996)


Professor Amar’s Three-Dimensional View of Double Jeopardy: Adjusting the Focus, 26 Cumb. L. Rev. 17 (1995)

Jurymandering is Asking for Trouble, New York Newsday, Sept. 22, 1994

Note, Fifth Amendment Privilege for Producing Corporate Documents, 84 Mich. L. Rev. 1544 (1986)

Selected Scholarly Presentations:

Speeches and Lectures:

James Otis Lecture, University of Mississippi Law School, Oxford, MS, April 2008

Hoffinger Lecture, NYU Hoffinger Criminal Justice Series, NYU Law School, NY, April 2007

Brainerd Curry Memorial Lecture, Duke University Law School, Durham, NC, November 2004
Keynote Speech, Constitutional Law Conference, Oberlin College, OH, November 2003
Public Lecture, Princeton University, Princeton, NJ, April 1995

**Paper Presentations at Faculty Workshops, Roundtables, and Symposia**

- Faculty Workshop, Fordham Law School, New York, NY, April 2007
- Clifford Symposium on the Rule of Law, DePaul College of Law, Chicago, IL, April 2006
- Symposium on Federal Sentencing, Univ. of Houston Law School, Houston, TX, Nov 2005
- Faculty Workshop, Cornell University Law School, Ithica, NY, October 2005
- Faculty Workshop, Brooklyn Law School, New York, NY, March 2005
- Symposium on State Sentencing, Columbia Law School, New York, NY, January 2005
- Faculty Workshop, Florida State University Law School, Tallahassee, FL, November 2003
- Faculty Workshop, Stanford Law School, Stanford, CA, October 2003
- Faculty Workshop, Duke Law School, Durham, NC, September 2003
- Conference on Jury Ethics, John Jay College, CUNY, New York, NY, September 2003
- Faculty Workshop, University of Illinois Law School, Champagne, IL, October 2002
- Faculty Workshop, Northwestern University Law School, Chicago, IL, October 2002
- Faculty Workshop, University of Colorado School of Law, Boulder, CO, October 2001
- Faculty Workshop, Ohio State University, Columbus, OH, November 2000
- Conference on the Jury, Brooklyn Law School, Brooklyn, NY, October 2000
- Faculty Workshop, University of Texas Law School, Austin, TX, September 2000
- Faculty Workshop, Northwestern University Law School, Chicago, IL, September 2000
- Faculty Workshop, University of Michigan Law School, Ann Arbor, MI, December 1998
- Faculty Workshop, University of Michigan Law School, Ann Arbor, MI, November 1998
- Faculty Workshop, University of Texas School of Law, Austin, TX, January 1998
- Symposium, Georgetown University Law Center, Washington, DC, March 1994
- Faculty Workshop, University of Kentucky School of Law, Lexington, KY, October 1993

**Presentations for the Federal Judiciary:**

- FJC Sentencing Institute, Washington, DC, July, 2006
- FJC Workshop for Judges of the Fifth Circuit, Houston, TX, October 2005
- FJC Workshop for Judges of the Eighth and Tenth Circuits, Santa Fe, NM, June 2005
- FJC Workshop for District Judges, Seattle, WA, September 2004
- FJC Workshop for District Judges, New Orleans, LA, February 2002
- FJC Workshop for District Judges, San Diego, CA, December 2001
- FJC Seminar, New York University Law School, December 1996
- FJC/ALI-ABA Seminar, Washington, D.C., September 1996

**Testimony and other Presentations to Judicial or Government Groups:**

- Presenter, Virginia Judicial Conference, Richmond, VA, September 2005
- Presenter, ALI-ABA Live Webcast, Washington D.C., March 2005
- Panelist, Jury Summit, Augusta, GA, May 2002
- Speaker, Jury Summit 2001, New York, NY, February 2001
- Speaker, Nat’l Assn. of Women Judges Annual Conference, Memphis, TN, September 1996
- Presentation, Office of the State Attorney General, Nashville, TN, October 1995
- Presentation, Comm’n on the Future of the Tenn. Judicial System, Nashville, December 1994
- Presentation, 3d Ann. Att’ys General Criminal Justice Colloquium, Nashville, August 1994
Presentation and consultation, Jury Project of New York State, Buffalo, NY, October 1993
Presentation, 2d Ann. Att’y’s General Criminal Justice Colloquium, Nashville, July 1993

**Discussant, Commenter, or Panelist:**

- Symposium on Sentencing Research, Albany Law School, Albany, NY, Sept 2010 (invited)
- Criminal Justice Roundtable, Vanderbilt Law School, Nashville, TN, September 2009
- *Booker* Roundtable, University of Illinois Law School, Champagne, IL, April 2005
- Conference on the Report of the Massachusetts Governor’s Council on the Death Penalty, Indiana University School of Law, Bloomington, IN, September 2004 (comments published in Indiana L. J.)
- Panelist, Criminal Justice Section, AALS Meetings, January 2004; June 2000
- Clifford Symposium on Tort Law and Public Policy, Chicago, IL, April 1998
- Law & Society Association Annual Meeting, Toronto, Ontario, June 1995
- Cumberland Law Distinguished Lecture Series, Birmingham, AL, March 1995
- Conference on the Jury, Annenberg/Woodrow Wilson School of Public and International Affairs, Princeton, NJ, November 1994

**Presentations to Bar Groups and CLE:**

- ABA Midyear Meeting, Philadelphia, PA, February 2002
- Conference on the Jury, AJS & McCormick Foundation, Chicago, IL, June 1999
- Vanderbilt University Law School Alumni CLE, Nashville, TN, October 1995

**Selected Professional Service Activities:**

**Professional:**

United States Courts:
- Member, Sixth Circuit Advisory Committee on Rules, 1996-1999

American Law Institute
- Elected Member 2009 – present

American Bar Association
- Member, Criminal Justice Standards Committee, 2008 – present
- Advisory Committee, American Jury Project, 2004

American Association Law Schools
- Member, Nominating Committee, 2008
- Member, Section on Criminal Justice

American Judicature Society
- National Advisory Council, 2005-07
- Board Member, 2001-05
- Governor’s *Blakely* Sentencing Task Force for the State of Tennessee, 2004-2005
- Tennessee Judicial Evaluations Guidelines Commission, 1994-95
- FBI Citizens Academy, Nashville, TN, Fall 2007
- State Bar of Michigan (admitted 1987, presently on inactive status)
**Manuscript and proposal reviews:**
Aspen Publishers  
Judicature  
Journal of Empirical Legal Studies  
Journal of Politics  
Law and Society Review  
National Institute of Justice, U.S. Department of Justice  
University of Chicago Press  
Yale University Press  

**Vanderbilt University:**
Search Committee for University Librarian, 2007–2008  
Search Committee for Public Policy Institute Director, 2006 - 2007  
Committee on Athletics, 2004-2008  
Committee on Vanderbilt Institute for Public Policy Studies, 2003-2004  
Faculty Senate, Law School Representative, 1999-2001  
Search Committee for University Chief of Security, 1998-2000  
University Committee on Humanistic Research, 1999-2000  

**Vanderbilt University Law School:**
Faculty Appointments Committee (entry level): 2009-2010 (Chair), 2010-11  
Faculty Appointments Committee (lateral): 2006-2007 (Chair)  
Ad Hoc Curriculum Committee, 2008-2009 (Chair)  
Building Committee, 1999-2002  
Technology Committee, 1996-1997  
Ad Hoc Promotion Committee, 1995-1996  
Workshop Committee 1994-1995  
Research Committee, 1994-1995  
Clerkship Committee 1993-1994, 1995-1996 (Chair)
Stephan Landsman

Prof. Landsman holds the Robert A. Clifford Chair in Tort Law and Social Policy at DePaul University College of Law. He is a nationally recognized expert on the jury system and was the Reporter to the American Bar Association (ABA) American Jury Project which was responsible for the rewriting of the ABA's Principles for Juries and Jury Trials. He is the author of numerous books and articles, both historical and empirical, about the jury as well as pieces on a range of other topics including the adversary system, punitive damages, human rights and the rules of evidence. He is also the author of CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES, a book recently published by the University of Pennsylvania Press. He is a sought-after speaker who has lectured in India, Japan, and Britain as well as across the United States. He has successfully advocated before the Supreme Court of the United States, served as an expert witness on behalf of the federal government and represented a wide range of clients. Professor Landsman attended Kenyon College and Harvard Law School.
Patricia Lee Refo is a partner at Snell & Wilmer L.L.P. in Phoenix, Arizona, where she concentrates her practice in complex commercial litigation. She has been named as one of The Best Lawyers in America since 2003, and The National Law Journal has named her one of the 50 Most Influential Women Lawyers in America. She represents business clients in a variety of complex matters, including class actions and claims involving fiduciary duty, contract, business torts, securities fraud and professional malpractice. She regularly defends major law and accounting firms in complex multiparty litigation brought by former clients and third parties. She has represented numerous financial institutions and venture capital clients in class actions and a variety of other large, sophisticated litigations.

She recently served as Chair of the American Jury Project of the American Bar Association and is a former Chair of the ABA Section of Litigation. By appointment of Chief Justice William Rehnquist, she served from 2000-2006 as a member of the Advisory Committee on the Federal Rules of Evidence for United States Judicial Conference, and presently serves on the Arizona Supreme Court’s Ad Hoc Committee on Rules of Evidence. She is a Fellow of the American Bar Foundation, the ABA Section of Litigation and the Arizona Foundation for Legal Services and Education. The National Law Journal has named her to its prestigious Editorial Board. She is also a member of the Board of Advisors of Commercial Lending Liability News. She serves in the ABA House of Delegates as the Arizona State Delegate and chairs the ABA’s Standing Committee on Membership. Her articles have appeared in numerous publications, and she has been a featured speaker at more than 100 continuing legal education programs across the United States and abroad.

Ms. Refo is a graduate of the University of Michigan and the University of Michigan Law School.
Stephen A. Saltzburg

Title
Wallace and Beverley Woodbury University Professor of Law

Education
B.A., Dickinson College; J.D., University of Pennsylvania

Professor Saltzburg joined GW Law in 1990. Before that, he taught at the University of Virginia School of Law, and was named the first incumbent of the Class of 1962 Endowed Chair. In 1996, he founded and directed the master’s program in Litigation and Dispute Resolution at GW. He was named University Professor, the highest title a University can confer upon a faculty member, in 2004. The Chief Justice of the United States appointed him as reporter for, and then as a member of, the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He was the reporter for the Civil Justice Reform Act Committee for the D.C. District Court before he became chair. He has served as a special master in two class action cases in the D.C. District Court, and continues to serve as a mediator for the U.S. Court of Appeals for D.C. He has mediated a variety of disputes involving public agencies and private litigants; served as a sole arbitrator, panel chair, and panel member in domestic arbitrations; and served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg held the following governmental positions: associate independent counsel in the Iran-Contra investigation; deputy assistant attorney general in the Criminal Division of the U.S. Department of Justice, the Attorney General’s ex-officio representative on the U.S. Sentencing Commission; and director of the U.S. Treasury Department Tax Refund Fraud Task Force. He was chair of the ABA Criminal Justice Section from 2007 to 2008, and represents the section in the ABA House of Delegates. He was appointed to the ABA Task Force on Terrorism and the Law and to the ABA Task Force on Gatekeeper Regulation and the Profession in 2001, and to the ABA President’s Advisory Group on Citizen Detention and Enemy Combatant Issues in 2002. In 2001 he was appointed by Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit as co-chair of the Task Force on the Selection of Lead Counsel in Class Actions, which published its final report in 2002. Professor Saltzburg is the author of numerous books and articles on evidence, procedure, and litigation.
Hon. Donald E. Shelton

Washtenaw County Trial Court
- Resides in Saline, Michigan
- Born June 28, 1944, in Jackson, Michigan
- Married to Marjorie K. Shelton

Education
- University of Nevada, 2010 - Doctor of Philosophy (Judicial Studies)
- Eastern Michigan University, 2007 - Master of Arts (Criminology and Criminal Justice)
- University of Michigan School of Law, 1969 - Juris Doctor (Law)
- Western Michigan University, 1966 - Bachelor of Arts (Social Science)

Professional Background
- Circuit Judge, 22nd Judicial Circuit, Washtenaw County Trial Court, Ann Arbor, Michigan, February, 1990 - present; Chief Judge, 2010-present; Chief Judge Pro Tem, 1992-1996, 2004-2009; Presiding Judge, Civil/Criminal Division, 1997 - 2009
- Washtenaw County Probate Court, Chief Judge, 2010-present; Chief Judge Pro Tem, 2004 - 2009
- Supervising Judge, Washtenaw County Juvenile Court, 2001 - present
- Washtenaw County Probate Court, Chief Judge, 2010-present; Chief Judge Pro Tem, 2004 - 2009
- Partner in law firm of Bishop and Shelton, P.C., Ann Arbor, Michigan, 1978 - 1990
- Partner in law firm of Forsythe, Campbell, Vandenberg, Clevenger & Bishop, Ann Arbor, Michigan, 1974 - 1978
- Attorney, Litigation Division, United States Army, Pentagon, Washington, D.C., 1973 - 1974
- Attorney, Staff Judge Advocate, U.S. Army, Third Infantry Division, Germany, 1970 - 1973

Public Offices and Positions
- Circuit Judge, Washtenaw County, February, 1990 - present
- Regent, Eastern Michigan University, 1987 - 1990
- Mayor, City of Saline, 1978 - 1986
- Chair, Southeast Michigan Council of Governments (SEMCOG), 1983 - 1985
- Board of Directors, National Association of Regional Councils, 1985 - 1986
- Board of Directors, Washtenaw Development Council, 1983 - 1986
- Member, Governor’s Small Cities Advisory Council, 1983 - 1986
- Vice Chair, Southeast Michigan Council of Governments, 1980 - 1983
- Mayor Pro Tem, City of Saline, 1977 - 1978
Councilmember, City of Saline, 1976 - 1978

Teaching Positions
- Adjunct Faculty, Eastern Michigan University, Political Science Department, Courses: "Understanding the Judicial System"; "American Legal System", “Law & Policy in a Constitutional Democracy” 1997 - present
- Adjunct Faculty, Eastern Michigan University, Sociology, Anthropology & Criminology Department, Course: "Criminal Law II - Criminal Procedure", "Criminal Sentencing", 1997 - present
- Adjunct Faculty, Oakland University Legal Assistant Program, 1977 - 1979
- Adjunct Faculty, Washtenaw Community College Legal Assistant Program, 1976 - 1979
- Adjunct Faculty, University of Maryland (Business Law, 1971 - 1973)
- Member, Ferris State College Legal Assistant Advisory Committee, 1977 - 1990
- Member, Washtenaw Community College Legal Assistant Advisory Committee, 1976 - 1979

Publications and Presentations

Books and Book Chapters
- Forensic Science in Court: Challenges in the 21st Century, Rowman & Littlefield (forthcoming)
- Donnelly, Musbach and Shelton, Best Uses of the Internet for Litigators, Chapter in The Internet and Technology Guide for Michigan Lawyers, Institute of Continuing Legal Education, August 1999
- Shelton, Bishop and Blaske, 1986 Tort Reform Legislation in Michigan, DTR Associates, Ann Arbor, MI, 1986
- Bishop and Shelton, Michigan Wrongful Death, Institute of Continuing Legal Education, 1986
- Bishop and Shelton, Medical Malpractice - A Systems Approach, Institute of Continuing Legal Education, 1982
- Bishop and Shelton, Motion Practice, Michigan Basic Trial Practice Handbook, Institute of Continuing Legal Education, 1981
- Bishop and Shelton, The Use of Legal Assistants in Domestic Relations Cases, Institute of Continuing Legal Education, 1975, rev. 1980

**Articles and Research Papers**

- *Forensic Science Evidence And Judicial Bias In Criminal Cases*, The Judges' Journal, American Bar Association (forthcoming)
- *How Reason for Surgery and Patient Weight Affect Verdicts and Perceptions in Medical Malpractice Trials: A Comparison of Students and Jurors*, with J. Reichert, M. Miller, & B. Bornstein, Behavioral Sciences and The Law (forthcoming)
- *Studying Juror Expectations for Scientific Evidence: A New Model for Looking at the CSI Myth*, with G. Barak & Y. Kim, Court Review, American Judges Association (forthcoming)
- *The "CSI Effect” Is Really The “Tech Effect”,* The Utah Prosecutor, Vol. 18:5, pp. 6-10, September 2008, Utah Prosecution Council, Salt Lake City, UT
- *Defending the Right to Trial by the People*, MTLA Journal, Vol. 41:1, Michigan Trial Lawyers Association, Summer 2007
- *An Evaluation of the Status Offense Diversion Program in the Juvenile Court of Washtenaw County, Michigan*, Washtenaw County Juvenile Court, May 24, 2007
- *The “CSI Effect” – Is It Real?*, Criminal Law Section, State Bar of Michigan, April 2007 Newsletter

- Washtenaw County Probate Court Reorganization Report, Washtenaw County, Michigan Circuit Court (October 29, 2004)
- Video Court Reporting - The Time Has Come, Judge's Journal, Vol. 42-1, American Bar Association, Winter 2003
- Juvenile Court Reorganization Report, Washtenaw County Trial Court Family Division (December 1, 2001)
- Equally Bad is Not Good: Allowing Title IX “Compliance” by the Elimination of Men's Collegiate Sports, 34 U. Mich. J. L. Reform 253 (2001)
- The Judge and Jury in a Court of Claims Case: Who's on First?, 27 MTLA Quarterly 10 (1993)

Presentations

- Twitter and Blogging in the Courtroom, Canadian Association of Law Libraries, Annual Conference 2010, Windsor, Ontario, Canada, May 10, 2010
- The "CSI Effect" In The Real World, 2008 United Judicial Conference of the


- The Impact of Pop Culture on Forensic Scientific and Legal Practice, Presentation, 8th Annual Forensic Science and Law Conference, Duquesne University, Pittsburgh, PA, April 5, 2008


- "CSI Effect" on Juries, Presentation, Michigan Judges Association Annual Conference, Mackinac Island, MI, August 14, 2007

- Effective Negotiation Techniques, 2nd Annual Advanced Negotiation and Dispute Resolution Institute, Institute of Continuing Legal Education, 2003

- Effective Motion Practice, Practical Skills for New Lawyers, Institute of Continuing Legal Education, 2002

- Technology in the Courtroom, State Bar of Michigan Young Lawyers Section, State Bar of Michigan 2001 Annual Meeting (Sept. 13, 2001)


- Using the Internet to Improve Judicial Systems, American Bar Association Forum on Justice Improvements, October 1999

- Judicial Resources on the Internet, Conference Presentation, American Bar Association, Judicial Division, Annual Meeting, 1999

- Electronic Filing, Seminar, Michigan Association for Legal Support Professionals, April 1999

- Tort Reform in Practice - The View From the Bench, Winter Meeting, Michigan Defense Trial Counsel, 1997

- Development of a Court Homepage, Conference Presentation, American Bar Association, Judicial Division, Annual Meeting, 1996
• Computers for Judges 101, Seminar, Michigan Judicial Institute, 1996
• Harassment in the Workplace, Seminar, Michigan Trial Lawyers Association, 1995
• Common Evidentiary Problems in the Courtroom, Ask the Judges Seminar, Institute of Continuing Legal Education, 1994
• Effective Courtroom Advocacy, Seminar, Michigan Trial Lawyers Association, 1994
• Presiding Judge and Faculty Member, 44th Annual Advocacy Institute, Institute of Continuing Legal Education, May 1993
• Academics and Pragmatics of Medical Malpractice Trial Practice, Michigan Trial Lawyers Association, 1990
• Fundamentals of Michigan Practice-Motion Practice, Institute of Continuing Legal Education Seminar, 1989
• No-Fault Update: 1988, Institute of Continuing Legal Education, 1988
• How to Handle the Automobile Negligence Case, Institute of Continuing Legal Education and State Bar Negligence Section Seminar, 1988
• Damages and the 1986 Tort Reforms, Institute of Continuing Legal Education and State Bar Negligence Section Seminar, 1988
• New Tort Legislation and Related Insurance Issues, Institute of Continuing Legal Education Seminar, 1986
• How to Handle an Automobile Negligence Case-Medical Proofs, Institute of Continuing Legal Education Seminar, 1985
• Successful Use of Depositions and Interrogatories: How to Make the Most of Pretrial Discovery, Institute of Continuing Legal Education Seminar, 1983
• Traumatic Neurosis, Evaluating and Proving Damages, Institute of Continuing Legal Education Seminar, 1982
• Motion Practice, Michigan Basic Skills, Institute of Continuing Legal Education Seminar, 1982
• No-Fault Third Party Litigation and Uninsured Motorist Claims, No-Fault Accident Update, Institute of Continuing Legal Education Seminar, 1982
• Motion Practice, Michigan Basic Skills, Institute of Continuing Legal Education Seminar, 1981
• Motion Practice, Michigan Basic Trial Practice Handbook, Institute of Continuing Legal Education, 1981
• Pretrial Motions, Civil Procedure Before Trial, Institute of Continuing Legal Education Seminar, 1981
• Wrongful Death Damages, Proving Damages in Special Cases, Institute of Continuing Legal Education Seminar, 1981
• Pretrial Motions, Civil Procedure Before Trial, Institute of Continuing Legal Education Seminars, 1979
- *Motion Practice*, Michigan Basic Skills, Institute of Continuing Legal Education Seminar, 1979
- *Evaluating and Proving Damages*, Institute of Continuing Legal Education, 1977
- *Legal Malpractice in Michigan-To Whom Are You Liable*, Institute of Continuing Legal Education Seminar, 1977
- *The Use of Legal Assistants in Divorce Cases*, Institute of Continuing Legal Education Seminar, 1977
- *The Use of Legal Assistants in Automobile Negligence Cases*, Institute of Continuing Legal Education Seminar, 1977
- *The Use of Legal Assistants in Domestic Relations Cases*, Institute of Continuing Legal Education Seminar, 1975
- *The Use of Legal Assistants in Civil Litigation-Automobile Negligence*, Institute of Continuing Legal Education Seminar, 1974
Regina Schuller, BSc (University of Toronto), MA PhD (University of Western Ontario)

My research interests lie at the intersection of social psychology and law. Prior to joining the faculty at York University, I completed a postdoctoral fellowship in the Law and Social Sciences program at Northwestern University. My research examines various behavioural assumptions in the law, specifically focusing on the judgments of various decision makers in the criminal justice system (e.g. juries, police). I have conducted work on decision making in cases involving violence against women (e.g., battered women, sexual assault) and most recently, have been studying the impact of racial bias in the courtroom and legal strategies for curbing its influence (e.g., challenge for cause).
Prof. Cindy Simmons

Cindy Simmons has a law degree from the University of Washington and an M.A. in journalism from the University of Wisconsin-Madison. She teaches mass media law, First Amendment, journalism skills classes and negotiation in the Department of Communication and coordinates the Olympia Legislative Reporting Internship Program. Prior to teaching, Simmons was a professional journalist for 15 years, including covering the Wisconsin and New Mexico legislatures. In law school she studied reporter shield laws.
Judge Urbina was appointed by President Clinton to his current position on the United States District Court for the District of Columbia in July 1994. He received a B.A. in 1967 from Georgetown University and graduated from the Georgetown University Law Center in 1970. He served as a staff attorney for the D.C. Public Defender Service from 1970 to 1972 and then entered private practice. From 1974 to 1981 he taught at Howard University Law School and directed the University’s Criminal Justice Program. He was appointed Associate Judge of the Superior Court of the District of Columbia in April 1981, and served as Presiding Judge of the Court’s Family Division from 1985 to 1988. Judge Urbina has remained active in the world of academia. He holds the David Seidelson Chair for Trial Advocacy at the George Washington University Law School. Over the years he has presided over several high profile criminal and civil cases which include *U.S. v. Espy*, *U.S. v. Jamal*, *U.S. v. Slough* (Blackwater), and *Kiyemba v. Bush* (the Uighurs’ Guantanamo habeas case). Judge Urbina continues to work with D.C. area grammar and high schools by providing them with exposure to the workings of the court system. In 1986 Washingtonian magazine selected Judge Urbina as a Washingtonian of the Year and one of the region’s most influential leaders in 2007. Judge Urbina and his wife, Coreen, live in Northwest Washington, D.C. They have two children, Adrienne and Ian. Both are journalists, and Ian is the National Investigative Reporter for the *New York Times*. Ian received a Pulitzer last year along with two other journalists for his work on the Eliot Spitzer story.
"Twitter, Google and Blackberry Oh My! Jurors and the Electronic Highway"

Judges: Instructions and Other Reactions

Hon. Donald E. Shelton
Preliminary Instructions

• A committee of the Judicial Conference of the United States has endorsed a set of model jury instructions for district judges to help deter jurors from using cell phones, computers or other electronic technologies during their jury service.

• “The committee believes that more explicit mention in jury instructions of the various methods and modes of electronic communication and research would help jurors better understand and adhere to the scope of the prohibition against the use of these devices.”
Before Trial:
You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. 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, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.
Deliberation Precautions

Judicial Conference of the United States:
At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.
Arizona

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, Blackberries, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose. ..." -- Rev. Ariz. Jury Inst. (Crim.) 3rd (2009), Prelim. Inst. 13 (excerpt)
Civil Jury Instruction 100 (excerpt)

... Do not post any information about the trial or your jury service on the Internet in any form. Do not send or accept any messages, including e-mail or text messages, to or from anyone concerning the trial or your service. ... Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments.

Criminal Jury Instruction 101 (excerpt)

Do not share information about the case in writing, by email, or on the Internet. ... During the trial, do not read, listen to, or watch any news report or commentary about the case from any source. Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials. ...
If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.
If you have a cell phone, pager or personal digital assistant, please turn it off while in the courtroom and during jury deliberations. Remember you are not allowed to communicate with anyone via any means about what is happening in the trial for the duration of the proceeding until a verdict is announced in court. During the course of the trial do not conduct independent research, view or listen to media reports, or access any information via the Internet or using any electronic tool, regarding this case, its participants, this type of case, or any related subject matter.
Even though you have not yet been selected as a juror, there are some strict rules that you must follow about using your cell phones, electronic devices and computers. You must not use any device to search the Internet or to find out anything related to any cases in the courthouse. ... In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. ... All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.

... You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.
Because of the requirement that your verdict must be based only on the evidence received in the courtroom and instructions on the law, you must not read, listen to or watch any news reports about this trial, if there are any, regardless of whether the report is from the newspaper, radio, television, internet or any other source. Do not research this case on your own or as a group by using a dictionary, encyclopedia, map or reference materials, including online or other electronic sources. You are not permitted to search the Internet, for example, using Google, or any other search engine or web site to look for information about this case or about the participants in the trial. ... The Court understands that in your daily life it may be a common occurrence for you to look for more information about a product or an event, but the moment you try to gather information about this case or the participants, is the moment you contaminate the process you promised to uphold.

Do not share information, opinions or anything else about this case with others, personally or in writing, or through computers, cell phone messaging, personal electronic and media devices and other forms of wireless communications. This includes, for example, communication about this case through e-mail, instant messaging, tweeting, text messaging, or using the Internet in any way. Also, do not post or look at information about this case on a blog, forum, social network site, chat room, discussion board or any other web site. If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom. ...
Michigan Court Rule 2.511 (H)(2)

The court shall instruct the jurors that until their jury service is concluded, they shall not
(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
(b) read or listen to any news reports about the case;
(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;
(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
(i) information about a party, witness, attorney, or court officer;
(ii) news accounts of the case;
(iii) information collected through juror research on any topics raised or testimony offered by any witness;
(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.
A more “explanatory” version
SANCTIONS

The Trial - a Mistrial?
The Juror
Contempt – Fine?
Contempt – Jail?
Write an Essay?
NEW MEDIA AND THE COURTS:
THE CURRENT STATUS AND
A LOOK AT THE FUTURE

A REPORT OF THE NEW MEDIA COMMITTEE OF THE
CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS

IN PARTNERSHIP WITH THE NATIONAL CENTER FOR STATE COURTS AND
THE E.W. SCRIPPS SCHOOL OF JOURNALISM AT OHIO UNIVERSITY

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AUGUST 9-11, 2010
ATLANTA
EXECUTIVE SUMMARY

The Conference of Court Public Information Officers report on new media and the courts finds that more than one-third of state court judges and magistrates responding to a survey use social media profile sites like Facebook, while less than 10 percent of courts as institutions use social media for public outreach and communication. After a year of study and online collaboration, the report reveals a judicial branch that clearly recognizes the importance of understanding new media but is proceeding cautiously with concerns about effects on ethics, court proceedings and the ability to support public understanding of the courts.

The report predicts that in the coming years, courts will re-examine state codes of conduct for judges and judicial employees, model jury instructions, rules on cameras in the courtroom and other areas. It makes other predictions and also recommends further research and specific steps for the judicial community to continue to respond productively to new media.

The project was first suggested at the CCPIO 18th Annual Meeting in August 2009 in St. Paul, Minn. A proposal for pursuing the research was approved by the CCPIO board in September. About 120 judges, journalists, public information officers, court managers and academics participated in sharing ideas and information about new media and the courts on the online social media site Ning.com from November 2009 to August 2010. (See Appendix A for a list of members.) A framework for the research was presented and discussed at a workshop in Columbus, Ohio, in February 2010. A series of discussions was held with students and faculty at the E.W. Scripps School of Journalism in spring 2010. The National Center for State Courts (NCSC) assisted in the development and administration of a national survey of judges, magistrates and court administrators conducted in June 2010.

A draft of the final report was presented to the membership of CCPIO at its 19th Annual Meeting in Atlanta, Aug. 9 to 11, 2010. And the final report was released online and to the media Aug. 24, 2010.

Highlights of CCPIO New Media and the Courts: The Current Status and a Look at the Future:

The judicial community is actively exploring new media. The report examines efforts and involvement by the NCSC, Conference of Chief Justices (CCJ), Conference of State Court Administrators (COSCA), National Association for Court Management (NACM), Reynolds Center for Courts and the Media, and other parties.

What is “new media”? The history and meaning of this term is explored, ranging from its use by early media theorists in the 1960s to its present meaning as an umbrella term for the overarching current media landscape. Four constituent segments of the new media environment are defined and discussed: (1) legacy media, (2) traditional public relations/community outreach, (3) digital media/Web 1.0 and (4) social media/Web 2.0. This new media landscape is characterized by:

- Emerging interactive social media technologies that are powerfully multimedia in nature.
• Fundamental and continuing changes in the economics, operation and vitality of the news industry that courts have traditionally relied on to connect with the public.
• Broader cultural changes in how the public receives and processes information and understands the world.

Courts face unique challenges and opportunities. Courts have responded more cautiously to new media because of unique incongruities between the two cultures:

• New media are decentralized and multidirectional, while the courts are institutional and largely unidirectional.
• New media are personal and intimate, while the courts are separate, even cloistered, and, by definition, independent.
• New media are multimedia, incorporating video and still images, audio and text, while the courts are highly textual.

Three areas of study. While new media impact almost every facet of court operations from the delivery of services to balancing privacy and public access in managing court records, the CCPIO report focuses on three areas specifically related to the mandate that courts support public trust and confidence in the judicial system:

1. Effects on court proceedings.
2. Effects on ethics and conduct for judges and court employees.
3. Effects on courts’ ability to promote understanding and public trust and confidence in the judicial branch.

Seven categories of technology. The report identifies seven categories of new media technology that impact the courts, and these technologies are explored in detail:

1. Social media profile sites (e.g., Facebook, MySpace, LinkedIn, Ning). These sites allow users to join, create profiles, share information, and view still and video images with a defined network of “friends.”

2. Microblogging (e.g., Twitter, Tumblr, Plurk). Microblogging is a form of multimedia blogging that allows users to send and follow brief text updates or micromedia, such as photos or audio clips, and publish them on a website for viewing by everyone who visits the website or by a restricted group. Microbloggers can submit messages a variety of ways, including text messaging, instant messaging, e-mail, or digital audio.

3. Smart Phones, Tablets & Notebooks (e.g., iPhone, Droid, Blackberry). This category is defined by those mobile devices that can capture audio, as well as still and video images, and post them directly to the Internet. These devices also enable users to access the Internet, send and receive e-mails and instant messages, and otherwise connect with online networks and communities through broadband or Wi-Fi access.
4. **Monitoring and metrics (e.g., Addictomatic, SocialSeek, Social Mention, Google’s Social Search, Quantcast).** This category includes the large and increasing body of sites that aggregate information about Internet traffic patterns and what is posted on social media sites. They display analyses of how a particular entity is portrayed or understood by the public.

5. **News categorizing, sharing and syndication (e.g., blogs, RSS, Digg, Reddit, del.iciou.us).** This is a broad category that includes websites and technology that enable the easy sharing of information, photos and video, and the categorization and ranking of news stories, posts to blogs and other news items.

6. **Visual Media Sharing (e.g., YouTube, Vimeo, Flikr).** These sites allow users to upload still and video images that are stored in searchable databases and easily shared, and can be e-mailed, posted, or embedded into nearly any website.

7. **Wikis.** A wiki is a website that allows for the easy creation and editing of multiple interlinked Web pages via a Web browser using a simplified markup language or a WYSIWYG (what-you-see-is-what-you-get) text editor. Among the uses for wikis are the creation of collaborative information resource websites, power community websites and corporate intranets. The most widely recognized and used wiki is the collaborative encyclopedia Wikipedia. Another much lesser known wiki that has impact on the judicial system and is the subject of study in the New Media Project is Judgepedia.

**Survey results.** An estimated 16,000 individuals in the court community were invited to participate using an online survey tool administered by NCSC between June 16 and 25, 2010. Federal judges were not included in the distribution. About 810 respondents completed the entire survey while another 789 submitted partially completed surveys.

Highlights include:

- About 40 percent of responding judges reported they are on social media profile sites, the majority of these on Facebook. This is almost identical to the percentage of the adult U.S. population using these sites.
- Judges who are appointed and do not stand for re-election were much less likely to be on social media profile sites. About 9 percent from non-elected jurisdictions reported they were on these sites.
- Nearly half of judges (47.8 percent) disagreed or strongly disagreed with the statement “Judges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.”
- Judges appear to be more comfortable with using these sites in their personal lives, with 34.3 percent disagreeing or strongly disagreeing with the statement “Judges can use social media profile sites, such as Facebook, in their personal lives without compromising professional conduct codes of ethics.”
- More than half (56 percent) of judges report routine juror instructions that include some component about new media use during the trial.
• A very small fraction of courts (6.7 percent) currently have social media profile sites like Facebook; 7 percent use microblogging sites like Twitter; and 3.2 percent use visual media sharing sites like YouTube.
• About three-quarters of all respondents agree or are neutral that courts as institutions can maintain a social media profile site, or use microblogging technologies or visual media sharing without compromising ethics.
• However, only about 25 percent of total respondents believe these are necessary tools for public outreach.
• A smaller proportion of judges than might be expected (9.8 percent) reported witnessing jurors using social media profile sites, microblogging sites, or smart phones, tablets or notebooks in the courtroom.
• Almost all (97.6 percent) respondents agree that judges and court employees should be educated about appropriate new media use and practices.

Future Trends. The report concludes with predictions about the near future of new media and the courts:

• More courts will develop official presences on Facebook, Twitter, YouTube and other social media sites.
• More judges will be on Facebook, both professionally and personally.
• Courts will continue to become primary content providers and develop multimedia communication capabilities.
• Public information officers and information technology officers will form stronger partnerships and collaborative operations.

Recommendations. The report concludes with a set of specific recommendations for future action, including:

• Continuation of CCPIO New Media Ning site. More than 120 people participated in the nearly yearlong online conversation about new media at http://ccpionewmedia.ning.com/. The site proved to be an invaluable tool for sharing timely information, news stories, and research concepts and ideas. CCPIO should continue to maintain this site and take steps to encourage even broader participation.
• National coordination and collaboration among the judicial associations. New media will continue to evolve rapidly in the coming years, and the courts will benefit from an ongoing, coordinated national response in this area. CCPIO proposes that NCSC, CCJ and COSCA, in partnership with CCPIO, form a standing committee to study and report on new media issues on an ongoing basis. The effort should invite the participation of other partner organizations with designated liaisons to the CCPIO New Media Project, including: NACM, National Association of Women Judges, Court Information Technology Officers Consortium, National Association of State Judicial Educators, and the National Conference of Appellate Court Clerks.
• Administer the survey as a longitudinal study. The survey of judges and court administrators was the first of its kind, and it was designed to allow for trend data to be collected and compared over time. CCPIO should plan to administer the survey
annually to measure changes in court use of, experiences with and attitudes toward new media.

- **Develop a survey for the general public.** While we now have a baseline measurement of what courts experience with new media, a valuable comparison would be a look at how some of these same questions are viewed by the general public. CCPIO should work with NCSC to develop and administer a similar survey of the general U.S. population.

- **Develop tools.** To help courts maintain the delicate balance between free speech and open access to courts on one side and fair trial issues on the other, the CCPIO New Media Committee should be established as a standing committee to develop online resources, checklists (see Appendix B), best practices and other tools for courts responding to and managing new media.
Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards

In the past few months, we have heard numerous stories about mistrials and appeals from jury verdicts that resulted because one or more jurors used the Internet to obtain ex parte information or to communicate with outsiders. In Miami, for example, a juror sent a number of “tweets” describing his deliberation experiences, including one that boasted of “giving away $12 million of someone else’s money.” In another case, the trial judge was told that one of the jurors had used his BlackBerry to look up information about the criminal defendant, including previous criminal records and media reports about the case. When the judge questioned the jurors about the impact that this information might have had on the jury, he discovered that eight of the other jurors had also engaged in their own Internet research despite an explicit admonition not to do so. Examples of juror misconduct via technology have become so widespread and alarming that a new expression has developed to describe the problem: Google mistrials.

Concerns about this latest variation on juror misconduct are two-fold: jurors may use the Internet to obtain ex parte information about the case without the knowledge of the court or trial counsel, and jurors may violate the privacy of jury deliberations by communicating with outsiders. Both of these concerns are as old as jury trials themselves, but the ubiquitous nature of modern Internet technologies seems to give the problem a more ominous cast of rampant juror disregard for basic rules of trial conduct. Proposals to prevent these problems run the gamut from better instructions to confiscating juror technologies at the courthouse door to complete juror sequestration. Before looking at the merits of any of these proposals, it is useful to first pinpoint the nature of the problem. Is it the technologies themselves? Intentional recalcitrance by tech-savvy jurors? Or is it some combination of the two that contributes to the apparent refusal of jurors to follow a few simple rules?

With respect to jurors’ communication with outsiders, a useful place to start is to ask whether the communication would constitute juror misconduct had it been done using non-technological means. For example, if a juror “tweets” about the conditions of the jury assembly room, the long wait with no seeming court activity taking place, and other frequent (and too often legitimate) complaints of jurors, why should we be any more alarmed than if he or she simply complains to their fellow juror sitting in the adjacent seat or to their spouse or family members when they return home at the end of the day? The communication does not jeopardize the juror’s impartiality or communicate case-specific information. Similarly, if a juror blogs about the jury service experience, including reflections about the trial and jury deliberations, after the trial is over, is this any different from the juror writing a newspaper editorial or even a full-length book about their experience?

Juror research about case facts is a more troublesome issue because, by definition, it is case-specific and can introduce inaccurate or prejudicial information to jury deliberations that have been intentionally shielded from jurors for legitimate reasons. Jurors want to do their best to render fair and accurate verdicts, but their frustration with evidentiary restrictions on information can sometimes lead them to inappropriate activities. The convenience of Internet technologies to engage in those activities — Google Earth that permits jurors to view the traffic intersection where an accident took place or www.dictionary.com to look up the definition of an unfamiliar term in the jury instructions — makes it much more difficult for courts to police juror behavior during trial and deliberations.
Like the Luddites of old, however, it is deceptively easy — and incorrect — to believe that simply barring these technologies at the courthouse door is sufficient to prevent incidents of juror misconduct. Overreaction to the potential risks of juror access to technologies fails both to recognize and take advantage of the self-policing behaviors of trial jurors while punishing jurors who rely on these technologies for legitimate purposes. These technologies should routinely be permitted to jurors in the jury assembly room. They allow jurors to work productively and offer harmless ways to relieve the boredom and anxiety that often accompanies jury service. Any constraints on juror access to these technologies should only apply to jurors during jury selection, trial, and deliberations. And, to use a legal term of art, those constraints should be the least restrictive available to prevent jurors from accessing ex parte information or communicating with non-jurors during trial and deliberations.

**Better Solutions**

A key characteristic of American culture is the extraordinarily high regard for personal freedom. Americans have never been wont to acquiesce blindly to arbitrary rules, particularly those imposed by government. Members of the Gen X and Gen Y generations are even less likely to do so than their parents. So although jurors are remarkably good about following instructions, and making sure their fellow jurors do likewise, they do require a clear and persuasive explanation for the rules themselves. This is particularly important with respect to modern communication technologies, which have become so second nature that many individuals do not fully appreciate their social meaning. For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication. Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.

**Juror Orientation**

Every court should have a clear and consistent policy on juror access to communication technologies, and information about that policy should begin with juror orientation and then be repeated frequently throughout each juror’s experience. Most juror orientation videos and DVDs predate the Internet age, so information about communications technologies must be provided orally by jury staff during the morning orientation session as well as in pamphlets, brochures, and booklets about jury service. If the policy permits jurors to use these technologies in the jury assembly, tell them so, but be sure to also explain any policies related to juror use of these technologies during jury selection and trial. Consider, for example, the following statement, which includes both the policy and the justification for the policy:

> All cellular telephones, PDAs, BlackBerries, laptop computers, and other communication technologies MUST be TURNED OFF when you are in the courtroom for jury selection. The judges need to have your full attention so that you don’t miss important information about the case or distract others from hearing that information.

Jurors should be reminded of the policy and given an opportunity to turn off these devices before leaving the jury assembly room for jury selection.

**Voir Dire**

Once the jury panel has arrived in the courtroom for voir dire, either the judge, the lawyers, or both should use the jury questioning process to identify tech-savvy jurors and to educate and raise awareness of the circumstances under which use of these technologies is inappropriate. For example, the judge or lawyers might ask the following of prospective jurors:

- Do any of you routinely use any of the following communication devices: cellular telephone, PDA or other BlackBerry device, or laptop computer?
• Do you have an email account?

• Do any of you have a Facebook, MySpace, LinkedIn, Twitter, or similar social networking account?

It should go without saying that the judge and lawyers should know what these technologies are and how they are used, particularly insofar that new variants on these technologies are being developed almost daily! It is very difficult to frame intelligible questions for jurors if the questioner does not fully understand what he or she is asking about or, for that matter, the responses of individual jurors to those questions.

In response to affirmative answers from jurors, the judge or lawyer should then explain that the individuals who are selected as trial jurors in the case will not be permitted to use these types of communication technologies either to conduct their own investigations or to inform others about the case. The explanation should also provide the reasons for the prohibition — namely, that if the juror uses these technologies to do their own research about the case, they might run across information that is inaccurate or highly prejudicial to the litigants; the judge and lawyers would have no way to know that this has happened nor have the ability to correct it. Similarly, jurors cannot talk with others until after the verdict has been delivered to prevent them from hearing opinions of family, friends, or blog lurkers that might influence their verdict. The judge or lawyer should then ask each juror whether they will be able to abide by those rules. This dialogue with prospective jurors makes them aware of the legitimate reasons behind these rules and provides other jurors with persuasive arguments with which to police each other and, in the worst case scenario, to ignore “information” provided by a misbehaving juror.

Jury Instructions

After the jury has been selected and sworn, the jurors should be admonished about all restrictions on their activities during trial and deliberations, including a repetition of the admonition about using communication technologies. The New York Committee on Criminal Jury Instructions has proposed the following instruction, which I recommend to you as a model:

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps, or Google Earth, or any other program or device to search for and view any location discussed in the testimony.

5. Do not read, view, or listen to any accounts or discussions of the case reported by newspapers, television, radio, the Internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or source.
In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat or chat rooms, blogs, or social Web sites such as Facebook, MySpace, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device or Internet site, including blogs, chat rooms, social Web sites, or any other means.

You also must not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because 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 also does not permit jurors to converse among themselves about the case until the court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, 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, issue, or law 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 to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

ABOUT THE AUTHOR
Paula Hannaford-Agor is director of the Center for Jury Studies at the National Center for State Courts. For more information on the Center for Jury Studies and its work, visit www.ncsc-jurystudies.org.
PRINCIPLES FOR

Juries & Jury Trials

AMERICAN BAR ASSOCIATION

AUGUST 2005

ABA
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Pursuing Justice
The American Bar Association would like to thank Thomson West for its generous support in the publishing of this document.
CONTENTS

Preamble vii

GENERAL PRINCIPLES

Principle 1: The Right to Jury Trial Shall Be Preserved 1
Principle 2: Citizens Have the Right to Participate in Jury Service and Their Service Should Be Facilitated 7
Principle 3: Juries Should Have Twelve Members 15
Principle 4: Jury Decisions Should Be Unanimous 21
Principle 5: It Is the Duty of the Courts to Enforce and Protect the Rights to Jury Trial and Jury Service 25
Principle 6: Courts Should Educate Jurors Regarding the Essential Aspects of a Jury Trial 29
Principle 7: Courts Should Protect Juror Privacy Insofar as Consistent with the Requirements of Justice and the Public Interest 35
Principle 8: Individuals Selected to Serve on a Jury Have an Ongoing Interest in Completing Their Service 43

ASSEMBLING A JURY

Principle 9: Courts Should Conduct Jury Trials in the Venue Required by Applicable Law or the Interests of Justice 47
Principle 10: Courts Should Use Open, Fair, and Flexible Procedures to Select a Representative Pool of Prospective Jurors 51
Principle 11: Courts Should Ensure That the Process Used to Empanel Jurors Effectively Serves the Goal of Assembling a Fair and Impartial Jury 65
CONDUCTING A JURY TRIAL

Principle 12: Courts Should Limit the Length of Jury Trials Insofar as Justice Allows, and Jurors Should Be Fully Informed of the Trial Schedule Established 87

Principle 13: The Court and Parties Should Vigorously Promote Juror Understanding of the Facts and the Law 91

JURY DELIBERATIONS

Principle 14: The Court Should Instruct the Jury in Plain and Understandable Language Regarding the Applicable Law and the Conduct of Deliberations 107

Principle 15: Courts and Parties Have a Duty to Facilitate Effective and Impartial Deliberations 113

Principle 16: Deliberating Jurors Should Be Offered Assistance When an Apparent Impasse Is Reported 121

POST-VERDICT ACTIVITY

Principle 17: Trial and Appellate Courts Should Afford Jury Decisions the Greatest Deference Consistent with Law 125

Principle 18: Courts Should Give Jurors Legally Permissible Post-Verdict Advice and Information 127

Principle 19: Appropriate Inquiries into Allegations of Juror Misconduct Should Be Promptly Undertaken by the Trial Court 131

Index 137
The Principles, which appear in bold type, were adopted as ABA policy in February 2005. The accompanying commentary has not been adopted by the ABA House of Delegates and, as such, should not be construed as representing the policy of the Association.
AMERICAN JURY PROJECT

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PREAMBLE

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system. Each Principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the Principles set forth will have to be updated in a manner that will draw them ever closer to the ideals to which we aspire.
General Principles

PRINCIPLE 1—THE RIGHT TO JURY TRIAL SHALL BE PRESERVED

A. Parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with law.

B. Parties, including the state, have the right to a fair, accurate and timely jury trial in criminal prosecutions in which confinement in jail or prison may be imposed.

C. In civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.

D. With respect to criminal prosecutions:
   1. A defendant’s waiver of the right to jury trial must be knowing and voluntary, joined in by the prosecutor and accepted by the court.
   2. The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing or in open court on the record.
   3. A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of trial.
   4. A defendant may withdraw a waiver of jury, and the prosecutor may withdraw its consent to a waiver, both as a matter of right, if there is a change of trial judge.

E. A quality and accessible jury system should be maintained with budget procedures that will ensure adequate, stable, long-term funding under all economic conditions.

Comment

Subdivision A.
The Seventh Amendment of the United States Constitution guarantees the right to jury trials in civil cases in federal court.
Principle 1

The right is such “a basic and fundamental feature of our system of federal jurisprudence” that it “should be jealously guarded by the courts.” Jacob v. City of New York, 315 U.S. 752, 753 (1942). The federal guarantee has not, however, been extended to civil cases in state courts. See Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 432 (1996); see also Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916). Nevertheless, although the strength of the guarantee varies, “[a]lmost without exception,” state constitutions or statutes guarantee trial by jury in civil cases as well. George D. Braden et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 57 (1977); see David A. Anderson, First Amendment Limitations on Tort Law, 69 Brook. L. Rev. 755, 793 (2004). In most states, the right to a jury trial is guaranteed for cases above the level of small claims court. See American Judicature Society, Juries in-depth: Right To a Jury Trial, available at http://www.ajs.org/jc/juries/jc_right_overview.asp.

The aspiration of subdivision A. is to extend the right to jury trial in civil cases to the furthest point allowed by law while acknowledging that this aspiration exceeds the mandate of the Seventh Amendment, as currently interpreted by the Supreme Court, as well as the law in some states.

Subdivision B.

This subdivision is drawn from Standard 15-1.1 of the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996).

The Sixth Amendment of the United States Constitution guarantees that in “all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. In Duncan v. Louisiana, the Supreme Court extended the constitutional guarantee to criminal cases in state courts. 391 U.S. 145, 149 (1968). It stated that “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth
Amendment, and it must therefore be respected by the States.” *Id.* at 156-58. Today, in state or federal court, a defendant in a criminal action “is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months.” *Blanton v. N. Las Vegas*, 489 U.S. 538, 542 (1989).

Recognizing that punishments of less than six months’ imprisonment can be quite serious to the individual, subdivision B. articulates a broader right to jury trial than is protected by current constitutional law. Although the specter of imprisonment may not be considered serious by some, incarceration for any period of time would be viewed as catastrophic by many and warrants a jury trial. This subdivision also recognizes that the availability of jury trial is beneficial to the prosecution and to society as a whole, not simply the accused. Accordingly, subdivision B. provides that the right should be available to both the prosecution and the defense.

Subdivision C.

Although there is a constitutional or statutory right to jury trial in civil cases, the Supreme Court has long recognized that a private litigant may waive its right to a jury in such matters. See *Commodity Futures Trading Comm’n. v. Schor*, 478 U.S. 833, 848 (1986); see also *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (permitting contractual waiver of due process rights). Waiver requires that the party waving such right do so “voluntarily” and “knowingly” based on the facts of the case and as provided by the law. *D.H. Overmyer Co.*, 405 U.S. at 185-86. Waiver should neither be presumed nor required where the interests of justice demand otherwise.

Subdivision D.

This subdivision is drawn from Standard 15-1.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Subsection D.1 reflects the accepted rule that waivers of right to trial by jury “not only must be voluntary but must be knowing,
Principle 1

Principles for intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748-49 (1970) (citations omitted). Whether a waiver is voluntary or knowing can be determined only by considering all of the relevant circumstances surrounding it. Id.

Further, a waiver by the defendant of his constitutional right to trial by jury may be subject to consent by both the prosecuting attorney and the trial court. Adams v. United States ex rel. McCann, 317 U.S. 269, 277-78 (1942) (waiver contingent upon government attorney and trial court’s consent). In Singer v. United States, the Court held that, because a “defendant’s only constitutional right concerning the method of trial is to an impartial trial by jury,” it did not find any “constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.” 380 U.S. 24, 35-36 (1965). Yet, there can be extraordinary circumstances, such as the unavailability of an impartial jury, that would warrant a defendant’s waiver of his constitutional right over the objections of the prosecutor. See Id. at 37-38. It should be noted that pursuant to statutory enactment in certain jurisdictions, prosecutors are not afforded an opportunity either to endorse or reject a defendant’s jury waiver request. It is not the aim of this subdivision to undermine the considered policy decisions reflected in such legislation.

Subsection D.2 recognizes that an effective waiver of the right to a jury trial must be knowing and voluntary and that, in a criminal trial, the consequences of such a waiver can be especially severe because the defendant’s freedom may be at stake. The defendant must decide whether or not to waive his right to a jury trial; it is not a tactical decision to be left solely to defense counsel. See Brockhart v. Janis, 384 U.S. 1 (1966). Thus, subsection D.2 requires that the defendant be advised of his right to a jury trial and of the consequences of any waiver of that right, and that he make any waiver personally either in writing or in open court on the record. Mere acquiescence in or failure to object to a non-jury trial is not a sufficient waiver. Douglass v. First Nat’l Realty
In addition, recognizing that pro se defendants are especially at risk of making non-knowing waivers, this subsection urges that judges, prior to accepting a waiver, inform pro se defendants, on the record, of the fundamental attributes of jury trial, including the number of jurors, the nature of the selection process and the defendant’s role in that process, the unanimity requirement, and the fact that the judge will decide guilt or innocence if the defendant waives his right to a jury trial. See Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993).

Subsection D.3 recognizes that a defendant may withdraw his knowing and voluntary waiver, but also limits that right, adopting the prevailing view that such withdrawal is conditioned on the court’s approval. See, e.g., Wyatt v. United States, 591 F.2d 260 (4th Cir. 1979). See generally H. H. Henry, Annotation, Withdrawal of Waiver of Right to Jury Trial in Criminal Case, 46 A.L.R. 2d 919 (1956). The contrary view has been rejected lest the defendant’s absolute power to withdraw his waiver be exercised tactically or arbitrarily resulting in unreasonable delay and inconvenience.

Subsection D.4 does, however, recognize one situation in which either party should have an absolute right to withdrawal of a jury trial waiver. With the substitution of the trial judge, the premise upon which jury trial was waived has changed. The underlying philosophy establishing trial by jury as the preferred mechanism for resolution of a criminal case should take precedence over the desire for efficiency in administration in this situation.

Subdivision E.

This subdivision recognizes the practical financial considerations affecting our justice system. Because the jury trial is a fundamental component of that justice system, budget procedures should be established that ensure adequate, stable and long-term funding to maintain the jury system. Michael L. Buenger, Of Money & Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times? 92 KY. L.J. 979, 981-93
Principle 1

(2003-04). Failure to do so may result in the sacrifice of justice in the name of economy. Judges facing such situations may be forced to delay trials and, in criminal cases, deny the accused their Sixth Amendment rights, creating a crisis of constitutional proportions. See Gordon Bermant & Russell Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 MERCER L. REV. 835, 848 (1995). Budgetary concerns should never compromise constitutional protections or a judge’s control over the essential aspects of the courtroom. See Id. Nor should fees or charges be levied which unreasonably interfere with access to jury trial.
PRINCIPLE 2—CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:
   1. Are less than eighteen years of age; or
   2. Are not citizens of the United States; or
   3. Are not residents of the jurisdiction in which they have been summoned to serve; or
   4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or
   5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

C. The time required of persons called for jury service should be the shortest period consistent with the needs of justice.
   1. Courts should use a term of service of one day or the completion of one trial, whichever is longer.
   2. Where deviation from the term of service set forth in C.1. above is deemed necessary, the court should not require a person to remain available to be selected for jury service for longer than two weeks.

D. Courts should respect jurors’ time by calling in the minimum number deemed necessary and by minimizing their waiting time.
   1. Courts should coordinate jury management and calendar management to make effective use of jurors.
   2. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of persons summoned for jury duty and the number assigned to jury panels.
Principle 2

3. Courts should ensure that all jurors in the courthouse waiting to be assigned to panels for the first time are assigned before any juror is assigned a second time.

E. Courts should provide an adequate and suitable environment for jurors, including those who require reasonable accommodation due to disability.

F. Persons called for jury service should receive a reasonable fee.
   1. Persons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care. Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials.
   2. Employers should be prohibited from discharging, laying off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.
   3. Employers should be prohibited from requiring jurors to use leave or vacation time for the time spent on jury service or be required to make up the time they served.

Comment

Subdivision A.

This subdivision is drawn from Standard 4 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision, as well as subdivisions B. and C. below, are designed to extend the privilege and responsibilities of jury service to as broad a segment of the population as is possible. The imposition of myriad eligibility requirements not only adversely affects the inclusiveness of the jury selection process, but may also increase the cost of administering the jury system. Hence, the qualifications for jury service listed in this subdivision are limited to those five that are essential to maintaining the integrity of the judicial process.

The first limitation on eligibility is that only persons age eighteen and over should be permitted to serve on a jury. All but three states set the minimum age at 18. No maximum age is recommended because it would be inappropriate to exclude older Americans as a group—most are able and willing to serve.
The second limitation is that a person must be a citizen of the United States to serve as a juror. This requirement is already imposed in most states either by law or in fact through reliance upon the voter registration list as the primary source of potential jurors.

The third limitation is that all prospective jurors must be residents of the jurisdiction in which they have been summoned to serve. In accordance with the statutes of most states, this subsection recommends no minimum period of residence. Courts have ruled lengthy periods of residency unconstitutional as prerequisites for voting and receiving public assistance. \textit{Memorial Hosp. v. Maricopa County}; 415 U.S. 250 (1974); \textit{Dunn v. Blumstein}, 405 U.S. 330 (1972); \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969). Therefore, the term “resident” refers to all persons living in the jurisdiction and includes students attending local universities, and military personnel and their dependents who live in the community.

The fourth limitation is that prospective jurors must be able to communicate in the English language or the court must provide a satisfactory interpreter. The purpose of using the word “communicate” is to minimize the possibility of bias and discrimination in the jury selection process based on disabilities that interfere with potential jurors speaking in English. For instance, courts have found that a juror’s hearing impairment did not disqualify the juror nor did an interpreter’s presence during jury deliberations deprive the defendant of a fair trial. \textit{United States v. Dempsey}, 830 F.2d 1084 (10th Cir. 1987). In addition, the option of using an interpreter is included to allow for non-English speakers to serve on juries. In New Mexico, the right of citizens of the state to serve on juries cannot be restricted on the basis of an inability to speak, read or write English or Spanish. N.M. \textit{CONST.} art. VII, § 3.

The fifth limitation is that prospective jurors have not been convicted of a felony and are not in confinement or under supervision such as probation or parole. Felons are disqualified in 31 states and in federal courts from ever serving on a jury. This subsection adds the proviso that in addition to a felony conviction, the disqualified individual must also be under court or penal supervision. It has been argued that the presence of felons on juries
Principle 2

Principles for may undermine the public’s respect for the process or inject bias into jury deliberations. However, the desire for a jury representative of the population may be thwarted if large groups of citizens are automatically debarred from service. See Brian C. Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev. 65 (2003).

Subdivision B.

This subdivision is drawn from Standard 1 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

Jury duty is both a civic responsibility and an obligation of all qualified citizens. It is also a constitutional right of citizens recognized by the Supreme Court. Powers v. Ohio, 499 U.S. 400 (1991). The subdivision stresses that each group and individual should have the opportunity for jury service, and that none should be excluded. By ensuring that everyone has the opportunity to serve, a court not only increases the number of individuals serving as jurors, but also increases the representative nature of the panel. Along those lines, the Supreme Court has held that a prima facie violation of the fair cross-section requirement is shown when a distinctive group in the community is not represented in the pool from which juries are selected in a fair and reasonable relationship to the number of such persons in the community; and the under-representation is due to the systematic exclusion of the group in the jury selection process. See Duren v. Missouri, 439 U.S. 357, 364 (1979). In addition, under the Americans with Disabilities Act of 1990, persons with disabilities must be afforded equal opportunities to serve, and must remain on the list of eligible jurors. 42 U.S.C. §§ 12101-12213.

The subdivision places on the court, the commission, or the individual responsible for managing the jury selection process the duty to avoid any practices or procedures that are discriminatory in purpose or effect. It urges the entity or individual responsible for jury operations to remain alert and sensitive to measures that may limit the opportunity of segments of the community to serve on a jury. The duty to avoid discriminatory practices applies at all stages of the jury selection process, including, but not limited to
the selection of names from the source list and the master list, the granting of excuses and deferrals and the exercise of peremptory challenges.

Subdivision C.

This subdivision is drawn from Standard 5 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision recommends that jurisdictions reduce to the shortest duration feasible both the period of time during which persons are required to remain available for jury duty and the time spent at the courthouse. The length of the jury term has a substantial impact on several aspects of jury management. See JANICE T. MUNSTERMAN ET AL., NATIONAL CENTER FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (1991) [hereinafter RELATIONSHIP]. The subdivision recognizes that reducing the term of jury service is essential to achieving a representative and inclusive jury. A shortened term would minimize or practically eliminate the inconvenience and hardship presented by jury duty and thus would justify the application of a strict excuse policy. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § II-2 (G. Thomas Munsterman et al., eds. 1997) [hereinafter INNOVATIONS].

In addition to diminishing representativeness and inclusiveness, lengthy terms of juror service, when combined with inefficient use of prospective jurors, lead to juror frustration and dissatisfaction with the jury system and with the judicial system in general. See Shari Seidman Diamond, What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 283 (Robert Litan, ed., 1993). A shortened jury term encourages more efficient use of jurors and reduces the amount of time they spend waiting to be used, thus recognizing that citizens are making an important contribution and their time is valuable.

This subdivision also attempts to alleviate the inconvenience of remaining available for service for several weeks or months by recommending that jurisdictions not require persons to remain available for jury service for more than two weeks and consider
Principle 2

Principles for placing a limitation on the number of times a juror can be called. This would relieve the hardship and inconvenience to both the individual and the employer. G. Thomas Munsterman, National Center for State Courts, Jury System Management, Elem. 6, (1996) [hereinafter Management].

Subdivision D.

This subdivision is drawn from Standard 13 of the ABA Standards Relating to Juror Use and Management (1993).

This subdivision recognizes the need to balance the supply of prospective jurors at the courthouse with the actual number required to accommodate scheduled trial activity and to employ prospective jurors’ service so as to achieve the best use of their time.

Inefficient scheduling practices, such as scheduling voir dires to begin simultaneously, create a heavy demand on the jury pool for short periods of time and usually result in the need to summon a larger pool to accommodate these anticipated trial starts. Staggering trial starts so that judges do not simultaneously call for panels of jurors, thereby depleting the pool, is one way to alleviate demands on the pool and to achieve a high rate of juror use. Another method is to maintain continuous court operation by scheduling bench trials and other activities around jury trials so that the demand for jurors is spread more evenly throughout the day, the week and the term. Although jury panels must be large enough to permit the selection of a trial jury after the parties have exercised their challenges, panels frequently include substantially more people than are needed to cover allowable challenges. Reducing the panel size to the minimally sufficient number of prospective jurors increases efficient juror use. Courts should set a standardized size for panels in a given type of case after analyzing data of past juror use. In general, courts that have reduced their panel sizes have found them sufficient to meet most of their needs for jurors with little or no delay. Furthermore, setting a standardized size for panels is essential to effective jury management so that judges and court administrators recognize the importance of improved juror use and its crucial impact on both the
overall cost and efficiency of jury system operations and the public’s attitude toward jury duty. MANAGEMENT, supra, Elem. at 7-12.

As a matter of the proper usage of prospective jurors’ time, each prospective juror in the courthouse waiting to be assigned to a panel for the first time should be so assigned before any juror is assigned a second time.

Subdivision E.

This subdivision is drawn from Standard 14 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

The court should make all facilities accommodating to all jurors, including those with disabilities. Adequate facilities play an integral part in the realization of an efficient, well-managed jury operation. Poor spatial arrangement and unsatisfactory environmental conditions, in addition to inadequate facilities, can reduce the efficiency of operations. Inadequate attention to the accessibility of courthouse facilities can reduce the representativeness of the jury pool by, in effect, excluding many otherwise eligible persons whose mobility is impaired. This subdivision also recognizes the need for an adequate and suitable environment for jurors, to allow them to wait in comfort, safety and dignity. See DON HADENBERGH, THE COURTHOUSE: A PLANNING AND DESIGN GUIDE FOR COURTHOUSE FACILITIES (2d ed., 1998).

Subdivision F.

This subdivision is drawn from Standard 15 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

While the daily fee paid to individual jurors is generally quite low, the aggregate cost of compensating jurors constitutes a significant percentage of the court budget in most jurisdictions. The minimal size of the daily fee means that “[f]ew persons making more than the minimum wage can afford [the] . . . sudden and involuntary cut in pay” imposed by jury service. JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 11 (1977). As a result, excuses from jury
service because of economic hardship are common in many jurisdictions for laborers, sales people, unemployed parents with childcare expenses, and sole proprietors of small businesses. RELATIONSHIP, supra. This not only reduces the representativeness of the jury pool but, when coupled with the length of the term of service in many jurisdictions, transfers a significant portion of the cost of public service to private industry. INNOVATIONS, supra, at § II-3.

Citizens should not be penalized for fulfilling their civic duty to serve as jurors. Employers should be prohibited from discharging, laying off, denying advancement opportunities to or otherwise penalizing employees who miss work because of jury service. Some jurisdictions have gone so far as to grant a statutory right of action for monetary damages as well as equitable remedies in such situations. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JURY SELECTION AND SERVICE ACT, § 17 (1986); D.C. CODE ANN., § 11-1913 (2001); NEB. REV. STAT., § 25-1640 (1989). Fortunately, most medium and large size organizations maintain the salary of those on jury duty. Several states mandate that jurors be paid their salary or wages. Some of these have provisions that relieve the employer of such an obligation after a specified number of days. The Supreme Court has upheld such a statutory arrangement in Alabama. Dean v. Gadsden Times Publ’g. Corp., 412 U.S. 545 (1973).
PRINCIPLE 3—JURIES SHOULD HAVE 12 MEMBERS

A. Juries in civil cases should be constituted of 12 members wherever feasible and under no circumstances fewer than six members.

B. Juries in criminal cases should consist of:
   1. Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction;
   2. At least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.

C. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of fewer jurors than required for a full jury, but in no case fewer than six jurors. In criminal cases the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, and the consequences of waiver, personally waives the right to a full jury either in writing or in open court on the record.

Comment

Subdivision A. and B.

These subdivisions are drawn from Standard 17 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and Standard 15-1.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to jury trial in non-petty criminal cases. The Seventh Amendment guarantees that right in federal civil cases. As historically understood this guarantee required a jury “composed of not less than twelve persons.” Thompson v. Utah, 170 U.S. 343, 350 (1898). In 1970, for the first time, the Supreme Court retreated from the requirement of a jury of twelve. Williams v. Florida, 399 U.S. 78, 102 (1970). The Court eventually concluded that juries with as few as, but no fewer than, six members are constitutional in state criminal cases. Ballew v. Georgia, 435 U.S. 223 (1978). It also held that juries with fewer than twelve members are constitutional in federal civil cases. Colgrove
Principle 3

Principles for


In light of history and the empirical data these Principles seek to encourage a return to the twelve person jury in all non-petty criminal cases and in all civil cases wherever feasible. Studies have established that there are significant differences between the effectiveness of six and twelve member juries. Dennis J. Devine et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 Psychol. Pub. Pol’y & L. 622, 670 (2001); Michael J. Saks, The Smaller the Jury the Greater the Unpredictability, 79 Judicature 263 (1996) [hereinafter “Unpredictability”]. Larger juries deliberate longer, and have better recall of trial testimony. Unpredictability, supra, at 264-65. Thus, they are more likely to produce accurate results. Angelo Valenti & Leslie Downing, Six Versus Twelve Member Juries; An Experimental Test of the Supreme Court Assumption of Functional Equivalence, 1 Pers. & Soc. Psychol. Bull. 273, 274 (1974). By contrast, smaller civil juries are more likely to produce a number of outlier awards that do not reflect community values. Unpredictability, supra, at 263; Devine et al., supra, at 670. Evidence also suggests the logical corollary, that larger juries in criminal cases are more likely to return verdicts in accord with community values. Michael J. Saks, The Role of Group Size and Social
Principle 3

Juries & Jury Trials


The smaller the size of the jury, the less representative it becomes. Colgrove v. Battin, 413 U.S. 149, 167 n.1 (1973) (Marshall, J., dissenting); Unpredictability, supra, at 264; E. THOMAS MUNSTERSMAN ET AL., A COMPARISON OF THE PERFORMANCE OF EIGHT AND TWELVE-PERSON JURIES (1990). A jury of one’s peers must be representative of the community lest it become a means of tyranny by the majority. Maintaining the representative nature of the jury is essential to preserving its fairness and legitimacy in the eyes of the public. Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261, 1317 (2000). Twelve person juries are significantly more likely to facilitate representation of minority voices. For example, in a community with a 10 percent minority population a twelve person jury is 25 percentage points more likely to contain a member of that group than is a six person jury (72 percent of twelve person juries v. 47 percent of six person juries). Unpredictability, supra, at 264.

Some decrease in hung juries is likely to occur with smaller juries. Michael J. Saks & Mollie W. Marti, A Meta-Analysis of the Effects of Jury Size, 21 LAW AND HUM. BEHAV. 451, 469-461 (1997). Fewer jurors must agree to reach a verdict on a smaller jury, and the smaller jury is less likely to include multiple jurors who do not share the position of the majority, decreasing the strength of the psychological position of the minority. With the effectiveness of the minority reduced, deadlocks are less likely. The modest reduction in hung juries in criminal cases that the smaller jury offers must be evaluated in light of the threat to representativeness and reliability associated with the drop in jury size. Moreover, research indicates that hung juries are most likely to occur in cases that judges and jurors view as ambiguous or close, suggesting that they may warrant a second look. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? (2002). Hung juries are rare in civil cases, so the effect of jury size on the rate of hung juries is likely to influence fewer outcomes in civil as opposed to criminal cases.

In contrast to the preliminary studies cited by the Supreme Court, subsequent research has found that six person juries are
Principle 3

Principles for only minimally more efficient or cheaper than twelve person juries. Developments in the Law, supra, at 1489 (1997); William R. Pabst, Jr., Statistical Studies of the Costs of Six-Man Versus Twelve Man Juries, 14 WM. & MARY L. REV. 326, 327 (1972); John T. Burke & Francis P. Smith, Jury of Twelve—No Accident, 42 INS. COUNS. J. 213 (1975); Hanz Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. REV. 710, 711-712 (1971). Any time savings resulting from smaller juries are likely to occur in the impaneling and deliberation stages of the trial. Data show that the additional time spent in the impaneling stage is insignificant. Pabst, supra, at 327; Comm. on Fed. Civ. Pro., 205 F.R.D. at 247. Similarly, studies indicate that differences in deliberation time are small. Devine et al., supra, at 670; MUNSTERMAN ET AL., supra. Overall, little court time is saved by reducing jury size. Comm. on Fed. Civ. Pro., 205 F.R.D. at 247; INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX AND TWELVE MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Edward Beiser & Rene Varrin, Six Member Juries in the Federal Courts, 58 JUDICATURE 428 (1975).

Consistent with long-standing ABA policy, these Principles are most insistent that all serious criminal cases (with a penalty of confinement of more than six months) be tried to a jury of twelve because of the particular opprobrium and the threat to liberty inherent in such convictions as well as the threat to society posed by an unwarranted acquittal. While such considerations may be somewhat moderated in civil cases and with respect to petty offenses, both will frequently have the most profound effect on those involved. Moreover, deviant jury awards, more likely with smaller juries, can undermine the legitimacy of the civil jury. The principle established with respect to serious offenses should be viewed as militating for a return to twelve person juries in all settings.

It should be emphasized that the preference expressed in these Principles for the twelve person jury is premised on colonial and federal constitutional considerations, long historical experience and the best empirical evidence currently available. In expressing that preference these Principles do not seek to deny that legitimate
alternative views regarding jury size exist nor to suggest the illegitimacy of alternative constitutional commitments existing in a number of states.

Subdivision C.

This subdivision is drawn from Standard 15-1.3 of the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996) and extends that Standard to civil cases as well as imposing a floor of six on the number of jurors that may be agreed to by stipulation.

The subdivision permits reduction of jury size where all the parties agree to such a reduction and the court approves it. Waivers of a jury of twelve have been approved by the Supreme Court. *Patton v. United States*, 281 U.S. 276 (1930). Agreement to reduce the jury’s size can be made at any time before verdict and can be made contingent upon one or more jurors becoming unavailable due to illness or emergency.

In criminal cases, stipulations cannot be approved unless the court has advised the defendant both of his or her right to a full jury and the consequences of waiver, and the defendant then personally waives that right in writing or in open court. The requirements to obtain a stipulation for reduction in the size of the jury are necessarily stricter in criminal cases because of the heightened threat to individual liberty. A lawyer’s representation of a client’s consent is not “personal” consent. *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971). Where the stipulation is made orally in court, the record must clearly reflect the defendant’s personal express and knowing consent to the stipulation. *Id.*; *Rogers v. United States*, 319 F.2d 5 (7th Cir. 1963). These requirements should be strictly enforced. *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), aff’d, 471 U.S. 773 (1985).
PRINCIPLE 4—JURY DECISIONS SHOULD BE UNANIMOUS

A. In civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted, except as provided in C. below.

B. A unanimous decision should be required in all criminal cases heard by a jury.

C. At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.

Comment

Subdivisions A. and B.

These subdivisions are drawn from Standard 17 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and Standard 15-1.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 HASTINGS L.J. 579, 586 (1993). This proposition was specifically embraced by the Supreme Court in American Publishing Co. v. Fisher, 166 U.S. 464, in 1897. It stood until 1972, when the Court decided that less than unanimous verdicts are permissible in state court criminal proceedings. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld an eleven-to-one verdict, while in Johnson v. Louisiana, 406 U.S. 356 (1972), it accepted a nine-to-three verdict. These decisions left open the question of just
Principle 4

Principles for how small a jury majority could be and still satisfy constitutional constraints. In criminal matters, the Supreme Court has provided at least a partial answer. In *Burch v. Louisiana*, 441 U.S. 130 (1979), the court held that conviction by a vote of five-to-one is unacceptable because it yields less than six votes for conviction, thereby trenching upon the principle established in *Ballew v. Georgia*, 435 U.S. 223 (1978). Still unanswered are questions about the validity of votes like eight-to-four and seven-to-five. These numerical questions point up the absence of any clearcut rationale for the Supreme Court’s preference.

The historical preference for unanimous juries reflects society’s strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions—ones that address and persuade every juror. Empirical assessment tends to support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 669 (2001). In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached. *Id.*

Unanimous verdicts also protect jury representativeness—each point of view must be considered and all jurors persuaded. Studies have shown that minority jurors participate more actively when decisions must be unanimous. Reid Hastie et al., *Inside the Jury* 45-58 (1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 2, 23 (2001); Dennis J. Devine et al., *supra*, at 669. A non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation. This fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1315 (2000).
There is a fear that a unanimity rule will result in more hung juries. This fear is overstated. Juries rarely hang because of one or two obstinate jurors. Id. at 1317; Harry Kalven & Hans Zeisel, The American Jury, 462-63 (1966). A survey of trial judges found that, where unanimous verdicts were required, 5.6 percent of juries ended in deadlock, compared with 3.1 percent where majority verdicts were permitted. Kalven & Zeisel, supra. Generally, when deadlocks occur, they reflect genuine disagreement over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations. Paula L. Hannaford-Agor et al., Are Hung Juries A Problem?, 67 (2002); Reid Hastie, et al., supra, at 166-167; Michael J. Saks, What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions, 6 S. Cal. Intercid. L.J. 1, 41 (1997). Moreover, the cost of hung juries should not be overstated. Only one-third of the cases resulting in hung juries are retried. Half are disposed of by plea agreements or dismissals. Hannaford-Agor et al., supra, at 83-84.

A unanimous verdict should be required in all criminal cases. This requirement reflects the established practice in federal criminal trials. Fed. R. Crim. P. 31(2) (2004). In criminal trials, there is a heightened need for accuracy and for a representative panel because a person’s liberty is at risk and society faces the threat of mistaken acquittal or conviction, both of which undermine faith in the justice system. The need for unanimity has been recognized as compelling by the Supreme Court, where only six jurors are impaneled. Burch, 441 U.S. at 139.

As in criminal cases, the preference for unanimous verdicts in civil cases is intended to ensure an accurate and representative verdict. However, it has been held that less than unanimous verdicts are permissible because civil trials require a lesser standard of proof and have traditionally been afforded more procedural flexibility than criminal litigation. See In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan J., concurring). Nonetheless, the need for accuracy, representativeness and public confidence in verdicts all argue for the unanimity standard in civil cases. In deference to local variation on this question, the present subdivision proposes that, in no case should a verdict be accepted that is concurred in
Principle 4

by less than five-sixths of the jurors. Thus, on a jury of twelve, there may be no more than two dissenting votes; on a jury of fewer than twelve, no more than one dissenter. On a jury of six, the subdivision requires unanimity.

The requirement that jurors deliberate for a reasonable period of time helps to ensure that minority voices will be heard during deliberations, even if a quorum is reached on the first vote. Richard O. Lempert, Uncovering ‘Nondiscernable’ Differences: Empirical Research and the Jury Size Cases, 73 Mich. L. Rev. 643, 645 (1975); Jon M. Van Dyke, Jury Section Procedures: Our Uncertain Commitment to Representative Panels 193-214 (1977). Three states, Iowa, Minnesota and Nebraska, have adopted a procedure that allows a split verdict only after the jury has deliberated for six hours (a unanimous verdict can be rendered at any time).

Subdivision C.

This subdivision is drawn from Standard 15-1.3 of the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996) and extends the standard to civil cases.

The subdivision permits a stipulation to a non-unanimous verdict where the parties all agree to a specified number of concurring jurors and the court approves. Waivers of unanimous verdicts have traditionally been permitted in civil trials and have also been permitted in some state criminal trials. Wayne F. Foster, Annotation, Validity and Efficacy of Accused’s Waiver of Unanimous Verdict, 97 A.L.R. 3d 1253 (1980); see, e.g., Ashton v. Commonwealth, 405 S.W. 2d 562 (Ky. 1965); State v. Ruppert, 375 N.E. 2d 1250 (Ohio 1978). A stipulation regarding non-unanimity can be made at any time before verdict.

In criminal cases, stipulations cannot be approved unless the court has advised the defendant both of his or her right to a unanimous verdict and the consequences of waiver, and the defendant has personally waived that right in writing or in open court. The requirements to obtain a stipulation or a waiver of unanimity are necessarily stricter in criminal cases because of the heightened threat to individual liberty.
PRINCIPLE 5—IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

A. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.
   1. All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state’s highest court or judicial council.
   2. A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.
   3. Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.

B. Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:
   1. The representativeness and inclusiveness of the jury source list;
   2. The effectiveness of qualification and summoning procedures;
   3. The responsiveness of individual citizens to jury duty summonses;
   4. The efficient use of jurors; and
   5. The reasonableness of accommodations being provided to jurors with disabilities.

Comment

This Principle places an affirmative obligation on courts to enforce and protect the rights of citizens to jury trials and jury participation. The Principle purposefully places this obligation on courts rather than the executive or legislative branches of government due to the direct impact that effective jury system management has on public perception of the fairness and integrity of the judicial branch of government. The pivotal role of the jury system in American democracy further warrants the direct responsibility
Principle 5


Subdivision A.

This subdivision is drawn from Standard 10 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

One of the most significant advances in court administration during the past several decades is the widespread acceptance of the principle that the judiciary should have the authority to control and reform the process by which the courts are administered and cases are litigated. Court rulemaking authority is inherently more flexible and responsive than the legislative process. This flexibility enables courts to react quickly in two critical ways: (1) to enact needed reforms, and (2) to take advantage of the latest technological innovations available to enhance jury system fairness and efficiency.

Obviously, the needs, resources and capabilities of large urban areas will differ from those in suburban or rural areas within the same state. In making rules pursuant to the authority suggested in this subdivision, states should take care to account for local needs, resources, customs and practices, and establish state standards flexible enough to permit them to be tailored to local needs and to encourage innovation at the individual administrator level. See, e.g., Interim Report of the Commission on the Jury to the Chief Judge of the State of New York, June 17, 2004 Press Release, at 3, available at www.nycourts.gov/press.

This subdivision encourages efficient use of juror resources. Ample empirical evidence demonstrates that in most jurisdictions, far more jurors are called than are ever seated for jury service, resulting in inefficient use of juror resources. See generally G. Thomas Munsterman, New York’s 82 Percent Committee: What Would You Call Your Committee? 18 COURT MANAGER 47 (2003), (citing statistics from various jurisdictions). Therefore, this subdivision advocates that the administration of jury systems within all the courts in a given locale be consolidated, standardized and directed from one central location. Standardized jury system administration improves overall
Juries & Jury Trials

Principle 5

juror utilization, which has been proven to result in more positive juror experience with the system, increased taxpayer savings and more equitable allocation of jury service obligations among the population. See G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT, Elem. 7 (1996) (hereinafter MANAGEMENT).

Centralizing administration of jury systems for all local courts in one location necessitates management of that system by one designated jury manager, as does the use of a jury system management plan. See generally Id. at Elem. 1. Jurisdictions that do not consolidate administration of jury systems in one court should nonetheless designate a single, supervised jury manager at an appropriate level to ensure accountability and facilitate ongoing monitoring of the system as a whole.

Subdivision B.

This subdivision is drawn from Standard 12 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision recognizes that regular data collection and analysis are essential to the effectiveness of the jury system. As of 2004, 32 states had examined or were currently examining their jury systems. See, e.g., Interim Report of the Commission on the Jury to the Chief Judge of the State of New York, June 2004, available at 222.nycourts.gov/press; G. Thomas Munsterman, Implementing Jury Trial Innovations, Court Manager “Jury News,” April 1, 2002, available at http://www.ncsonline.org. Those examinations have resulted in significant reforms to jury procedures in several states, including guaranteed one-day service, increased juror fees, telephone standby systems, parking and transit reimbursement and drafting of a juror’s handbook. Jury System Improvement, April 5, 2005 available at www.courtinfo.ca.gov/jury/improvements.htm; National Center for State Courts, Jury Trial Innovations: State Links, May 5, 2005 available at www.ncsonline.org/WC/Publications/KIS_JurInnStates Pub.pdf. Regular data collection and analysis are essential to the success of these and future assessments of the effectiveness of the jury system. Data that identifies shortcomings in accommodating...
Principle 5

jurors with disabilities is of particular importance because it enables courts to be more responsive to those shortcomings. For specific steps that courts can take to accommodate jurors with disabilities, see AMERICAN BAR ASSOCIATION, INTO THE JURY BOX: A DISABILITY ACCOMMODATION GUIDE FOR STATE COURTS (Fall 1994).
PRINCIPLE 6—COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:
   1. Upon initial contact prior to service;
   2. Upon first appearance at the courthouse; and
   3. Upon reporting to a courtroom for juror voir dire.

B. Orientation programs should be:
   1. Designed to increase jurors’ understanding of the judicial system and prepare them to serve competently as jurors;
   2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and
   3. Presented, at least in part, by a judge.

C. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.
   1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury’s role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.
   2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room until the trial is over and the jury has reached a verdict. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F.
   3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.
   4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.
Principle 6

Comment

This Principle is drawn from Standard 16 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

In order for citizens to fulfill their responsibilities as jurors, it is essential to inform prospective jurors what is expected of them and how they should approach the challenging tasks they will be performing in the course of jury service. Adequately apprising jurors of their role and responsibilities in the American legal system also promotes a positive attitude toward jury service among citizens by ensuring that they feel confident in performing their duties as jurors.

This Principle recognizes the many types of information received by jurors and emphasizes the importance of clear, concise communication with them.

Subdivisions A. and B.

For most citizens, jury duty is a unique experience. They are eager to do a good job, but are often unsure precisely what they will be asked to do. Jurors, particularly those who have never served before, may be unfamiliar with courts and court proceedings. Indeed, citizens are sometimes hesitant to appear for jury duty because they are uncertain about what to expect. Robert G. Boatright, Why Citizens Don’t Respond to Jury Summons, 82 JUDICATURE 156 (1999). Orientation of jurors should begin with the first contact between the court and the prospective juror. At the earliest possible time, either in the juror qualification questionnaire or in the jury summons, courts should inform prospective jurors about procedures for reporting, including where, when and how to report. The court should also let citizens know how to request a deferral or excuse. So that citizens can arrange their schedules to accommodate jury service, the court should also inform citizens how long jury service will last, whether for a set period of time or, as in many jurisdictions, for one day or, if they are selected, the length of a trial. Prospective jurors are sometimes reluctant to respond to a jury summons because they anticipate that jury duty will be likely to involve service on a long trial, like the
ones that receive attention in the media. It may also be useful to inform jurors that the vast majority of trials last less than a week.

With the growing use of the internet, a number of jurisdictions direct interested prospective jurors to a court website that provides much of this information, including maps showing how to find the courthouse. The website can also address questions frequently asked by jurors in the jurisdiction and handle requests for deferrals. Nancy S. Marder, Jurors and Technology: Equipping Jurors for the Twenty-First Century, 66 Brook. L. Rev. 1257 (2001). This technology offers an efficient and easy way for citizens to become acquainted with the courts and their responsibilities as prospective jurors. Although the internet is rapidly becoming a standard tool, courts using this technology should be sure to make the same information available to citizens who do not yet have easy access to, or facility with, the internet.

When jurors report for jury duty, they should receive an orientation that informs them about the trial process and their role in it, including how they were selected for jury duty, the responsibilities of jurors and court personnel and a general description of what will occur during the day. See G. Thomas Munsterman, National Center for State Courts, Jury System Management (1996). Videotaped presentations, supplemented by juror handbooks, can provide most of the orientation information that remains constant from day to day (e.g., proper juror conduct and behavior; a description of the typical courtroom layout; the functions of the judge and jury), but the introductory greeting welcoming the prospective jurors to the courthouse should include a personal greeting by a judge. Although it can be brief, the judge’s personal greeting provides citizens with tangible recognition of the importance of jury service, whether or not the juror ultimately serves on a trial jury. See Simants v. Nebraska, 277 N.W.2d 219, 220 (Neb. 1979) (finding judge’s brief personal communication with a juror proper).

Further orientation materials should be supplied to prospective jurors by the time they report to a courtroom for jury selection. The commentary appended to Standard 16 of the ABA Standards Relating to Juror Use and Management (1993)
Principle 6

Principles for

provides a detailed description of the matters that should be addressed when the jurors are initially contacted prior to service, when they first appear at the courthouse and when they report to a courtroom for jury selection.

Subdivision C.

Subdivision C recognizes that courts have a responsibility to take measures that facilitate jurors’ understanding of their responsibilities as jurors and the law they are to apply. Because jury instructions perform a crucial function in providing jurors with the legal framework that should guide their decision making, the instructions must be formulated and presented in a manner that is easy to understand. The unnecessary complexity of language, as well as the challenging and convoluted structure of many jury instructions, can create unnecessary obstacles to the effective use of instructions by the jury. Accordingly, instructions should be written in plain language and presented in a manner understandable to laypersons. The commentary regarding Principle 14 provides a full description of issues that should be addressed in formulating clear instructions.

The court should give preliminary jury instructions, both verbally and in writing, before the presentation of the parties’ opening statements. These instructions should explain the jury’s role and responsibilities, the basic general and specific underlying principles of law to be applied in the case and the order and nature of the presentations. COUNCIL FOR COURT EXCELLENCE DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON, D.C. (1998); B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993); Joel D. Lieberman & Bruce D. Sales, What Social Science Teaches Us About the Instruction Process, 3 PSYCHOL. PUB. POL’Y. & LAW 589 (1997).

In the preliminary instructions, the court should tell jurors what they should and should not do in the course of the trial. The preliminary instructions should provide jurors with the instructions governing juror note-taking, submitting questions for
witnesses, the use of juror notebooks and the nature of the discussions concerning the evidence they are permitted to have among themselves during breaks in the trial, as described in Principle 13. The preliminary instructions should describe the circumstances under which such activities are permitted and each juror should receive a copy of those instructions to consult during the trial. The preliminary instructions should also advise jurors of their obligation to refrain from talking about the case outside the jury room until after the case is over. See, e.g., United States v. Venske, 296 F.3d 1284 (11th Cir. 2002); United States v. Brooks, 161 F.3d 1240 (10th Cir. 1998).

The role of preliminary instructions is to provide an introduction to the parties and their claims, and to provide guidance on contested issues and the governing legal principles. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § V-9 (G. Thomas Munsterman et al., eds. 1997). Comprehension of jury instructions, including the ability to apply the law to the facts of the case and to recall relevant evidence, can be improved when jurors receive instruction on the applicable law both before and after the evidence, rather than simply after the evidence is presented. Vicki L. Smith, Impact of Pretrial Instruction on Jurors’ Information Processing and Decision Making, 76 J. APPLIED PSYCHOL. 220 (1991); Amiram Elwork et al., Juridic Decisions: In Ignorance of the Law or In Light of It?, 1 LAW & HUM. BEHAV. 163 (1977). The value of preliminary instructions is consistent with the finding that people receive information more effectively if they understand in advance the context in which they will be required to evaluate or analyze that information, and repetition can enhance recall. Bradley Saxton, How Well Do Jurors Understand Jury Instructions?, 33 LAND & WATER L. REV. 59 (1998). Preliminary jury instructions should include sufficient detail on the legal framework the jurors will be asked to apply to inform the jurors about the relevant legal issues they should be aware of as the trial unfolds. For example, jurors may assume that their task in a tort case will simply be to decide whether or not the defendant is at fault. If the case involves a tort claim of comparative negligence, preliminary instructions should alert jurors to the possibility that at the end of the trial they will be asked to decide how much fault,
Principle 6

if any, should be assigned to each of the two parties. Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 Ariz. L. Rev. 1, 66 (2003).

In delivering the preliminary instructions, the judge should explain that the instructions given at the beginning of the trial may be subject to some change in light of the evidence that emerges at trial, and that the jury will receive the final and definitive instructions only at the end of the trial after all of the evidence has been presented. The final instructions, discussed in Principle 14, should review the relevant content from the preliminary instructions as well as describe the procedures to be used in deliberations, the applicable law and the appropriate method for reporting the results of deliberations.

In the course of the trial, the court may provide the jury with additional explanations concerning the law that will assist the jury in understanding its role and responsibilities. Thus, in addition to ruling on objections, the judge may explain the purpose of a sidebar or the reason why the court is taking a recess to handle a trial-related matter.

All parties should submit proposed preliminary and final instructions in advance of the trial. These proposed instructions can help determine appropriate and timely presentation of procedural and substantive information to the jurors.
PRINCIPLE 7—COURTS SHOULD PROTECT JUROR PRIVACY INSO FAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

A. Juror interest in privacy must be balanced against party and public interest in court proceedings.
   1. Juror voir dire should be open and accessible for public view except as provided herein. Closing voir dire proceedings should only occur after a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury.
   2. Requests to jurors for information should differentiate among information collected for the purpose of juror qualification, jury administration, and voir dire.
   3. Judges should ensure that jurors’ privacy is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.
   4. Courts should explain to jurors how the information they provide will be used, how long it will be retained, and who will have access to it.
   5. Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.
   6. Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and the parties.
   7. Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.
   8. Following jury selection and trial, the court should keep all jurors’ home and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure. Original records, documents and transcripts relating to juror summoning and jury selection may be destroyed when the time for appeal has passed, or the appeal is complete, whichever is longer, provided that, in criminal proceedings,
Principle 7

Principles for the court maintains for use by the parties and the public exact replicas (using any reliable process that ensures their integrity and preservation) of those items and devices for viewing them.

B. Without express court permission, surveillance of jurors and prospective jurors outside the courtroom by or on behalf of a party should be prohibited.

C. If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.

Comment

The jury is the cornerstone of democracy in the judicial branch of government. Unlike participation in most other institutions associated with democracy, however, jurors do not voluntarily choose to serve. Indeed, jurors are compelled to perform their duties or risk prosecution. As a part of their service jurors may be subjected to intrusive questioning and may be compelled to disclose highly personal information. This Principle recognizes that, in certain circumstances, jurors may have a legitimate interest in protecting their privacy and encourages courts to consider and, where possible, protect jurors’ legitimate concerns regarding personal information. Such an approach is not only protective of jurors’ interests but likely to foster juror participation and candor during jury selection.

Subdivision A.

This subdivision acknowledges that established law requires courts to balance the privacy interests of jurors and the rights of litigants and the public when determining whether to keep information touching on the private lives of jurors out of the public domain. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984). Subsections A.1 through A.8 are designed to establish a framework within which courts may balance those interests.
Subsection A.1 emphasizes the presumption that jury selection processes are generally open and accessible to public scrutiny as indicated in Press-Enterprise Co., 464 U.S. at 501. Therefore, jurors’ responses during jury selection are generally open to public view. David Weinstein, Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options, 70 TEMP. L. REV. 1, 19-24 (1997). However, courts may close jury selection processes in those limited circumstances when the court determines that disclosure of the jurors’ identities places them at risk of physical harm or where there is evidence of attempts to intimidate or influence the jury. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § III-8 (G. Thomas Munsterman et al. eds., 1997) [hereinafter INNOVATIONS].

Subsection A.2 recognizes that courts typically collect three types of information from jurors: qualification information; administrative information; and juror selection information. Qualification information is collected to determine whether a prospective juror meets the statutory requirements for service. Administrative information is gathered for purposes of efficient management by the jury system, and includes such items as address, telephone number and Social Security number. Jury selection information, on the other hand, is required by the court and counsel for purposes of examining the fairness and impartiality of prospective jurors in the context of a particular trial. Because qualification and administrative information is generally not necessary to satisfy litigant and public confidence in the fairness and impartiality of jurors, courts may reasonably place more restrictions on public and party access to such information. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 80, 132-34 (1998). In fact, many states restrict public access to qualification and administrative information and/or require that such information be segregated from jury selection information. Paula L. Hannaford, Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures, 85 JUDICATURE 18, 21 (2001). Therefore, in addressing concerns of juror privacy courts should consider the extent to which policies regarding public access to each type of information should differ.
Principle 7

Subsection A.3 recognizes that ignoring the privacy concerns of jurors actually undermines the primary objective of voir dire examination by discouraging prospective jurors from disclosing personal and sensitive information in court. Hannaford, supra, at 19. This subsection encourages courts to consider the potential problem posed by allowing counsel to interrogate jurors extensively regarding personal information. Courts should take proactive measures to ensure that the personal information being solicited during voir dire is relevant to the selection of a fair and impartial jury. Courts should be extremely wary of identification-related questions, such as the name of children’s schools or of employers, when such questions are not relevant to the instant matter. Moreover, courts have a duty to ensure that litigants are not elicitng information as a means of perpetuating unlawful bias. Batson v. Kentucky, 476 U.S. 127 (1986); J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994). When potentially harmful or embarrassing, but relevant information is being elicited from jurors, courts should consider alternative methods of juror selection examination such as in camera examination or written questions. Courts can then, if warranted, take measures to redact such information before transcripts or questionnaires are released.

Juror confidence is enhanced when jurors are made aware of how the information about them will be used and of court procedure for handling the information jurors provide. Therefore, subsection A.4 urges that courts explain to jurors how the information they provide will be utilized. Because jurors are more likely to reveal sensitive information if they are told how such information is relevant, courts or attorneys should also explain the rationale of certain questions. See Hannaford, supra, at 23-24; Mary R. Rose, Expectations of Privacy, 85 JUDICATURE 10, 43 (2001). In addition, courts should inform jurors how the information that they provide will be retained.

Subsection A.5 requires courts to consider juror privacy concerns when choosing a method for voir dire examination. When examination involves very personal or potentially embarrassing or harmful information courts should consider the use of in camera examinations or a written questionnaire. In camera examinations relieve jurors from revealing personal information in open
Principle 7

Juries & Jury Trials
court and in the presence of other jurors, court personnel, or spec-
tators. INNOVATIONS, supra, § III-4; MURPHY ET AL., supra, at 80-
81, 132-33. Questionnaires permit jurors to reveal sensitive or
personal information in their written responses, rather than pub-
licly. Such techniques serve to alleviate some of the discomfort
that prospective jurors would otherwise feel. In choosing a
method, courts should consider the likelihood of increased candor
when jurors are permitted to explain their personal views in a pri-

tate setting. Gregory E. Mize, On Better Jury Selection: Spotting
UFO Jurors Before They Enter the Jury Room, 36 CT. REV. 10,
10-15 (1999). Moreover, before a determination to close a court
proceeding or seal the record is made courts must balance the ju-
rors’ privacy interests against party and public interests and con-
sider alternatives.

Subsection A.6 urges that courts should inform prospective ju-
rors that once the nature of a sensitive question is made known to
them, they may properly request an opportunity to present the
answer to the court in camera, on the record, and in the presence
of counsel. MURPHY ET AL., supra, at 132-33. This procedure
serves to enhance juror confidence and foster candor because it
informs the jurors that the court is aware of the challenge of pro-
viding sensitive information in a setting that the jurors have
nearly no control over. Rose, supra, at 43.

Subsection A.7 directs that to ensure that jurors are not ex-
posed to potentially prejudicial material regarding the trial, courts
should examine the jurors as to such material out of the presence
of one another. This procedure serves to preserve the integrity of
the jury selection process.

The greatest variation in court practice exists in the area of
record retention. Retention of juror information invites misuse of
that information and wastes valuable court resources. Therefore,
subsubsection A.8 proposes that courts should keep all jurors’ home
and business addresses and telephone numbers confidential and
under seal. See MURPHY, ET AL., supra, at 133. Transcripts, docu-
ments and records relating to juror summoning and selection
should be destroyed when the time for appeal has passed or the
appeal is complete. See Hannaford, supra, at 44. However, exact
replas should be kept for criminal proceedings.
Principle 7
Principles for
The access and replicas requirement of subsection A.8 are necessary in order to enable criminal defendants to enforce their right to be judged by an impartial jury. The ABA has specifically recognized that post-trial inquiries into juror bias can be critical to uncovering constitutional error. For this reason, defense counsel must “make every effort to develop the relevant facts, whether by interviewing jurors or otherwise.” ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.10.2 cmt. at note 260 (rev. ed. 2003) (citing sources). The conduct of such an investigation is “good cause” for the disclosure of juror information within the meaning of subsection A.8.

Subdivision B.
Subdivision B is drawn from Standard 7 of the ABA STANDARDS ON JURY USE AND MANAGEMENT (1993). This subdivision acknowledges that it is not uncommon for counsel to obtain the services of private investigators to conduct background investigations of prospective jurors. David Weinstein, Protecting a Juror’s Right To Privacy: Constitutional Constraints and Policy Options, 70 TEMP. L. REV. 1, 33 (1997). Privacy issues are raised as private information is accumulated. The availability of information through the use of the internet increases the likelihood that the storage of information from unsupervised pre-trial investigations may result in an unintended harm. Id. at 6; see also Jonathan M. Redgrave & Jason J. Stover, The Information Age, Part II: Juror Investigation On The Internet—Implications For the Trial Lawyer, 2 SEDONA CONF. J. 211, 211-12 (2001) (discussing the “powerful new investigatory tool” of the internet for attorneys and jury consultants). There is a concern that pre-trial investigations may threaten the impartiality of the jury if a juror discovers that his or her friends, family or neighbors have been subjected to surveillance. See United States v. White, 78 F. Supp. 2d 1025, 1026-28 (D.S.D. 1999). This subdivision urges the prohibition of surveillance of jurors or prospective jurors outside the courtroom, whether by a party or a party’s agents, absent express court permission.
Subdivision C.

Subdivision C. recognizes that technology allows the media to provide information regarding a trial in real time. Roscoe C. Howard, Jr., The Media, Attorneys, And Fair Criminal Trials, 4 KAN. J.L. & PUB. POL'Y 61 (1995). Courts must be aware of the effects such coverage may have on a jury. For instance, the presence of cameras in a courtroom escalates the sensational aspects of the trial; therefore, the attention received may have an effect on the jurors' perception of their roles. Joseph F. Flynn, Prejudicial Publicity In Criminal Trials: Bringing Sheppard v. Maxwell Into The Nineties, 27 NEW ENG. L. REV. 857, 866 (1993). This subdivision acknowledges that the negative impact such attention may have on jurors is not merely speculative. Kenneth B. Nunn, When Juries Meet The Press: Rethinking The Jury's Representative Function In Highly Publicized Cases, 22 HASTINGS CONST. L.Q. 405, 430 (1995). Permitting the jury to be photographed or videotaped exposes them to the public, which in turn may subject them to being contacted and influenced by the community. See Sheppard v. Maxwell, 384 U.S. 333, 353 (1966); see also Estes v. Texas, 381 U.S. 532, 545-46 (1965). Such attention may cause the jurors to base their decision on the community's desires instead of the facts of the case. Nunn, supra, at 431. Therefore, to ensure the privacy of jurors and to prevent them from being exposed to outside influences, courts must take measures to insulate the jury from reporters and photographers. See Sheppard, 384 U.S. at 353; Estes, 381 U.S. at 545-46; see also MURPHY ET AL., supra, at 134.
PRINCIPLE 8—INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

Comment

The significance of a jury is not limited to its role in the decision-making process; jury service also provides citizens with an opportunity to learn, observe and participate in the judicial process. In addition, jury service affords an opportunity for citizens to develop an active concern for and interest in the administration of justice. Jury duty is a civic responsibility shared by all qualified citizens. It is also a constitutional right of citizens recognized by the Supreme Court. *Powers v. Ohio*, 499 U.S. 400 (1991). Based upon the importance of jury service to jurors and parties, as well as to the interest of justice generally, once the process of selecting a jury has begun, the trial court has limited authority to discharge a sworn juror. *New York v. Wilson*, 484 N.Y.S.2d 733 (App. Div. 1985). “A defendant has a valued right to have his trial completed by a particular tribunal and removal of a juror is prejudicial to a defendant absent a showing of good cause.” *Stokes v. State*, 532 A.2d 189, 190 (Md. 1987) (quoting *Tabbs v. State*, 403 A.2d 796, 798 (Md. 1979)).

A juror should not be removed absent a compelling reason. For example, if a juror becomes incapacitated during trial, he or she may be removed and replaced by an alternate juror if one is present. See *Wilson*, 484 N.Y.S.2d at 736. Incapacitated jurors are those who “become or are found to be unable or disqualified to perform their duties.” ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY, 15-2.9 (1996). This Principle permits the court to replace a juror when it is discovered for the first time during trial that the juror should have been disqualified at the time that the juror was sworn, or when the incapacity develops during the course of the trial itself. See ABA STANDARDS FOR
Principle 8

CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY, 15-2.9 (1996); see also United States v. Meinster, 484 F. Supp. 442 (S.D. Fla. 1980) (juror suffered a heart attack during deliberations). However, only illness or other incapacity may be considered in an application to discharge a sworn juror. “The trial court ‘cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left.’” Wilson, 484 N.Y.S.2d at 773.

In cases that involve possible jury nullification, courts should be extremely reluctant to remove a juror after he or she is sworn. In United States v. Thomas, 116 F.3d 606 (2d Cir. 1997), the court held that a juror who intends to nullify the applicable law is subject to dismissal on an analogy to a juror who disregards the court’s instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict. Id. at 614. This case has been widely and appropriately criticized because a juror’s intent to nullify has not, generally, been viewed as constituting compelling reason for removal and because of the overwhelming need to preserve the secrecy of the deliberative process. See Ran Sev Schijanovich, Note, The Second Circuit’s Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence, 20 CARDOZO L. REV. 1275 (1999). Even the court in Thomas conceded that, once a jury has retired to deliberate, the trial judge’s authority to dismiss a juror conflicts with the enormous importance of safeguarding the secrecy of jury deliberations. See Thomas, 116 F.3d at 618.

Other cases approving removal of sworn jurors involve only the most extraordinary and unusual circumstances. These include cases in which a juror is no longer capable of rendering an impartial verdict because he or she feels threatened by one of the parties, United States v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991); when it is discovered that one of the jurors has a relationship with one of the parties, United States v. Barone, 846 F. Supp. 1016, 1018-19 (D. Mass. 1994); or when life circumstances otherwise change for a juror during the course of deliberations in such a way that the juror is no longer considered capable of rendering an impartial verdict. United States v. Egbuniwe, 969 F.2d
Principle 8

Juries & Jury Trials

757, 762-63 (9th Cir. 1992) (affirming dismissal of juror who refused to deliberate or reach a guilty verdict because he had been threatened outside of court in relation to the deliberations). Nevertheless, such cases are exceedingly rare and require special proof of the cause for removal.

A compelling reason exists for removal if a juror refuses to deliberate. “A refusal to deliberate consists of a juror’s unwillingness to engage in the deliberative process; that is he or she will not participate in discussion with fellow jurors by listening to their views and by expressing his or her own view.” People v. Cleveland, 21 P.3d 1225, 1237 (Cal. 2001). Dismissal for this reason has been limited to extreme circumstances as when a juror “express[es] a fixed conclusion at the beginning of deliberations and refus[es] to consider other points of view, refus[es] to speak to other jurors, and attempt[s] to separate [him]self physically from the remainder of the jury.” Id. at 1237-38. A juror who does not deliberate well or relies on faulty logic or analysis does not demonstrate a refusal to deliberate. Id.
Assembling A Jury

PRINCIPLE 9—COURTS SHOULD CONDUCT JURY TRIALS IN THE VENUE REQUIRED BY APPLICABLE LAW OR THE INTERESTS OF JUSTICE

A. In civil cases where a jury demand has been made, a change of venue may be granted as required by applicable law or in the interest of justice.

B. In criminal cases, a change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.

C. Courts should consider the option of trying the case in the original venue but selecting the jury from a new venue. In addition to all other considerations relevant to the selection of the new venue, consideration should be given to whether the original venue would be a better location to conduct the trial due to facilities, security, and the convenience of the victims, court staff, and parties. This should be balanced against the possible inconvenience to the jurors.

Comment

Principle 9 recognizes that courts deciding motions for changes of venue do so by applying a large body of U.S. constitutional and state law. Principle 9 is intended to supplement, not replace, that body of law.

The Principle’s requirement that courts should conduct jury trials in the venue required by applicable law while remaining cognizant of the interests of justice is undergirded by extensive social science research regarding the influence of pre-trial publicity on potential jurors and trial outcomes and the effectiveness of measures short of change of venue to ensure trial fairness. See generally Edith Greene & Elizabeth F. Loftus, What’s New in the News? The Influence of Well-Publicized News Events on Psychological Research and Courtroom Trials, 5 BASIC & APPLIED SOC.
Principle 9

Principles for

**PSYCHOL. 211 (1984)** (analyzing the impact of an unrelated news story regarding mistaken identification on trial involving eyewitness testimony); Edith Greene & R. Wade, *Of Private Talk and Public Print: General Pre-Trial Publicity and Juror Decision-Making*, 2 *APPLIED COGNITIVE PSYCHOL*. 123 (1988) (analyzing the impact of general pre-trial publicity involving similar events on trial outcomes).

Subdivision A.

Subdivision A. indicates that a change of venue may be appropriate in a civil case either under applicable law or in the interest of justice. Examples of problems warranting a change of venue in civil actions have become increasingly common.

Pre-trial publicity may create difficulties in civil trials involving celebrities or issues directly related to high-profile criminal cases. In addition, civil trials may present other occasions warranting a change of venue, such as in suits involving a highly publicized event, or a matter which significantly impacts a particular community.

Subdivision B.

Subdivision B. is drawn from Standard 15-1.4 of the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996).

This subdivision recognizes that criminal trials should ordinarily be held in the place where the offense occurred. As a general matter, holding criminal trials in the community where the crime occurred is equally favorable to both the prosecution and the defense. Costs are reduced, witnesses are readily available for both sides, jurors are familiar with the geographic area, the jury is representative of the community and citizens are afforded the opportunity to participate directly in their government. There are numerous examples of recent cases which have been subject to widespread pre-trial publicity that have been filed, denied change of venue and successfully tried or disposed of in their home jurisdictions. *See* TIMOTHY R. MURPHY ET AL., *NATIONAL CENTER FOR*
State Courts, Managing Notorious Trials 1 (1998) (citing examples such as the cases involving Lorena Bobbitt, O.J. Simpson, Louise Woodward and the 1993 World Trade Center bombing). Some scholars have gone so far as to argue that the community’s right of “vicinage” is a matter of constitutional imperative. See, e.g., Steven A. Engel, The Public’s Vicinage Right: A Constitutional Argument, 75 N.Y.U. L. Rev. 1658 (2000).

At the same time, the factors that normally support trial of a criminal case in the local jurisdiction can, in some circumstances, produce bias necessitating change of venue to ensure a fair trial. One of these circumstances is when the impact of the alleged crime is so pervasive in a community as to taint the entire pool of available jurors, as in the Oklahoma City bombing. In such cases, changes of venue are granted because the impact of the crime in the community results not only in extensive pre-trial publicity, but also in a substantial likelihood that the members of the jury pool know or are related to one or more of the many victims. See Murphy, et al., supra, at 20.

Another such circumstance is when jurors become aware that the verdict reached may result in violence within the community, and that potential for violence rises to the level of influencing trial outcome. See generally Murphy et al., supra, at 21; see also, e.g., Lozano v. Florida, 584 So.2d 19 (Fla. Ct. App. 1991) (manslaughter conviction of Miami police officer overturned on appeal following denial of change of venue motion where evidence showed substantial likelihood of violence if there were an acquittal); Michigan v. Budzyn, 566 N.W.2d 229 (Mich. 1997) (overturning conviction of Detroit police officer where juries became aware of city riot planning in the event of acquittal).

Subdivision C.

Subdivision C. encourages the consideration of “change of venire” or out-of-locality juries. Using this method, the jury is selected from outside the jurisdiction and brought to the original jurisdiction, where the trial is conducted. See Murphy et al., supra, at 21-22; see also Robert S. Stephen, Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure
Principle 9

*a Fair Trial in the Face of a “Media Circus,”* 26 *SUFFOLK U. L. REV.* 1063, 1086-87 (1992). Changes of venire are frequently treated along with changes of venue in applicable state laws and court rules and require courts to apply similar standards for granting either motion.

The “change in venire” option has enjoyed more widespread use in recent years as a preferred alternative to complete change of venue, with its associated costs and impact on the receiving jurisdiction. As out-of-town jurors may be de facto sequestered if their home locale is at a great distance from the trial, courts using this procedure should be mindful of its potential impact on jurors and the deliberative process.
PRINCIPLE 10—COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS

A. Juror source pools should be assembled so as to assure representativeness and inclusiveness.

1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.

2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.

3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.

4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.

5. Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.

B. Courts should use random selection procedures throughout the juror selection process.

1. Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations.

2. Courts should use random selection procedures in:
   a. Selecting persons to be summoned for jury service;
   b. Assigning jurors to panels;
   c. Calling jurors for voir dire; and
   d. Designating, at the outset of jury deliberations, those
Principle 10

Principles for jurors who will serve as “regular” and as “alternate” jurors.

3. Departures from the principle of random selection are appropriate:
   a. To exclude persons ineligible for service in accordance with basic eligibility requirements;
   b. To excuse or defer jurors in accordance with C. below;
   c. To remove jurors for cause or if challenged peremptorily in accordance with D. and E. below; or
   d. To provide jurors who have not been considered for selection with an opportunity to be considered before other jurors are considered for a second time, as provided for in Standard 2 D. 3.

C. Exemptions, excuses, and deferrals should be sparingly used.
   1. All automatic excuses or exemptions from jury service should be eliminated.
   2. Eligible persons who are summoned may be excused from jury service only if:
      a. Their ability to perceive and evaluate information is so impaired that even with reasonable accommodations having been provided, they are unable to perform their duties as jurors and they are excused for this reason by a judge; or
      b. Their service would be an undue hardship or they have served on a jury during the two years preceding their summons and they are excused by a judge or duly authorized court official.
   3. Deferrals of jury service to a date certain within six months should be permitted by a judge or duly authorized court official. Prospective jurors seeking to postpone their jury service to a specific date should be permitted to submit a request by telephone, mail, in person or electronically. Deferrals should be preferred to excuses whenever possible.
   4. Requests for excuses or deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.
D. Courts should use sensible and practical notification and summons procedures in assembling jurors.
   1. The notice summoning a person to jury service should be easy to understand and answer, should specify the steps required for answering and the consequences of failing to answer, should allow for speedy and accurate eligibility screening, and should request basic background information.
   2. Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.
E. Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors.

Comment

This Principle is derived primarily from the ABA's STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and the STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996). It sets forth a variety of well-tested procedures to help courts gather pools of prospective jurors that properly represent the characteristics of the community at large.

The selection of a jury from “a fair cross section of the community is fundamental to the American system of justice.” Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (footnote omitted). As the Supreme Court has observed:

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, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.
Principle 10


The representativeness of the jury is initially dependent on the quality of the source data used for summoning. The closeness of this relationship was succinctly stated by the Supreme Court of California in People v. Wheeler. “Obviously if that [source] list is not representative of a cross-section of the community, the process is constitutionally defective ab initio.” Wheeler, 583 P.2d at 759.

Subdivision A.

This subdivision advises that jury source pools should be representative and inclusive of the eligible population in the jurisdiction. Representativeness is achieved when the percentages of cognizable group members on the source lists are reasonably proportionate to their corresponding percentages in the population. Representativeness and inclusiveness are conceptually distinct and may be antagonistic in practice. Inclusiveness pertains to the percentage of the entire eligible population in a jurisdiction that is included in the sources. Sources can be representative, yet not inclusive. There can be absolute certainty that sources are both representative and inclusive only when they contain 100 percent of the eligible population.

The pursuit of inclusiveness, however, is more straightforward and avoids the need to define the many dimensions of representativeness. By striving for inclusiveness we generally advance representativeness.

Inclusiveness is also important in order to distribute the experience and educational value of jury service across the greatest proportion of the population. The benefit of jury service was remarked by Tocqueville in the 19th century: “The jury serves amazingly to form the judgment and increase the natural enlightenment of the people. That, in my opinion, is its greatest advantage. It must be considered as a school that is free and always open.” ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA, Vol. 1, Ch. 8 (trans. Stephen D. Grant 2000). This benefit is maximized
Principle 10

Juries & Jury Trials

when all citizens serve. The burden of service in terms of time, expense and lost income is minimized when all persons share the experience of jury duty.

Subsection A.1 advises that names of potential jurors should be drawn from two or more regularly maintained lists. Arguments against the use of multiple lists have pointed to the difficulty and cost of combining lists and the difficulty of ensuring that individuals are not entered on the combined list more than once. However, techniques have been developed to accomplish these tasks at relatively little cost. These techniques have been tested in the juror source list context and been found to be effective. See *Paula L. Hannaford-Agor & G. Thomas Munsterman, National Center for State Courts, The Promise and Challenges of Jury System Technology* Ch. 2 (2003).

Many other lists, if they are reasonably current, can be used as a supplement to the original single source (often the roll of registered voters). The most common second list is the list of persons holding drivers licenses or identification cards issued by the state licensing authority. As of 2004, over half of the states use the list of registered voters and the drivers list. Some combine additional sources such as the welfare, unemployment or state income tax lists. Only a few states use the voter or drivers list alone. In selecting lists to be used to form a jury source list, policy makers should consider the frequency with which names are added to and deleted from those lists and when corrections are made for addresses and other information.

Subsection A.2 recognizes representativeness as the proportionate representation of cognizable groups on the source list and in the assembled jury pool.

The Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979), has defined the steps necessary to establish that proportionality is lacking. The three requirements to challenge representativeness are: (1) “that the group alleged to be excluded is a ‘distinctive’ group in 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.” *Id.* at 364.
Principle 10

Principles for

The first prong requires that the alleged group is distinctive or cognizable. A group meets this requirement if members of the group view themselves as distinct, others view the group as distinct and they hold values not necessarily represented by other groups. The second prong requires the application of various statistical tests to show that the underrepresentation is significant. The third prong requires the party challenging the representativeness show that the underrepresentativeness is due to a function of the system and not simply a random occurrence. See Robert Walters & Mark Curriden, A Jury of One's Peers? Investigating Underrepresentation in Jury Voir Dires, 43 Judges J. No. 4 at 17 (2004).

Subsections A.3 and A.4 recommend that courts conduct periodic examination of the source lists being used by a jurisdiction for summoning prospective jurors in order to ensure that the lists are both representative and inclusive of the eligible population in that jurisdiction. If the lists are found deficient in any way, the court should correct the deficiency. See G. Thomas Munsterman & Paula L. Hannaford-Agor, Building on Bedrock, The Continued Evolution of Jury Reform, 43 Judges J. No. 4 at 11-16 (2004).

Subsection A.5 calls upon jury officials to determine the specified qualifications of prospective jurors. This may be accomplished by questionnaire or interview in order to disqualify those who fail to meet eligibility requirements. Such advance screening saves time in the later selection of jurors in individual cases. The discretion afforded jury officials is limited, however, to the determination of whether the prospective juror satisfies qualifications defined by law.

Subdivision B.

Subdivision B. calls for random selection procedures at all appropriate stages of the juror selection process to ensure that the representativeness provided by broadly based jury source lists is not inadvertently diminished or consciously altered.

Subsection B.1 recognizes that random selection of juries can be achieved by various means. Methods can range from manually reaching into a box for the ballots or cards containing the names
of prospective jurors to the use of automated systems. This subsection provides a definition of randomness: giving each “eligible” and “available” person an “equal probability of selection.”


Subsection B.2 advises that random selection procedures are particularly appropriate at four points in the jury selection process: the selection of names of the persons to be summoned for jury service; assignment of those persons to panels; calling persons for consideration in the voir dire process; and designating those jurors who will serve as “regular” and as “alternate” jurors. Randomization procedures may be repeated at each of these stages, although this is not required. For example, the individuals who have been randomly selected to be summoned could be assigned to panels in the order in which their names are drawn from the source list.

Subsection B.3 lists four instances in which exceptions to random selection procedures are appropriate. The first three involve instances when an individual's eligibility, availability for service or impartiality in a particular case is at issue. Clearly, a rational, nonrandom decision must be made in each of these situations to ensure the integrity, quality and efficient operation of the jury
Principle 10

Principles for
system. The fourth instance, B.3d., addresses a possible side effect of a completely random selection. Unless there is an opportunity for all persons on a list to be selected before a name can be drawn a second time, some individuals will be called upon to serve several times while others will not be called at all. To overcome this problem, a “randomization or sampling without replacement” system can be used. Under such a system, the entire list of persons on standby or available is exhausted before a name is drawn a second time. Similarly, every person in the juror pool would be sent to a courtroom for voir dire before an individual returned to the pool after jury selection can be sent a second time. This procedure should ensure that all cognizable groups are represented in the pools and panels from which juries are selected, in a fair and reasonable relationship to the number of such persons in the community and that as many citizens as possible serve on juries.

Subdivision C.

Subdivision C. advises that exemptions, excuses and deferrals should be pared to a minimum. The Supreme Court has held that a jury drawn from a representative cross section of a community is an essential component of the Sixth Amendment guarantee of trial by an impartial jury. Taylor v. Louisiana, 419 U.S. 522 (1975). The exclusion of a substantial portion of the community from jury service through excuses or exemptions seriously alters the representativeness and inclusiveness of a jury panel. See G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT, Elem. 6 (1996). Representative juries will be attained only if the source lists are representative and if as many people as possible on those lists actually appear on jury panels. This subdivision counsels that there must be strict limitation on the number of individuals released from jury duty through excuses and exemptions if the goals of representativeness and inclusiveness are to be achieved.

Subsection C.1 advises that all automatic excuses or exemptions should be eliminated as has been done in 29 states and the District of Columbia. A few states exempt individuals who fall
into certain occupational categories or, upon request, automatically excuse other classes of individuals, such as the elderly or mothers caring for young children. In many areas, this practice has resulted in the absence of a significant portion of the community from the pool of prospective jurors. The difficulty of securing a representative cross section of the community is further increased where certain persons, such as physicians, attorneys, government service workers, accountants and clergymen are exempted from jury service.

The report of the New York Jury Project stated that "5 to 10% of New Yorkers who return their qualification questionnaires claim an occupational exemption. These exemptions were thereafter eliminated increasing the number of available persons such that the percent of persons reporting who indicated that this was their first time on jury duty increased from 33% to over 50%.” See Office of the Chief Administrative Judge, New York United Court System, Jury Reform in New York State: A Second Progress Report on a Continuing Initiative, 33 (March 1998).

This subdivision urges adoption of a strict excuse policy in order to reduce the erosion of representativeness and inclusiveness of the jury at the excuse stage of the jury selection process. Consequently, subsection C.2 recommends that individuals be excused in only a small number of instances. The grounds for excuse are phrased in functional terms rather than as broad diagnostic labels, since it is the effect of the disability rather than its cause which is significant. Accordingly, subsection C.2a. envisions that an excuse only be granted when an individual is so physically or mentally impaired that he or she is unable to receive and assess the evidence and arguments and participate in deliberations with the jury members.

The court may release an individual from jury duty under subsection C.2a. on its own motion. To require a mentally disabled individual to request an excuse makes little sense. Because of the discretion and sensitivity required and to prevent abuse, a judge rather than an administrator should decide whether to grant or deny an excuse on this basis. A judge may also take advanced age
Principle 10

into consideration if any individual requests to be excused. However, age should not constitute an automatic excuse. Rather, age-related problems and disabilities should be considered in an individualized determination.

Subsection C.2b. advises that an excuse may be granted when an individual demonstrates that he or she served as a member of a venire within the past twenty-four months, or that jury service would cause exceptional personal hardship, economic or otherwise, to the individual requesting the excuse, to members of his or her family, to others dependent on his or her skills or services or to members of the public whom that individual serves. The prior service provision spreads jury service more equitably over the population of eligible persons. The hardship provision gives courts the necessary flexibility to accommodate exceptional cases.

Subsection C.3 recommends that all requests for an excuse that do not meet the criteria for excusing a juror should be accommodated by deferring an individual’s jury service. In such circumstances, jury service should be rescheduled immediately for a specific date when the individual will be able to serve. Permitting jury service to be deferred and rescheduled increases the overall representativeness and inclusiveness of the jury pool while decreasing the hardship of jury service.

To facilitate the attainment of these goals, procedures for obtaining a deferment should be relatively simple and informal. This includes allowing prospective jurors seeking to postpone their jury service to a specific date to do so by submitting a request by telephone, mail, in person or electronically. Care must be taken, however, to ensure that the Principle’s purpose of increasing representativeness and inclusiveness is not defeated through abuse of the deferment policy. This can be done by limiting the number deferred to a specific date and the number of deferrals allowed to each person.

Subsection C.4 advises that in order to avert charges of arbitrary or capricious action, a request for an excuse or deferral should be made in writing or, if made orally, reduced to writing for the court’s records. Such records are essential for operating a fair and efficient deferral program and for monitoring the effect of the excuse and deferral process. Requests should be considered
Principle 10

Juries & Jury Trials

...on a case-by-case basis by a judge or duly authorized court official to ensure that sufficient justification for an excuse exists. Recognizing the need for consistency, the subsection further suggests the creation and adoption of a specific and uniform written policy detailing what constitutes undue hardship, specifying the manner in which the hardship is to be demonstrated, and imposing limitations on the number of deferments allowed per individual. The uniform application of a strict, written policy will preclude the granting of arbitrary and inequitable excuses from jury service. Moreover, safeguards against the granting of excessive excuses will protect the representative character of the jury pool.

Subdivision D.

Subdivision D. urges adoption of clear policies and procedures to ensure, to the greatest extent possible, that a summons for jury service involves the use of sensible and practical notification and summons procedures for assembling jurors.

Subsection D.1 sets forth the requirements for a summons. The design and packaging of the notification form is important not only for reasons of efficiency but also because the form serves as an introduction to the courts. Long, legalistic documents may be confusing, tedious, and aggravating to prospective jurors. Both the operation of the jury system and esteem for the judicial process is significantly enhanced when citizens called for jury duty understand what is expected of them, and why it is required. Since the summons will be the first contact for many individuals with the court system, it is essential that the form be as clear and concise as possible.

First, the summons should specify both the manner in which the prospective juror is to respond—by appearing at the courthouse or by calling a particular telephone number—and the exact time, date and place by which the response must occur. Special features, such as a juror-parking pass or a map illustrating how to reach the courthouse can promote a positive citizen response and attitude. Many courts provide this information on a juror-specific internet site. In addition, subsection D.1 advises that the summons should provide notice that compliance is required by law.
Principle 10

Respect for the law should be encouraged. The recipient of a summons should not be able to assume that it can be ignored with impunity. Subsection D.2 carries this concept further by urging that courts establish procedures for dealing with non-respondents appropriately and that the enforcement process should be monitored. See Robert G. Boatright, *Improving Citizen Response to Jury Summons*, American Judicature Society, 1988.

The results of such efforts have been significantly improved response rates. See Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court’s Perspective*, 43 Judges J. No. 4 at 24 (2004); see also Office of the Chief Administrative Judge, *supra*, at 33.

Further, subsection D.1 advises that the summons sent to prospective jurors be carefully tailored to meet the screening and information needs of the jurisdiction. Many different formats for qualification questionnaires are used. Some are designed for manual screening, others for manual entry into a computer, and still others for reading by an optical scanner. Whatever method is used, the form should facilitate rather than complicate the screening process. See Paula L. Hannaford-Agor & G. Thomas Munsheimer, *supra*.

Subdivision E.

This subdivision is drawn from Standard 15-2.3 of the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996).

Subdivision E. advocates that all parties be given an opportunity to challenge the jury array. This is a pretrial procedural mechanism by which any party may attack the validity of the process by which the venire is summoned. Wayne LaFave & Jerold Israel, *Criminal Procedure* 968, 969 (4th ed.) (2004). The challenge aims at the panel as a whole and not at any single juror. The challenge is addressed to the court, and if the challenging party establishes the grounds, the panel must be discharged.

The challenge to the array is governed by statute in most jurisdictions. Although the statutes vary, most address the timing of the challenge and the grounds on which the challenge is to be
determined. Failure to comply with the time limits in the applicable statute or rule is generally considered to be a waiver of the challenge to the array, at least in a case involving a challenge based on the statutory selection process.

The burden of proof is upon the party challenging the array. When the challenge is on statutory grounds, the party objecting must establish a statutory violation. See State v. Pelican, 580 A.2d 942 (Vt. 1990). When the challenge is on constitutional grounds, the party objecting must establish that the jury selected was not a constitutionally requisite cross-section as discussed in A.2 above.

To facilitate the monitoring of representativeness, the court should maintain demographic information regarding potential jurors on source lists, on summonses issued and actually reporting for service. Some courts may be fearful of maintaining such data because it can foster a challenge as previously described. However, if the court is to comply with the periodic review requirement of A.3 and the corrective action requirement of A.4, then such information is essential.

Some source lists contain demographic information. Indicia of representativeness can be inferred by comparing source list coverage to some sub-jurisdiction measure such as census tract or zip code or similar U.S. Census information. Some courts, including all federal district courts, ask responding citizens to provide demographic information. Comparison to U.S. Census information is again possible. Persons reporting for jury service can be asked to supply demographic information; however, means to respect jurors’ privacy should be provided as specified in Standard 7A.8. See Duren v. Missouri, 439 U.S. 357 (1979); see also United States v. Ross, 468 F.2d 1213 (9th Cir. 1972); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983).
PRINCIPLE 11—COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

B. The voir dire process should be held on the record and appropriate demographic data collected.

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors’ legal qualification to serve in the case.

2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit
Principle 11

Principles for each separately represented party to participate meaningfully in questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.

3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.

4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.

5. It is the responsibility of the court to prevent abuse of the juror selection examination process.

C. Challenges for cause should be available at the request of a party or at the court’s own initiative.

1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.

2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.

3. In ruling on a challenge for cause, the court should evaluate the juror’s demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

D. Peremptory challenges should be available to each of the parties.

1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.
2. The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.

3. The court should have the authority to allow additional peremptory challenges when justified.

4. Following completion of the examination of jurors, the parties should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.

E. Fair procedures should be utilized in the exercise of challenges.

1. All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court’s ruling on the challenge.

2. After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D. 4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.

3. The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.

4. No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.

F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.
Principle 11

2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the juror because of the juror’s membership in that group.

3. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

4. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.

5. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.

G. The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court’s discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.
1. Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.
2. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.
3. In civil cases where there are 12 or fewer jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.

H. Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury’s decision.

Comment

Principle 11 encourages courts to establish and enforce practices that promote the selection of a jury that is fair and impartial. Principle 11 provides judges and counsel with model procedures that promote the intelligent and lawful exercise of for-cause and peremptory strikes of unfit prospective jurors. This Principle addresses the policy issues of how voir dire can elicit necessary and useful information while still observing constitutional requirements and respecting the privacy interests of prospective jurors.

Subdivision A.

This subdivision encourages the use of pre-voir dire questionnaires. It is drawn from Standard 15-2.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

It is beneficial both to the system as a whole and to the attorneys involved in a particular case to use a questionnaire to obtain information from prospective jurors. The questionnaire data should be furnished to counsel before voir dire along with the list of prospective jurors. Use of a questionnaire is likely to shorten the time necessary for juror selection and permits both the court and counsel to make better informed decisions about the exercise of challenges during the jury selection process.
This subdivision discusses two types of questionnaires: a basic questionnaire to be returned by the prospective jurors in all cases and a specialized questionnaire to be returned by prospective jurors when the demands of a particular case warrant it.

The purpose of questionnaires is to shorten the time required for the voir dire, and thereby streamline the trial process. Questionnaires should be mailed to all prospective jurors well in advance of trial, to be returned either by mail before the day of trial or when the jurors arrive at the courthouse. MANUAL FOR COMPLEX LITIGATION (THIRD) § VI(A)(3)(e) (1995). In any case, they should be returned in sufficient time to permit timely use by the court and counsel.

Basic questionnaires currently in use vary significantly as to length and intrusiveness of the questions proposed. The basic questionnaire should enable counsel to acquire sufficient information without engaging in overly intrusive questioning. The Federal Judicial Center has recommended an extensive, yet not overly intrusive questionnaire. Id. Specialized questionnaires are designed to obtain information more directly related to the issues in a particular case. They should be designed to permit the court and counsel to gain specialized information needed for effective voir dire in an efficient manner.

There are several benefits to providing questionnaires to counsel before voir dire. First, repetitive voir dire questioning can be minimized. Second, prospective jurors may be more willing to divulge sensitive information on the written form than to discuss the same information in open court. Mary R. Rose, Juror’s Views of Voir Dire Questions, 85 JUDICATURE 10, 14 (2001); Paula L. Hannaford, Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures, 85 JUDICATURE 18, 20 (2001). Third, the questionnaires, by providing relevant information early, permit the court and counsel to conduct a more focused voir dire. Valerie Hans & Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process, 78 CHI-KENT L. REV. 1179, 1198 (2003). Lastly, questionnaires can reduce the number of citizens who spend time waiting to be questioned for a case on which
Principle 11

Juries & Jury Trials

they could never serve. In such instances, the parties can stipulate that some questionnaire responders can be sent to another courtroom. See, AMERICAN SOCIETY OF TRIAL CONSULTANTS, POSITION STATEMENT OF THE AMERICAN SOCIETY OF TRIAL CONSULTANTS REGARDING EFFORTS TO REDUCE OR ELIMINATE PEREMPTORY CHALLENGES (2004).

To encourage honesty and to enhance the value of the use of the questionnaire, prospective jurors should be advised of the purpose of the questionnaire, how their answers will be used and who will have access to the information.

Subdivision B.

This subdivision is drawn from Standard 7 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993). It addresses the gathering of information through voir dire.

The voir dire process provides the court and the parties with the opportunity to question prospective jurors to discover conscious or subconscious preconceptions and biases or other facts related to selecting a fair and impartial jury. Voir dire is a valued and integral part of the adversary process and is necessary for the intelligent and effective exercise of challenges. Swain v. Alabama, 380 U.S. 202, 218-219 (1965).

Since the right of a criminal defendant to an impartial jury of peers makes voir dire a fundamental part of the trial process, the voir dire examination and the exercise of challenges should be recorded in a manner that will permit the subsequent rendering of a verbatim transcript should one be requested during an appeal challenging the jury selection process or the competency of counsel. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM R. CRIM. P. 754(a) (1987). The jury selection process in civil cases is no less critical. Hence making voir dire procedures a matter of record in civil cases as well as in criminal cases is recommended.

Challenges for cause and peremptory challenges are intended to be used, within certain restrictions, by counsel on the basis of judgments about prospective jurors’ possible attitudes toward the
Principle 11

Principles for case or one of the parties. Counsel are entitled to a reasonable amount of information on which to base such judgments.

The jury selection portion of a trial can exhibit differing professional interests of lawyers and judges. Counsel argue that they are most familiar with their cases and must zealously obtain information on behalf of their clients. Moreover, voir dire is the only chance to gain insights about prospective jurors. Hence, counsel seek opportunity for robust questioning. See, e.g., Abbe Smith, Nice “Work If You Can Get It”: Ethical Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523 (1998); Barbara Allen Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 STAN. L. REV. 545, 558-59 (1975).

Conversely, courts faced with burgeoning caseloads, often feel the need to take over the questioning of prospective jurors. Unlimited voir dire examination may be unduly time-consuming, hamper the efficient use of jurors and probe unnecessarily into the private lives of prospective jurors. G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT (1996); William H. Levit et al., Expediting Voir Dire: An Empirical Study, 44 S. CAL. L. REV. 916, 942-44 (1971).

The subdivision recognizes the need to balance the contending objectives of eliciting sufficient information during voir dire for the effective use of challenges while restricting unnecessary inquiry into matters beyond the proper scope of voir dire to protect juror privacy and to expedite the process. It reflects the conclusion that voir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is voir dire conducted by the judge alone. A simple, perfunctory examination by a judge does not “reveal preconceptions or unconscious bias.” Dingle v. State, 759 A.2d 819, 828-29 (Md. 2000); see also Darbin v. Nourse, 664 F.2d 1109, 1115 (9th Cir. 1981); State v. Ball, 685 P.2d 1055, 1058 (Utah 1984).

Because this subdivision also recognizes the potential for abuse of the voir dire process by attorneys, the subdivision provides for judicial control of the process. Appropriate judicial oversight should be sufficient to curb voir dire excesses and to ensure that
the process is not overly lengthy. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 427-433 (1985). In addressing the potential tension between counsel's need to obtain sufficient information through questioning of potential jurors and the judge's obligation to ensure that the process is not abused and unduly protracted, this subdivision contains no specific time limitations; neither is there a proposed limitation on the potential subject matter of inquiry.

This subdivision sets out the principles that should guide the trial judge in exercising this discretionary oversight. Subsections 1 and 2 suggest that the initial questioning of citizens should be done by the court followed by reasonable inquiry from the parties. Studies have shown that focused examination of the venire members by the court and counsel in a more private setting than an open courtroom can yield invaluable information regarding disqualifying conditions. Gregory E. Mize, *Be Cautious of the Quiet Ones*, available at http://www.abota.org/publications/article.asp?newsid=94 (2003); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 33 CT. REV. 1 (Spring 1999); Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1118-20 (1996). Accordingly, subsection 2 encourages questioning of prospective jurors both as a panel and individually.

Subsection 3 provides that the voir dire should be at least sufficient for counsel to uncover any bases for challenges for cause and to permit counsel to obtain enough information to facilitate intelligent exercise of peremptory challenges.

Subsection 4 envisions that where a juror has been exposed to information about the case itself, the trial judge should give counsel liberal opportunity to explore the substance of that prior exposure. At the same time, the questioning should be supervised by the trial judge, who has the responsibility to prevent its abuse. The Supreme Court has “stressed the wide discretion granted to the trial courts in conducting voir dire in the area of pretrial publicity and other areas that might tend to show juror bias.” *Mu’Min v. Virginia*, 500 U.S. 415, 427 (1991).
Subdivision C.

This subdivision presents for-cause challenge procedures that have been found effective and is drawn from Standard 15-2.5 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

In order to guarantee trial by an impartial jury, this subdivision provides that a prospective juror should be excused if, after voir dire, the court has a reasonable doubt that the juror is capable of hearing the case with impartiality. Exclusion is accomplished through the court’s granting of a challenge for cause. Because juror impartiality is required to preserve the integrity of the judicial system, challenges for cause should not be limited in number. Gray v. Mississippi, 481 U.S. 648 (1987). Under this subdivision, a challenge for cause may be initiated by either party or at the court’s own initiative.

Ordinarily, the grounds to sustain a challenge for cause are enumerated by statute in each jurisdiction. This subdivision encourages jurisdictions to develop a list of grounds for which a challenge for cause will be granted and is premised on the belief that expressly stated standards will help assure that the winnowing of unfit jurors follows a process based on sound, clear reasoning. The subdivision also enumerates those bases for challenge that should, at a minimum, serve as grounds for a challenge for cause. These include an interest in the outcome of the case, a bias for or against one of the parties, a failure to meet the qualifications established by law for jury service, a familial relation to a participant in the trial or an inability or unwillingness to hear the case fairly and impartially.

The general grounds are designed to exclude the prospective juror who, consciously or unconsciously, is unable to act impartially as required by law. To achieve that goal in particular cases it may be necessary to sustain challenges for cause on other bases as well. See, e.g., Morgan v. Illinois, 504 U.S. 719, 729 (1992) (“juror[s] who will automatically vote for the death penalty in every case,” or are unwilling or unable to give meaningful consideration to mitigation evidence must be disqualified from service); see also ABA GUIDELINES FOR THE APPOINTMENT
Principle 11
Juries & Jury Trials


Because prospective jurors may be unwilling to disclose their biases, subsection 3 advises careful questioning during voir dire. See Dingle, 759 A.2d at 824-27. Hans & Jehle, supra, at 1194-1201.

The fact that a particular jurisdiction has enumerated statutory grounds for exclusions for cause should not preclude the exclusion of potential jurors on other non-enumerated grounds. The trial court has wide discretion in determining whether a particular juror should be excused absent a specifically enumerated ground. Washington v. State, 98 So. 605, 606 (Fla. 1923). Generally, a juror’s response that he or she can render a fair and impartial verdict should be given great weight, but the court is not bound by the juror’s response, and may excuse a juror for cause notwithstanding that juror’s claim of an ability to be impartial.

The trial court is a fact-finder when it rules on challenges for cause. Because a juror’s credibility depends on his or her answers to the court’s or counsels’ questions as well as his or her demeanor, it is important that the court evaluate both when making such a ruling. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Dingle, 759 A.2d at 829.

Subdivision D.

This subdivision is drawn from Standard 9 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993). It establishes the framework for the use of peremptory strikes.

Beginning in 1986, the Supreme Court established that peremptory strikes of prospective jurors were not beyond judicial scrutiny. In Batson v. Kentucky, 476 U.S. 79 (1986) and subsequent decisions, the Supreme Court has affirmed the constitutional principle that peremptory strikes may not be exercised to discriminate against citizens based on their race, ethnicity or gender. Beginning with Justice Thurgood Marshall’s dissent in Batson, several jurists and members of the legal academy have advocated abolition of peremptories. Id. at 102; Morris B. Hoffman,
Principle 11


Despite the fact that peremptories may not be constitutionally required and are sometimes subject to abuse, this long-standing feature of trial by jury remains necessary for several reasons. Peremptories enable parties to exclude jurors they suspect of bias, but with respect to whom they lack sufficient proof of bias to sustain a challenge for cause. Swain v. Alabama, 380 U.S. 202, 220 (1965). The Supreme Court declared in Swain that peremptory challenges are essential to achieving a fair trial by jury because they enable parties to eliminate extremes of partiality and result in juries more likely to decide cases on the basis of the evidence. Although, as stated in Batson, a peremptory challenge can be highly subjective and may be “exercised without a reason stated, without inquiry and without being subject to the court’s control,” its risks must be balanced against its benefits. Id. For example, one important advantage of peremptories is that they allow the parties, especially defendants in criminal proceedings, to participate in the construction of the tribunal that is to judge them. John H. Mansfield, Peremptory Challenges to Jurors Based Upon or Affecting Religion, 34 SETON HALL L. REV., 435, 450 (2004). Further, eliminating peremptory strikes could destroy an important safeguard against judicial error in the administration of challenges for cause. Especially in courts with huge case dockets and diminished resources, peremptory strikes can be a necessary tool for litigants who face customs and practices that make jury selection an extremely abbreviated part of the trial. Smith, supra. Indeed, research suggests that effective questioning during voir dire combined with careful, but limited, use of peremptory strikes may be the best way to obtain a fair and impartial jury. Shari Seidman Diamond et al., Realistic Responses to the Limitations of Batson v. Kentucky, 7 CORNELL J. L. & PUB. POL’Y 77 (Fall 1997).

To promote uniform statewide practice in this area, the subdivision recommends that both the permissible number of peremptory
challenges and the procedures for exercising those challenges be clearly established. All fifty states currently permit peremptory challenges, usually allocating the same number to each party and, in criminal cases, increasing the number allotted as the severity of the charge increases. Note, Developments in the Law—Race and the Criminal Jury, 101 Harv. L. Rev. 1557, 1565 (1988); see Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum. L. Rev. 1357, 1359-60 (1985); Sarah Sharp, The Florida Bar, Jury Selection Ch. 7 (2001). Although the number of challenges is usually specified, only a few jurisdictions set forth the order and manner in which peremptory challenges are to be exercised. See Jon Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 169 (1977). As a result, practices vary within as well as among the states. This subdivision recommends that trial judges allow a reasonable number of peremptories. While the number should not be excessively large, it should not be limited to just one or two. Rather, there should be enough challenges “to protect the right to ‘unpick’ the few jurors who don’t feel right.” Myron Moskovitz, You Can’t Tell a Book By Its Title, 8 Crim. L. F. 125, 138 (1997).

This subdivision recommends that trial judges, in both federal and state courts, be given the authority to permit parties to exercise additional peremptory challenges in certain cases. This is already the case in a number of circumstances in federal court. For example, under Federal Rule of Criminal Procedure 24(b), multiple defendants charged with a non-capital felony “may” be given additional peremptory challenges at the trial court’s discretion. Fed. R. Crim. P. 24(b); see, e.g., United States v. Magana, 118 F.3d 1173, 1206 (7th Cir. 1997); State v. Cambara, 902 F.2d 144, 147-49 (1st Cir. 1990). Moreover, Rule 24(c) provides that a defendant shall have an additional peremptory challenge if up to two alternate jurors are to be seated. Fed. R. Crim. P. 24(c); see William Pizzi & Morris Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1441 (2001). In civil trials under the federal system, 28 U.S.C. § 1870 provides that, while each party shall be entitled to three peremptory challenges, the trial court may allow multiple plaintiffs or defendants to have additional peremptory challenges and permit them to be exercised.
Principle 11

Principles for separately or jointly. David Baker, *Civil Case Voir Dire and Jury Selection*, 1998 Fed. Cts. L. Rev. 3, 1.2. This subdivision urges state court judges be given the same authority.

This subdivision, together with subsections E.1 and E.2 advocates the use of the “struck jury system.” There are a number of procedural variations of this system, but the basic pattern is as follows: (1) A panel is brought to the courtroom equal to the number of jurors and alternates to be seated plus the total number of peremptory challenges available to the parties and the statistically projected number of those likely to be removed for cause; (2) The panel is questioned as a whole by the judge and counsel with follow-up questions to individual panel members, and removals for cause are made; (3) After the examination has been completed, the parties exercise their peremptory challenges “by alternate striking of jurors’ names from a list passed back and forth between counsel,” rather than orally; (4) The jury is impaneled after all sides have passed or exercised their peremptory challenges; and (5) If some challenges are passed and more prospective jurors remain than are needed, the unstruck names are called in the order they appear on the list until the prescribed number of jurors and alternates are seated. Bettina B. Plevin, *Current Development in Federal Civil Practice*, 706 PLI/LIT 403, 452-53 (2004); G. Thomas Munsterman et al., *The Best Method of Selecting Jurors*, Judges. Summer 1990, at 8.

This procedure benefits the parties by permitting them to compare all the prospective jurors before striking the most objectionable. Thus a party will not be caught in the dilemma of accepting a person who may be somewhat partial for fear that his or her replacement may be even more partial, and counsel do not need to hold one peremptory challenge in reserve to guard against the possibility that a particularly partisan panel member may be called into the box after most of the jury has been selected. The procedure benefits prospective jurors by eliminating the embarrassment of being challenged and asked to step down from the jury box for no apparent reason. Strikes are made by drawing a line through a name on the list of panel members rather than orally. The process focuses on the affirmative choice of the final
Principle 11

Juries & Jury Trials

jurors rather than on the disqualification of individuals along the way. In the traditional jury box or sequential method, a challenge regarding the use of a peremptory for a constitutionally impermissible reason (discussed in subdivision F below) cannot be sustained without calling a new panel, because prejudice between the prospective juror and the party exercising the challenge has been established. The struck jury method allows such challenges to be made and acted upon without the knowledge of the potential jurors. It also provides an opportunity for more prospective jurors to be considered for service on a jury. Finally, it benefits the court system by shortening the voir dire process. There is no need to repeat questions to each replacement for a person removed for cause, and there is less pressure on counsel to question each prospective juror exhaustively. The comparative choices that have to be made tend to become apparent early, and the parties can limit their questions to the few panel members involved.

It should be noted that nothing in this subdivision is intended to limit the authority of the trial judge to require special procedures in unusual cases to protect the integrity and fairness of the trial process. Thus, in cases in which there has been extensive publicity, for example, the trial judge could still order that prospective jurors be questioned individually, out of the hearing of the other members of the panel. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 8-3.5 (1991).

Subdivision E.

This subdivision is drawn from Standard 15-2.7 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision supplements the prior subdivision and specifies procedural mechanisms for striking prospective jurors from the panel pursuant to the “struck method.” Subsection E.3 provides that a party should have the opportunity to assist counsel before any challenges are exercised. It also provides that counsel in multiple party cases should be allowed to consult with each other about the exercise of challenges.
Principle 11

Principles for Subsection E.4 rejects the practice used in some courts of individually swearing jurors before the entire jury panel has been selected. This kind of segmentation often forecloses strikes to jurors once passed in the questioning. It makes impossible the evaluation of the panel as a whole. It also prevents a later challenge of a sworn juror in the event that a problematic relationship between that juror and others later selected should arise. Additionally, the sequential swearing of jurors makes it difficult to determine claims of former jeopardy. Since jeopardy attaches at the time that the jury is sworn, Crist v. Bretz, 437 U.S. 28, 35 (1978), the sequential swearing of individual jurors raises a question about the time when jeopardy has attached. People v. Lawton, 487 N.Y.S. 2d 273 (N.Y. Sup. Ct. 1985); United States v. Raymer, 941 F.2d 1031, 1038 (10th Cir. 1991).

Subdivision F.

This subdivision is drawn from Standard 15-2.8 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996). Subdivision F. incorporates the three-step hearing process established by the Supreme Court for addressing unlawful discrimination against prospective jurors based on their race, gender, or ethnicity.

Our judicial and political systems have developed an increased sensitivity to discrimination against citizens for constitutionally impermissible reasons. This sensitivity is demonstrated, for example, by the expansion of the definition of constitutionally cognizable groups and by the passage of broad-based civil rights legislation, e.g., Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In this same vein, the Supreme Court has invalidated the use of the peremptory challenge for purposeful racial discrimination. Batson v. Kentucky, 476 U.S. 79 (1986). Since then the Court has wrestled with the inherent conflict between the nature of the peremptory challenge itself, a traditionally unreviewable exercise of counsel’s discretion, and the obligation of trial judges to ensure that the courts are not used as a mechanism for discrimination against citizens. Eric L. Muller, Solving the Batson

In the context of a criminal prosecution, the *Batson* Court held that race-based challenges are unconstitutional under the Equal Protection Clause of the 14th Amendment. In facing alleged violations under this new rule, the High Court instructed trial courts to presume that the party utilizing peremptory challenges used them legitimately. To overcome that presumption, an objecting party needs to make a prima facie case that the exercised peremptory challenges were race-motivated. A defendant makes a prima facie case if he or she proves membership in a cognizable racial group, and that members of that group were eliminated by the prosecutor’s selective exercise of peremptories. *Batson*, 476 U.S. at 96. *Batson* also requires the objecting party to show that “relevant circumstances raise an inference” of intentional discrimination. Id.; see Daniel Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2472-73 (2003).

Once that showing is made, the second step begins and the burden shifts to the challenged party to articulate a neutral reason for the peremptory strike. In *Purkett v. Elam*, 514 U.S. 765 (1995), the Court said the explanation proffered need not meet the requirements of a challenge for cause nor be persuasive. However the explanation must not deny equal protection.

Finally, *Batson* requires the trial court to evaluate the credibility of the party offering the neutral reason for the challenge. Some courts now not only evaluate the credibility of the person offering the reason, they also evaluate the credibility of the reason asserted to determine if the challenge was unconstitutional. See, e.g., *Green v. State*, 583 So. 2d 647 (Fla. 1991). If the court finds the proffered neutral reason is a mere disguising of discriminatory intent, then the trial court must permit the challenge. See *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

Although the *Batson* court did not spell out when a facially-neutral explanation is pretextual, some courts have identified relevant factors that should be considered when deciding whether a proffered reason is pretextual. For example, in 1987, the Alabama
Principle 11


The *Batson* rule now applies regardless of the race of the potential juror or the defendant, *Powers v. Ohio*, 499 U.S. 400 (1991), whether the challenging party is the defense or the prosecution, *Georgia v. McCollum*, 505 U.S. 42 (1992), whether the challenge is to race-based or gender-based strikes, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), or whether the case is civil or criminal, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Reflecting respect for this robust development of the *Batson* doctrine, subsections F.2 through F.5 concisely replicate the above-described requirements of the three-part hearing. The *Batson* line of cases also highlight the fact that peremptories can deprive citizens of both the right and the duty to take part in trials. A central concern of this jurisprudence is to protect the integrity of our judicial system. It is clear that courts must be vigilant for unconstitutional peremptory strikes of which the proponent’s adversary is not even aware. In such a situation, the Court instructs trial judges, on their own initiative, to challenge suspicious strikes. Accordingly, subsection F.5 promotes judicial leadership in initiating an inquiry under subsection F.3 when counsel fails to do so. Further, in order to preserve an appellate record, subsection F.5 urges trial courts to record the reasons and the factual bases for their rulings.

Subdivision G.

This subdivision is drawn from Standard 15-2.9 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision provides the general framework for an alternate juror system. It leaves the initial decision to impanel alternate jurors and the number of alternate jurors to be impaneled to
the court’s discretion, recognizing that the trial judge is best positioned to balance the factors relevant to deciding on use of alternate jurors in a given case. This reduces the likelihood that the alternate juror decision can be used as a tactic to obtain a mistrial.

The need for alternates is usually prompted when a regular juror becomes or is found to be unable or disqualified to perform further jury service. This subdivision contemplates replacement of the juror when the impairment is first discovered.

This subdivision does not prescribe a particular procedure to be followed whenever the court considers excusing a juror and impaneling an alternate. At a minimum, however, the court should hold an on-the-record hearing reflecting why the court excused the juror. Courts have generally held that such a hearing may be summary in nature and need not have all the formalities of a trial. W. J. Dunn, Annotation, Constitutionality and Construction of Statutes or Court Rule Relating to Alternate or Additional Jurors or Substitution of Jurors During Trial, 84 A.L.R. 2d 1288 § 8 (2004).

This subdivision counsels that alternate jurors be selected, qualified, examined and sworn in as regular jurors. Accordingly, if an alternate substitutes for a regular juror, the alternate will have met all of the requirements for selection and qualification as a regular juror. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation. As Judge William Schwarzer has pointed out “when none of the jurors regard themselves as supernumeraries likely to be excused before deliberations begin, they will all be more attentive and responsible.” William Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 582 (1991).

A particularly difficult question is whether a regular juror who must be excused for some reason should be replaced by an alternate juror after deliberations have begun. See Jon D. Ehlinger, Note, Substitution of Alternate Jurors During Deliberations, 57 Notre Dame L. Rev. 137 (1981); Douglas J. McDermott, Note, Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial, 35 B.C. L. Rev. 847 (1994). It is efficient and expedient to permit
Principle 11

substitution of alternates even after deliberations have begun. Additionally, it has been held constitutionally permissible. This Commentary, however, urges its rejection. The juror who is not part of the deliberative process has not been exposed to the jury discussion which occurred prior to the substitution. As a result, substitution of an alternate at this point increases the risk of the jury returning a verdict based upon a less-than-thorough examination and discussion of the evidence. *Johnson v. Duckworth*, 650 F.2d 122 (1981).

Subsection G.3 seeks to help address the concern that juries numbering less than twelve present significant disadvantages compared to juries of twelve. By allowing alternates to deliberate and vote where the total number is twelve or fewer, these drawbacks can be minimized. Moreover, this provision is intended to afford citizens respect for investing their time and energy in the case. Consistent with the longstanding view that jury service is not only a civic duty but an opportunity to participate in the administration of justice, alternate jurors should taste the fruits of their time spent in the courtroom.

Subdivision H.

Subdivision H. proposes that the use of anonymous juries be limited to compelling circumstances that are demonstrated to the trial court.

There is general agreement that an anonymous jury is one for which, at a minimum, the last names of jurors are not disclosed. G.M. Buechlien, Annotation, *Propriety of and Procedure for, Ordering Names and Identities of Jurors to be Withheld from Accused in Federal Criminal Trial: Anonymous Juries*, 93 A.L.R. Fed. 135 (1989).

The first anonymous jury trial in recorded American history took place in 1977 in New York. *United States v. Barnes*, 604 F.2d 121 (2nd Cir. 1979). Since then, courts have developed a non-exhaustive list of factors to guide them in deciding whether to conceal the identities of jurors. These factors include: (1) the defendant’s involvement in organized crime; (2) the defendant’s participation in a group with the capacity to harm jurors; (3) the
Principle 11

Juries & Jury Trials

defendant’s past attempts to interfere with the judicial process; (4) the fact that the defendant faces a lengthy prison term or substantial fine; and (5) extensive media publicity. KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 4.04; (5th ed. 2000); ABRAHAM ABRAMOVSKY & JONATHAN I. EDLESTEIN, ANONYMOUS JURIES; IN EXIGENT CIRCUMSTANCES ONLY, 13 ST. JOHN’S J. LEGAL COMMENT 457 (1999).

Subdivision H. is premised on those core legal values that uphold public trials and the presumption of innocence. Open court proceedings serve the critical goals of public education and engendering public trust and confidence in the courts. The use of anonymous juries erodes the presumption of innocence and makes juries less accountable. The subdivision recognizes that using juror anonymity as a default mechanism constitutes a short-sighted approach to a complex issue. Without reasonable grounds to show a genuine problem in a particular case, anonymous juries should not be used, due to the implications of bias they present: “An anonymous jury raises the specter that the defendant is a dangerous person from whom jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.” United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

Besides the risk of polluting the minds of jurors, the imposition of anonymity can make voir dire more cumbersome and inefficient. Anonymity may create additional roadblocks for obtaining important information about the biases or impairments of prospective jurors which, in turn, would conflict with the values promoted by the various provisions of Principle 11.

The factors weighing in favor of open juries are overwhelming. Accordingly subdivision H. strongly discourages anonymous jury trials. See SUPREME COURT OF ARIZONA, SUPPLEMENTAL REPORT OF THE JURY PRACTICES AND PROCEDURES COMMITTEE CONCERNING JUROR ANONYMITY (March 2003).
Conducting A Jury Trial

PRINCIPLE 12—COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS INSO FAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED

A. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.

B. Trial judges should use modern trial management techniques that eliminate unnecessary trial delay and disruption. Once begun, jury trial proceedings with jurors present should take precedence over all other court proceedings except those given priority by a specific law and those of an emergency nature.

C. Jurors should be informed of the trial schedule and of any necessary changes to the trial schedule at the earliest practicable time.

Comment

This Principle seeks to minimize juror dissatisfaction by encouraging courts to manage trial time more effectively and to apprise jurors of trial developments and delays, so that jurors do not feel their time is being wasted. Because jury service is an involuntary obligation imposed by the government on its citizens, “the legal system should be required to maximize the usefulness of its citizens’ contributions and minimize the negative experiences that may accompany the obligation.” Shari Seidman Diamond, What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 282, 283 (Robert E. Litan ed., 1993). Jurors often complain about the “repetition and redundancy of trial testimony.” Id. at 289. Although some amount of repetition and redundancy may be useful for juror comprehension and recall, the court should utilize its power to impose reasonable time limits. The court should also
minimize undue disruption and delay, and, to reduce juror frustration, should explain to the jurors why delay occurs and why the legal system tolerates it. *Id.* at 289.

The court’s power to impose reasonable time limits for trial derives from its inherent power and from codified sources such as Federal Rules of Civil Procedure 16(c)(4) and (15), Federal Rules of Evidence 403, 611(a) and 102, and analogous provisions in force in most states. See *Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500 (9th Cir. 1995); see also, e.g., *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. Ct. App. 1990); *Varnum v. Varnum*, 586 A.2d 1107, 1114-15 (Vt. 1990); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 21.653, 22.35 (1995); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 712 (1993). In addition to reducing wasted juror time, by shortening trials, time limits maximize court resources and reduce litigant costs. Longan, *supra*, at 707. By deterring unnecessarily prolonged litigation, time limits also promote clearer, more succinct, and less expensive lawyering. Reagan W. Simpson & Cynthia A. Leiferman, *Innovative Trial Techniques; Timesaving Litigation Devices or Straight Lines to Disaster?*, 26 Fall Brief 21, 23 (1996). Time limits must be reasonable in light of the circumstances of the case, they must be flexible and they cannot be arbitrary. *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987).

To better manage trial resources, a significant number of judges and trial lawyers favor the “chess clock” approach to trials, in which the court gives each side a fixed amount of time to present its case after consultation with both parties. Patricia Lee Refo, *The Vanishing Trial*, LITIGATION, Summer 2004, at 1; Longan, *supra*; Donald G. Alexander, *Let’s Kick Abe Lincoln Out of the Courtroom or New Approaches to Conducting Trials*, 10 ME. B. J. 148, 149 (1995). The lawyer is free to allocate her time according to her own discretion, but she must stay within the total limits set by the judge. Refo, *supra*, at 2. Other judges advocate an approach under which excessive time spent on cross examination or objecting results in a time bonus allocated to the other side, William O. Bertelsman, *Right to a Speedy Trial; Judges Need to Set Time Limits for the Public’s Sake*, 80 A.B.A. J. 116 (Oct.
1994), or where limits are defined contextually, such as ‘cross cannot exceed direct.’ Alexander, supra, at 149.

In addition to setting time limits, courts can streamline trials by limiting discovery, the number of issues to be addressed, the number of witnesses presented and the manner in which evidence is presented at trial. Alexander, supra, at 149. Courts can present uncontested evidence in the form of stipulations or pre-approved narrative statements read by counsel. Bertelsman, supra, at 116. Courts can also permit summaries of voluminous evidence and allow depositions to be edited. Id. Courts should inform jurors when time limits or other limits are in place so that jurors are aware that their time is valued and so that parties are not unnecessarily prejudiced. Alexander, supra, at 149.
PRINCIPLE 13—THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

A. Jurors should be allowed to take notes during the trial.
   1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed.
   2. Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.
   3. The court should ensure that jurors have implements for taking notes.
   4. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate.
   5. After the jurors have returned their verdict, all juror notes should be collected and destroyed.

B. Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court’s preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.
   1. At the time of distribution, the court should instruct the jurors concerning the purpose and use of their trial notebooks.
   2. During the trial, the court may permit the parties to supplement the materials contained in the notebooks with additional material that has been admitted in evidence.
   3. The trial notebooks should be available to jurors during deliberations as well as during the trial.

C. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.
Principle 13

Principles for

1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.

2. Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.

3. After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court should modify the question to eliminate any objectionable material.

4. After the question is answered, the parties should be given an opportunity to ask follow-up questions.

D. The court should assist jurors where appropriate.

1. The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court's rulings, conduct, or remarks during the trial.

2. When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.

3. The court should exercise self-restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.

a. Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes the questioning is necessary, the court should afford the parties an opportunity to develop the subject by further examination prior to its questioning of the witness.
b. The court should instruct the jury that questions from the court, like questions from the parties, are not evidence; that only answers are evidence; that questions by the court should not be given special weight or emphasis; and the fact that the court asks a question does not reflect a view on the merits of the case or on the credibility of any witness.

E. The court should control communications with jurors during trial.
   1. The court should take appropriate steps ranging from admonishing the jurors to, in the rarest of circumstances, sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.
   2. At the outset of the case, the court should instruct the jury on the relationship between the court, the parties and the jury, ensuring that the jury understands that the parties are permitted to communicate with jurors only in open court with the opposing parties present.
   3. All communications between the judge and members of the jury panel from the time of reporting to the courtroom for juror selection examination until dismissal should be in writing or on the record in open court. Each party should be informed of such communications and given the opportunity to be heard.

F. Jurors in civil cases may be instructed that they will be 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.

G. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.
Principle 13

H. In civil cases the court should seek a single, unitary trial of all issues in dispute before the same jury, unless bifurcation or severance of issues or parties is required by law or is necessary to prevent unfairness or prejudice.

I. Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.

J. The court may empanel two or more juries for cases involving multiple parties, defendants, or claims arising out of the same transaction or cause of action, in order to reduce the number and complexity of issues that any one jury must decide. Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single trial.

Comment

Subdivision A.

This subdivision, which encourages note taking by jurors, is drawn from three previous ABA standards endorsing the procedure: Standard 15-3.5 of the ABA CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY STANDARDS (1996); Standard 16(c) of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and ABA CIVIL TRIAL PRACTICE STANDARD 3 (1998).

The Federal Judicial Center has observed that “[p]ermitting jurors to take notes, once discouraged, has now become widely accepted.” MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.42 (1995). The vast majority of courts recognize that it is within the sound discretion of the trial judge to permit jurors to take notes. See, e.g., United States v. Darden, 70 F.3d 1507 (8th Cir. 1995); Esaw v. Friedman, 586 A.2d 1164, 1167-68 (Conn. 1991) (collecting cases); Note, Developments in the Law—The Civil Jury, 110 HARV. L. REV. 1408, 1509-11 (1997).

Note taking is encouraged because “[t]here is abundant evidence that individuals tend to be better able to recall events and testimony if they have taken notes at the time; the very process of writing things down helps to encode the events in one’s memory.” BROOKINGS INSTITUTION, AMERICAN BAR ASSOCIATION SECTION OF
LITIGATION, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 18 (1992); see also Larry Heuer & Steven Penrod, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 JUDICATURE 256 (1996); Note, Developments in the Law, supra, at 1509-11. Empirical evidence also suggests that the disadvantages typically associated with juror note taking are minimal, while the benefits are significant. See Larry Heuer & Steven Penrod, Juror Notetaking and Question Asking During Trials, 18 LAW & HUM. BEHAV. 121 (1994); see also David L. Rosenhan et al., Notetaking Can Aid Juror Recall, 18 LAW & HUM. BEHAV. 53 (1994).

After the jury has rendered its verdict, the jury’s notes and/or notebooks are to be collected and destroyed by the bailiff or clerk. See ARIZ. R. CIV. P. 39.

Subdivision B.

This subdivision is drawn from Standard 2 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

Subdivision B. encourages the increasingly common practice of using juror notebooks to maximize comprehension of the evidence in appropriate complex cases. In addition to copies of the court’s instructions, important exhibits (or salient excerpts from exhibits) and stipulations, contents may consist of any other aids to the understanding of the jury that the court finds appropriate in the circumstances. See, e.g., Consorti v. Armstrong World Indus., 72 F.3d 1003, 1008 (2d Cir. 1995); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 22.32, 22.42 (1995); NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § IV-7 (G. Thomas Munsterman et al. eds. 1997) [hereinafter INNOVATIONS].

Empirical research on the effects of the use of multi-purpose juror notebooks reveals their benefits, especially when used in lengthy trials and cases involving complex evidence. See, e.g., AMERICAN BAR ASSOCIATION, JURY COMPREHENSION IN COMPLEX CASES 34-37 (1989); Michael Dann & Valerie Hans, Recent Evaluative Research on Jury Trial Innovations, 41 COURT REV. 12, 16-17 (2004).
Principle 13

Subdivision C.

This subdivision is drawn from Standard 4 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998), which endorses responding to juror questions under controlled circumstances. The language is based, in large part, on Arizona Rule of Civil Procedure 39(b)(1) & (10) and Arizona Rule of Criminal Procedure 18.6(e).

State and federal courts, both in civil and criminal cases, have overwhelmingly recognized that whether to allow juror questioning of witnesses is a matter vested in the sound discretion of the trial judge. See, e.g., United States v. Bush, 47 F.3d 511, 514-15 (2d Cir. 1995); State v. Doleszny, 844 A.2d 773 (Vt. 2004) (state and federal cases collected).

As the courts have observed, in the context of complex cases and complicated testimony, “[j]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors’ minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror.” United States v. Sutton, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992).

Juror questioning can materially advance the pursuit of truth particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony; juror satisfaction with the trial is also enhanced. See e.g., AMERICAN JUDICATURE SOCIETY, TOWARD MORE ACTIVE JURIES: TAKING NOTES & ASKING QUESTIONS 11-14 (1991); see also Larry Heuer & Steven Penrod, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 JUDICATURE 256 (1996); MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT TO THE COLORADO SUPREME COURT’S JURY SYSTEM COMMITTEE (2002).

The practice of jury questioning—especially oral questioning—has often been frowned upon, particularly in criminal cases, due to concern that it risks compromising jury neutrality, encouraging premature deliberations and unduly delaying the proceedings. These concerns can be addressed with proper precautions, as suggested in this subdivision, and a vigilant trial judge.
Ordinarily, the court should not invite or entertain questions from jurors until after the parties’ examination and cross-examination of a witness has concluded. Counsel should generally be afforded wide latitude to try their cases as they see fit, and juror questions should be permitted on a purely supplemental basis.

If for any reason the judge refuses to ask a question submitted by a juror, the judge should explain to the jury that evidentiary rules may prohibit certain questions from being asked of the witness and the jurors should attach no significance to the fact that some of the questions were asked of the witnesses while others were not. If the judge modifies a question submitted by the jury, he or she should explain that the modification was made because of procedural or evidentiary rules. Adherence to these procedures and precautions should ensure the constitutional rights of the defendant in a criminal case and all parties to any civil action. See INNOVATIONS, supra, at § V-7.

Subdivision D.

This subdivision is drawn from Standard 15-4.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1993) and Standard 10 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

Subsection D.1 specifies a preferred practice from among the existing practices of the state and federal systems with respect to the issue of a judge expressing her or his personal opinion to the jury. Even where the federal or state constitution gives the trial judge the right to express an opinion concerning the merits of the case, the judge is not under an obligation to do so, and the better practice is that the judge not do so. See CAL. CONST. Art. 6, § 10; CAL. PENAL CODE § 1127 (1970).

In the federal system, a trial judge is permitted to summarize and to comment upon the evidence and to express an opinion as to the facts of the case, provided that the judge makes it clear that the resolution of disputed facts is a matter for the jury alone. Gant v. United States, 506 F.2d 518, 520 (8th Cir. 1974). A decision will ordinarily not be reversed on appeal because of such
comments unless the appellate court finds that they were prejudicial to the losing party, particularly where the jury is instructed that they are the sole judge of the facts.

Although the judge in the federal system is permitted to comment on the evidence, it has also been held to be reversible error for the judge to express an opinion concerning the merits of the case. See, e.g., United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976); United States v. Van Horn, 553 F.2d 1092 (8th Cir. 1977). This practice has been upheld, however, if there is no question of fact and only a question of law remains. See Gant, 506 F.2d at 518. Prejudicial remarks of the trial judge disparaging either party have, however, been held to constitute error requiring a new trial. See J. R. Kemper, Annotation, Prejudicial Effect of Trial Judge's Remarks, During Criminal Trial, Disparaging Accused, 34 A.L.R. 3d 1313 (1970).

In most state courts, the authority of the trial judge to express an opinion on the credibility of the evidence or on the merits of the case is more circumscribed than in the federal system. In the state courts, the judge is looked upon as an impartial arbitrator, the “governor” of the trial for the purpose of “assuring its proper conduct and the fair and impartial administration of justice.” Id. at 1319.

As in the federal system, however, improper statements of the trial judge will not generally be considered grounds for reversal unless they can be shown to have been prejudicial to the complaining party. Various factors which are analyzed in considering potential prejudicial effect are the degree of intemperateness of such remarks, the manner in which the remarks are delivered and the surrounding or receptive circumstances affecting their impact. Id.

In addition, it has been held that the error may be cured by the trial judge through the use of subsequent curative instructions. See, e.g., People v. Miller, 170 P. 817 (Cal. 1918); Poff v. State, 241 A.2d 898 (Md. 1968); State v. Green, 151 S.E.2d 606 (N.C. 1966); but see People v. McNeer, 47 P.2d 813 (Cal. App. 1935); State v. Bryant, 126 S.E. 107 (N.C. 1925).

Occasions may arise during the trial when it is appropriate, even necessary, for the court to instruct the jury. Subsection D.2
Principle 13

Juries & Jury Trials

deals with those occasions on which an instruction, to be most effective, should be given during the trial itself, and should not be delayed until the conclusion of the evidence. For example, when there are multiple defendants and evidence is offered which is admissible only against one of them, the trial judge should give the jury a limiting instruction at that time rather than wait until the end of the trial. The court should advise the jury as to the limited use or admissibility of the evidence.

This approach is not intended to affect the authority of the judge, at the beginning of the trial, to give preliminary instructions to the jury deemed appropriate for guidance in hearing the case.

Subsection D.3 starts from the premise that witness questioning is ordinarily for counsel, not the court. The basic principle that the trial judge “should exercise self-restraint and preserve an atmosphere of impartiality and detachment” is drawn from Judge Augustus Hand’s opinion in Pariser v. City of New York, 146 F.2d 431, 433 (2d Cir. 1945). See People v. Hawkins, 43 Cal. Rptr. 2d 636 (1995); People v. Melendez, 643 N.Y. S.2d 607, 608-09 (App, Div. 1996); MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.24 (1995). This subsection nonetheless recognizes that for certain limited purposes the trial court may “question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side.” United States v. Filani, 74 F.3d 378, 385 (2d Cir. 1996).

The corollaries articulated under subsection D.3 are drawn from practice and reflect numerous decisions. See, e.g., United States v. Dreamer, 88 F.3d 655, 659 (9th Cir. 1996); United States v. Castner, 50 F.3d 1267 (4th Cir. 1995); United States v. Gonzalez-Torres, 980 F.2d 788 (1st Cir. 1992); Van Leirsburg v. Sioux Valley Hosp., 831 F.2d 169 (8th Cir. 1987); United States v. Block, 755 F.2d 770 (11th Cir. 1985); Lane v. Wallace, 579 F.2d 1200 (10th Cir. 1978). See generally 2 STEPHEN SALTBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1005-06 (6th ed. 1994); MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.24 (1995).

In dealing with inexperienced counsel, particularly those with little or no trial experience, the court from time to time may interject questions without consulting counsel in order to save time.
Principle 13

This may be especially appropriate when opposing counsel makes numerous objections to the form of questions and those objections have merit. The court may suggest to counsel questions that would avoid objections as to form.

In any case in which the court asks more than a few questions, at a recess when the jury is absent, the court should inquire whether counsel believe the court’s questions were either objectionable or otherwise counterproductive. Although objections may be made outside the presence of the jury under Federal Rule of Evidence 614(c) and analogous rules in effect in most states (see 2 GREGORY JOSEPH & STEPHEN SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 48.2, 48.3 (Supp. 1994)), counsel often will be reluctant to volunteer objections to the court’s questions. The court can ameliorate counsel’s concern about questioning the court’s decision to intervene with a witness by inviting counsel’s views. Although the court has the power to call witnesses under Federal Rule of Evidence 614(a) and analogous state law provisions, this power is rarely exercised, probably because the court has no opportunity to prepare a witness to testify and may, by calling an unprepared witness, inject evidence into a case that might damage a party unfairly. The court, especially in a bench trial, may invite a party to explain the failure to call a witness, particularly when the failure to call a witness might give rise to an adverse inference. The court should, however, bear in mind that the party may have made a conscious and informed judgment not to call the witness, and that judgment should ordinarily be respected.

Subdivision E.

This subdivision is drawn from Standard 15-4.1. of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision concerns judicial control over contacts with jurors once the jury has been sworn to try the case. Subsection E.1 deals with the steps that should be taken by the trial judge to insulate the jurors from extraneous prejudicial information. Subsection E.2 calls for the trial judge to instruct the jury on the
Principle 13

Juries & Jury Trials

authority of counsel to address the jury only in open court. Sub-
section E.3 provides that the court should ensure that a record of
judicial contact with jurors is maintained, and provides that con-
tact between judge and jury should occur only in open court.

Subsection E.1 gives the trial judge broad discretion to take
steps necessary to ensure that the jury is protected from improper
prejudicial influences, ranging from mere admonition of the ju-
rors to avoid exposure to prejudicial material to sequestration
of the jury. See, e.g., United States v. Turkette; 656 F.2d. 5 (1st Cir.
1981); Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982); United
States v. Shackelford, 777 F.2d. 1141 (6th Cir. 1985). In an ordi-
nary case, admonishing jurors to avoid potentially prejudicial ma-
terial and supplying them with prominent badges identifying
them as jurors should be sufficient to insulate them from im-
proper approaches. In addition, the trial judge should use his or
her authority, when necessary, to control the conduct of others
who may attempt to interfere with the impartiality of the jury.

Some state statutes specifically address the issue and regulate con-
duct of the public or press in the environs of the courthouse. N.Y.
PEMAL LAW § 21.5.50(7) (1975). Because of the importance of in-
sulating the jurors during the course of the trial and deliberations,
courthouse facilities should be arranged to minimize contact be-
tween the jurors and parties, counsel and the public.

Actual sequestration is burdensome on jurors, but may be justi-
fiable when it reasonably appears to be the only means of guard-
ing against palpable risks. The trial judge should not order seque-
stration except under compelling circumstances and only for the
purpose of insulating the jury from improper influences or threat-
ened harm. Moreover, when sequestration is ordered, the jury
should not be told which party, if any, requested the sequestration.

The vital role the jury plays in the American judicial system
makes it imperative that all communications to or from the jury
regarding the case be put on the record. This is part of the general
obligation of the judge concerning the record of the proceedings.
Communication between the judge and jurors, because of the sin-
gular position of the judge, must also be particularly guarded.
Communications between the jurors and the court should be in
writing, and delivered to the bailiff for transmission to the court.
Principle 13

Subsection E.2 makes it clear that the responsibility to ensure juror impartiality extends to counsel and the parties as well as the court. At the very least, the appearance of impartiality is compromised if counsel or parties converse with jurors outside open court, and therefore such contact is forbidden. A danger, however, is that a juror who is unaware of the limitation on counsel and the parties may regard their reluctance to speak to him or her as an affront or bad manners. The trial judge should instruct the jurors at the outset of the trial that their reluctance to speak is an obligation imposed on them by the court in an effort to protect the system.

Subsection E.3 is not intended to apply to communications to or from jurors involving only housekeeping matters; nor is it intended to require a judge to refrain from giving a juror a civil greeting when they pass each other in a corridor or elsewhere. However, to the extent practicable, even housekeeping matters should be reduced to writing and communicated on the record in order to eliminate future misunderstandings.

Subdivision F.

Subdivision F. allows, in the court’s discretion, jurors in civil cases to discuss evidence among themselves in the jury room during the trial. The substance of subdivision F. is drawn from Rule 39(f), Arizona Rules of Civil Procedure and case law. See also Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945); United States v. Klee, 494 F.2d 394 (9th Cir. 1974); Meggs v. Fair, 621 F.2d 460 (1st Cir. 1980).

In exercising its discretion to limit or prohibit jurors’ permission to discuss the evidence amongst themselves during recesses, the court should consider the length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis. ARIZ. R. CIV. P. 39(f), cmt. 1995 Amendments.

State and federal trial judges who have studied juries and jury trials advocate use of this procedure, given its potential to improve juror comprehension by recognizing jurors’ natural impulses to discuss at least limited aspects of their shared experience.
Principle 13

Juries & Jury Trials


Recent empirical studies of structured juror discussions of the evidence during actual trials of civil cases found that allowing discussions did not lead to premature judgments in cases by jurors, enhanced juror understanding of the evidence in the more complex cases, served to decrease the incidence of “fugitive discussions” of the trial by jurors with family and co-workers and met with high levels of acceptance by jurors, judges and trial counsel. See, e.g., Shari Seidman Diamond et al., Juror Discussions During Civil Trials: Studying an Arizona Innovation, 45 ARIZ. L. REV. 1 (2003); Paula Hannaford et al., Permitting Jury Discussions During Trial: Impact of the Arizona Reform, 24 LAW & HUM. BEHAV. 359 (2000); Valerie Hans, The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, 32 MICH. J. L. REV. 349 (1999).

Subdivision G.

This subdivision is drawn from Standard 15-4.2. of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Subdivision G. encourages trial judges to consider, consistent with the rights of the parties, mechanisms that might be adopted to improve juror understanding of the issues and the efficiency of trial. In recent years, a number of innovative procedures have been used in different courts. Procedures to consider include pre-instruction, pre-trial tutorials, interim summaries, mini-closings and a broad range of graphic techniques to enhance juror comprehension and retention of information. Leonard B. Sand & Steven A. Reiss, A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, 60 N.Y.U. L. REV. 423 (1985); Schwarzer, 132 F.R.D. 575; INNOVATIONS, supra, at §§ IV-3, IV-9 and IV-10.
Principle 13

Principles for Subdivision H.

Subdivision H. favors a single unitary trial in civil cases on all issues in dispute before the same jury, unless bifurcation is required by law. A single jury minimizes the inconvenience to jurors and the cost and expense to litigants. Moreover, lay and expert witnesses can often be substantially inconvenienced by having to appear at both portions of a bifurcated trial. Additionally, bifurcation may dramatically favor one side over the other—in some cases predetermining the ultimate outcome of the trial in ways that would not occur under this rule. See INNOVATIONS, supra, at § IV-8. See also Albert P. Bedecarré, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, 17 ENV'TL. AFF. 123 (1989); Douglas L. Colbert, The Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases, 44 HASTINGS L.J. 499 (1993); Jennifer M. Granholm & Williams T. Richards, Bifurcated Justice: How Trial—Splitting Devices Defeat the Jury’s Role, 26 U. TOL. L. REV. 505 (1995), Stephan Landsman et al., Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages, 1998 WISC. L. REV. 297.

Subdivision I.

Subdivision I. encourages the presentation of live testimony as opposed to transcripted or recorded testimony. Live testimony leads to increased juror involvement, comprehension and satisfaction. Further, interactive jury innovations, such as juror questions to witnesses, would be difficult to implement without the benefit of live testimony. See INNOVATIONS, supra, at § V-2; see also Marshall J. Hartman, Second Thoughts on Videotaped Trials, 61 JUDICATURE 256 (1978); Gray v. United States Dep’t of Agric., 39 F.3d 670 (6th Cir. 1994).

Subdivision J.

Subdivision J. advocates the use of two or more juries in cases involving multiple parties or multiple claims arising out of the
same transaction or cause of action. In practice, multiple juries
are generally impaneled separately. Opening and closing state-
ments should be presented separately. Jury instructions for each
jury should be developed separately and they should reference
only the facts or law presented to that particular jury. Separate ju-
ries deliberate separately and deliver separate verdicts. Dual juries
reduce the risk that a jury will incorrectly consider evidence or
testimony introduced for another purpose. Further, dual juries
can often reduce the emotional burden for victims of crime who
would otherwise have to testify twice. See INNOVATIONS, supra, at
§ V-4. See also United States v. Sidman, 470 F.2d 1158 (9th Cir.
1972).
Jury Deliberations

PRINCIPLE 14—THE COURT SHOULD INSTRUCT THE JURY IN PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS

A. All instructions to the jury should be in plain and understandable language.

B. Jurors should be instructed with respect to the applicable law before or after the parties’ final argument. Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.

C. Instructions for reporting the results of deliberations should be given following final argument in all cases. At that time, the court should also provide the jury with appropriate suggestions regarding the process of selecting a presiding juror and the conduct of its deliberations.

D. The jurors alone should select the foreperson and determine how to conduct jury deliberations.

Comment

Principle 14 recognizes that jurors, as fact finders, are responsible for applying the relevant law to the facts. The court instructs the jurors on the relevant law and, as a result, courts have a responsibility to take measures that facilitate jurors’ understanding of the law.


Subdivision A.

Subdivision A. addresses the goal of juror comprehension by directing courts to instruct the jury in plain and understandable
Principle 14

Principles for language. Jury instructions, which accurately state the law, may nonetheless be incomprehensible to a jury of lay persons. The “pattern,” “standard” or “uniform” jury instructions that are overwhelmingly used today were developed to conserve the time of lawyers and judges, reduce the number of appeals and reversals caused by erroneous instructions and increase juror comprehension of the applicable law. But, in the late 1970’s and early 1980’s, empirical studies revealed that the standard instructions fell short of increasing juror comprehension. Amiram Elwork et al., Toward Understandable Jury Instructions, 65 JUDICATURE 432 (1982); Laurence J. Severance & Elizabeth F. Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 LAW & SOC’Y REV. 153 (1982); Robert P. Charrow & Veda R. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306 (1979). Recent studies have discovered that jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese. Peter M. Tiersma, Jury Instructions in the New Millennium, 36 CT. REV. 28 (1999) [hereinafter Jury Instructions]; Peter M. Tiersma, LEGAL LANGUAGE 231-33 (1999). Studies testing juror comprehension find that jurors may misunderstand or fail to recall as many as half of the instructions they receive. Alan Reifman et al., Real Jurors’ Understanding of the Law in Real Cases, 16 LAW & HUM. BEHAV. 539, 593 (1992); Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N. C. L. REV., 77, 78 (1988).

Providing jurors with preliminary instructions, as described in Principle 6 C., and equipping each juror with a written copy of the instructions, as described in Principle 14 B., can assist the jury in understanding and applying the law, but only if the instructions are comprehensible. Jury instructions communicate most effectively if they avoid legalese, abstract or unnecessarily formal language. When statutes require judges to use unfamiliar terms, or terms with multiple possible meanings (e.g., “aggravation”) in their instructions to the jury, definitions should be provided. Sentence structure should be direct and the instructions should be organized in a logical order. “Case-specific” language should be used in preference to more generic language (e.g., “Mr. Jones” or

Difficult language and sentence structure are not the only causes of inadequate jury instructions. Jurors have difficulty with instructions that are inconsistent with their intuitions or preconceived notions. Ellsworth & Reifman, supra, at 800. Accordingly, courts can increase juror comprehension by addressing such misconceptions directly. For example, it may be useful to alert jurors to the higher standard of proof required in a criminal case than in a civil case by explicitly describing the difference. See, e.g., FEDERAL JUDICIAL CENTER PATTERN CRIMINAL JURY INSTRUCTIONS, Instruction 21 (1987) (“The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely than not true. In criminal cases, the government’s proof must be more powerful than that. It must be beyond a reasonable doubt.”).

Subdivision B.

Subdivision B. is drawn from ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY 15-4.4 (1996), which provides the court with the option of instructing the jury before or after closing arguments. As noted in the commentary to Standard 15-4.4, providing instructions before closing arguments has been criticized because it may cause jurors to forget what law they
Principle 14

Principles for

were able to comprehend from the charge. On the other hand, providing the instructions prior to closing arguments give counsel the opportunity to explain the instructions by arguing the application of the facts and thereby providing the jury with maximum assistance. In the absence of empirical evidence on the impact of the timing of instructions on jury comprehension, this subdivision recognizes the potential advantages and disadvantages of both approaches.

As suggested in both the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and the ABA CIVIL TRIAL PRACTICE STANDARDS (1998), each juror should be provided with a written copy of the jury instructions. Receiving instructions on the law by listening to a judge read them aloud is far from ideal. Reifman et al., supra, at 540. Individuals process and retain information better when the information is presented both visually and in an auditory form. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 146 (1988). Thus, providing written instructions for jurors to read as the court charges them on the law can increase their comprehension. Saxton, supra, at 110-111. Providing each juror with a copy of instructions during deliberations increases their ability to recall and apply the instructions. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 88 (1998); Joel D. Lieberman & Bruce D. Sales, What Social Science Teaches Us About the Jury Instruction Process, 3 PSYCHOL. PUB POLY & L. 589, 626-28 (1997).

Verdict forms are an important part of the legal instructions to the jury. If the verdict forms do not clearly convey the choices that jurors must make in arriving at a verdict, the forms will invite inconsistent verdicts or verdicts that do not reflect juror fact-finding or application of the law. In the course of instructing the jury on the law, the court should explain the choices the jury must make in completing the verdict forms.

Subdivisions C. and D.

Courts should instruct jurors on the procedures for reporting results, including how to complete the verdict forms, how they will
inform the court about their verdict and who will be responsible for announcing the verdict in court. Courts should also remind jurors that they may ask the court for assistance and instruct jurors how to request clarification on particular issues from the court. Juror comprehension can be increased when jurors ask and are provided with help from the court. Reifman et al., *supra*, at 539.

According to subdivision C., courts should make suggestions regarding the process of selecting a presiding juror and the conduct of deliberations. Subdivision D. maintains, however, that the selection of a presiding juror and determining how to conduct jury deliberations should be left to the jurors. Hence, these subdivisions acknowledge that it is up to the jury to decide whether or not to follow the court’s suggestions.

In accordance with Standards 16(c)(ii) and 18(a) of the ABA *STANDARDS RELATING TO JUROR USE AND MANAGEMENT* (1993), courts should advise that the presiding juror generally chairs the deliberations and ensures a complete discussion before any vote. The court should note that each juror should have an opportunity to be heard on every issue and should be encouraged to participate. Jurors should be told that they should not surrender an individual opinion or decision merely to return a verdict. The court should further inform the jurors that they may be asked, when the verdict is returned, if the verdict is in fact their individual verdict. By providing those suggestions, courts are explaining the functions of the presiding juror and deliberations. Those explanations serve to equip the jurors for the task at hand. Studies have shown that in selecting a presiding juror, jurors have considered such factors as previous experience, including relevant expertise, as well as socioeconomic status, who spoke first, professional occupation and location at the deliberation table. Because the presiding juror can affect the quality of deliberations, juror understanding of the individual’s functions may assist them in considering more relevant factors. See Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC’Y REV. 513, 548-53 (1992); Fred L. Strodtbeck & Richard M. Lipinsky, *Becoming First Among Equals: Moral Considerations in Jury Foreman Selection*, 49 J. PERSONALITY & SOC. PSYCHOL. 927, 934-36 (1985).
Principle 14

The American Judicature Society’s BEHIND CLOSED DOORS: A RESOURCE MANUAL TO IMPROVE JURY DELIBERATIONS (1999) (“MANUAL”) offers a brief set of suggestions on selecting a presiding juror and organizing deliberations, including (1) the responsibilities of the presiding juror; (2) potential ways to facilitate discussion, participation and attention to the relevant evidence and instructions, and (3) timing and methods of voting. The MANUAL makes it clear that the jury is free to select its own method of deliberating, but jurors who participated in a pilot study of the MANUAL, reported that they found the advice in the MANUAL to be helpful.
PRINCIPLE 15—COURTS AND PARTIES
HAVE A DUTY TO FACILITATE EFFECTIVE
AND IMPARTIAL DELIBERATIONS

A. In civil cases of appropriate complexity, and after consulta-
tion with the parties, the court should consider the desirabil-
ity of a special verdict form tailored to the issues in the case.
If the parties cannot agree on a special verdict form, each
party should be afforded the opportunity to propose a form
and to comment upon any proposal submitted by another
party or fashioned by the court. The court should consider
furnishing each juror with a copy of the verdict form when the
jury is instructed and explaining the form as necessary.

B. Exhibits admitted into evidence should ordinarily be provided
to the jury for use during deliberations. Jurors should be pro-
vided an exhibit index to facilitate their review and consider-
ation of documentary evidence.

C. Jury deliberations should take place under conditions and
pursuant to procedures that are designed to ensure impartial-
ity and to enhance rational decision-making.
   1. The court should instruct the jury on the appropriate
      method for asking questions during deliberations and re-
      porting the results of its deliberations.
   2. A jury should not be required to deliberate after normal
      working hours unless the court after consultation with the
      parties and the jurors determines that evening or weekend
      deliberations would not impose an undue hardship upon
      the jurors and are required in the interest of justice.

D. When jurors submit a question during deliberations, the
court, in consultation with the parties, should supply a
prompt, complete and responsive answer or should explain to
the jurors why it cannot do so.

E. A jury should be sequestered during deliberations only in the
rarest of circumstances and only for the purposes of protect-
ing the jury from threatened harm or insulating its members
from improper information or influences.

F. When a verdict has been returned and before the jury has dis-
persed, the jury should be polled at the request of any party
Principle 15
Principles for

or upon the court’s own motion. The poll should be con-
ducted by the court or clerk of court asking each juror indi-
vidually whether the verdict announced is his or her verdict.
If the poll discloses that there is not that level of concurrence
required by applicable law, the jury may be directed to retire
for further deliberations or may be discharged.

Comment

Principle 15 emphasizes the importance of effective and impar-
tial juror deliberations to the success of the jury trial system in
both civil and criminal cases. To that end, it is designed to facili-
tate juror deliberations and to ensure that any external impedi-
ments to the jury’s ability to consider evidence are removed.

Principle 15 recognizes that jury deliberations are by nature a
human process over which courts ultimately have limited actual
control. Even under ideal conditions and given proper, clear, in-
structions, jurors come to deliberations with individual values,
opinions and beliefs that influence the deliberation process. See
generally Dennis J. Devine et al., Jury Decision Making: 45 years
of Empirical Research on Deliberating Groups, 7 PSYCHOL. PUB.

Subdivision A.

This subdivision is drawn from Standard 6 of the ABA CIVIL

Subject to governing law, the court has the discretion to submit
any of a broad array of potential verdict forms to the jury. This
subdivision recognizes that “[c]hoosing among these alternatives
is not subject to scientific precision; each has desirable and unde-
sirable features.” NEW YORK STATE BAR ASSOCIATION FEDERAL
COURTS COMMITTEE, IMPROVING JURY COMPREHENSION IN COM-
PLEX CIVIL LITIGATION 31 (July 1988), NATIONAL CENTER FOR
STATE COURTS, JURY TRIAL INNOVATIONS § VI-10 (G. Thomas
Munsterman et al., eds. 1997). Accordingly, counsel should be
permitted to be heard on this subject.

To assist the court and expedite the trial, the parties should be
couraged to agree on a verdict form. The court may provide
sample verdict forms to counsel to expedite the process. If the parties come to agreement, and the agreed form is neither defective under applicable law nor otherwise inappropriate, the court should ordinarily furnish that form to the jury. If the parties disagree, the court should receive submissions from the parties and fashion an appropriate form of verdict, permitting the parties to be heard on the judicially-crafted form.

The purpose of providing all jurors with copies of the verdict form is to assist them with their deliberations. It will also make it easier for each juror—especially if a special verdict is involved—to answer questions if the jury is polled at the end of the case. The verdict form may be included within juror notebooks, if those are provided.

Traditionally, use of special verdict forms in the guilt determination phase of criminal trials has been prohibited on constitutional grounds. See United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969) (“There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step.”); State v. Surrette, 544 A.2d 823, 825 (N.H. 1988) (such use deprives defendant of impartial jury). Supreme Court decisions requiring juries instead of judges to find the existence of special circumstances that may increase the authorized punishment beyond that called for by the underlying offense of which the defendant has been convicted (e.g., Blakely v. Washington, 124 S. Ct. 2531 (2004)) may bring the special verdict form back to criminal litigation. See Prescott & Starr, Improving Criminal Jury Decision Making After the Blakely Revolution, U. Mich. Olin Center for Law and Econ., Paper #05-004 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=680682.

Subdivision B.

This subdivision is drawn from Standard 7 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

This subdivision is animated by the conviction that jurors should ordinarily be permitted to review the tangible evidence during their deliberations. If the evidence is voluminous, the court may invite counsel to identify those exhibits that they wish
Principle 15

initially be delivered to the jury room. If certain evidence is potentially dangerous to the jurors, the court may prefer to substitute, at least initially, a photograph for the jurors’ use.

This subdivision recognizes that aids may be necessary for the jury to review evidence efficiently—or, in some cases, at all—during deliberations. See ABA Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases 29-31 (1989); Arthur D. Austin, Complex Litigation Confronts the Jury System 100 (1984). The one category of aid considered by the subdivision is an index to facilitate retrieval and review of documents. Other categories of aids should be considered as well, in light of developing technology and Subdivision C.

Subdivision C.

This subdivision is drawn from Standard 18 of the ABA Standards Relating to Juror Use and Management (1993).

It is designed to set conditions for jury deliberations that attend to jurors’ individual needs, reduce or eliminate confusion and create a minimum of disruption to jurors’ occupations and personal lives. Setting appropriate conditions for deliberations is critical not only to ensure fair deliberations in a particular case, but also to the overall effectiveness of the jury system, as the conditions of deliberations bear directly on jurors’ willingness and capacity to serve.

This subdivision recognizes that most jurors will not have had prior experience as jurors. As a result, the court should facilitate deliberations by ensuring that jurors are instructed regarding the proper method of asking questions during deliberations and reporting deliberation results. These instructions should be given on the record prior to deliberations and in language understandable to persons unfamiliar with the legal system.

This subdivision recognizes that courts have broad discretion with regard to the conduct of jury deliberations. The subdivision encourages courts to limit the extension of juror deliberations into the evening and weekend hours, due to the potential adverse impact that prolonged deliberations sessions may have both on the lives of jurors and on the rational deliberative process they are
Principle 15

Juries & Jury Trials

charged with carrying out. See State v. Green, 121 N.W.2d 89 (Iowa 1963) (reversing conviction where verdict reached after jury deliberated for 27 hours without sleep); Commonwealth v. Clark, 170 A.2d 847 (Pa. 1961) (reversing conviction based on verdict returned at 5:25 AM following continuous deliberations).

To assess the impact of extending deliberations beyond normal working hours, courts should consider (1) the views and preferences of jurors and counsel, including the impact of extended deliberations on juror religious beliefs or practices; (2) the length of time the jury has already been deliberating; (3) the likelihood that jurors would be exposed to improper information or influences; (4) the complexity of the case and (5) the presence of jury fatigue.

Subdivision D.

Subdivision D. is intended to encourage the courts to respond to juror questions during deliberations or inform them why the court cannot do so.

This subdivision is premised on the notion that when courts provide a meaningful response to juror questions, juror frustration is reduced and juror experience with the system is more positive. Moreover, empirical data suggest that when courts provide responsive answers or careful explanations for their inability to do so, jurors are more likely to follow judicial instructions regarding a range of issues that the legal system considers irrelevant, but that jurors, nonetheless, find of interest, such as the effect of insurance and attorney fees on net verdicts in civil cases. See Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 Va. L. Rev. 1857, 1887-1905 (2001).

Subdivision E.

This subdivision is drawn from Standard 19 of the ABA Standards Relating to Juror Use and Management (1993), but has strengthened limitations on the use of sequestration.

This subdivision prefers that trial courts be granted discretion to determine when sequestration is appropriate, rather than being compelled to order sequestration pursuant to statutory mandate.
Principle 15

This view is consistent with the evolution of the law in this area and reflects current practice in most jurisdictions. This is true even in states such as New York, where sequestration was once prevalent due to statutory requirements. See Separation and Sequestration of Deliberating Juries in Criminal Trials (April 1, 1999), available at www.courts.state.nv.us/press/old keep/seqreport.shtml.

This subdivision is also informed by recent scholarship and experience suggesting that the costs of sequestration and its demonstrated adverse impact on the lives of jurors weigh against its use in almost all cases. See Marcy Strauss, Sequestration, 24 AM. J. CRIM. L. 63 (1996); see also James P. Levine, The Impact of Sequestration on Jurors, 79 JUDICATURE 266 (1996). At the same time, the subdivision is flexible enough to allow for sequestration when warranted by considerations of juror safety and outside media influence, particularly in high profile cases. See Timothy R. Murphy et al., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 68 (1998). When sequestration is necessary, courts should consider limiting it to particular phases of trial, such as deliberations, where juror’s physical safety and subjection to outside influence can have the most impact.

In those cases where sequestration is warranted or required, courts should make it as “juror-oriented” as possible by (1) involving jurors in the drafting of sequestration rules; (2) evaluating rules for their impact on the dignity and privacy of jurors; (3) monitoring actual conditions through the use of an ombudsman or similar representative to bring jury concerns to the court; (4) adopting a system of post-trial counseling to facilitate juror transition to their former lives. Strauss, supra, at 119-20.

Subdivision F

This subdivision is drawn from Standard 15-5.6 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Polling the jury is derived from common law tradition, and the procedures for polling described in this subdivision are consistent
Principle 15

Juries & Jury Trials

with practice in most jurisdictions. This subdivision envisions individual questioning of jurors to avoid issues of coercion that may arise if the polling is done with a collective group.

This subdivision provides that the judge may either direct the jury to retire for further deliberations or discharge the jury when polling reveals a lack of requisite concurrence. This approach is taken from Rule 31(d) of the Federal Rules of Criminal Procedure and is in direct contrast to most state statutes and court rules, which generally permit the trial judge only to direct the jury to retire for additional deliberations. This subdivision represents a preference for the federal approach, which gives the court power to discharge the jury where coercion is evident or the court is otherwise aware that further deliberations are unlikely to result in a verdict with the appropriate level of concurrence.
PRINCIPLE 16—DELIBERATING JURORS
SHOULD BE OFFERED ASSISTANCE WHEN AN
APPARENT IMPASSE IS REPORTED

A. If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how court and the parties can assist them in their deliberative process. After receiving the jurors’ response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.

B. If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

C. If there is no reasonable probability of agreement, the jury may be discharged.

Comment

Subdivision A. is the lone subdivision of this Principle that is not derived from previous ABA Standards. Instead, it is drawn from Rule 39(h), Arizona Rules of Civil Procedure, and Rule 22.4, Arizona Rules of Criminal Procedure, which allow the court to offer assistance in the form of additional instructions or further proceedings in the event the jury announces an impasse in its deliberations. Subdivisions B. and C. pertain to ordering further deliberations and dealing with deadlocked deliberations and are derived in significant part from Standard 15-5.4. of the ABA CIVIL TRIAL PRACTICE STANDARDS.

Subdivision A.
Subdivision A. urges the court to provide assistance to deliberating jurors who request help on the theory that such assistance will improve the chances of a verdict and avoid needless mistrials. The jury’s announcement of an impasse is required; otherwise the
Principle 16

Principles for
court is not justified in offering assistance. See State v. Huerstel, 75 P.3d 698 (Ariz. 2003). Moreover, jurors who are allowed to
define the issues that divide them and receive appropriate re-
sponses thereto, will more likely reach verdict, and one that is ac-
curate. The court’s invitation following notice of jury impasse,
should not be coercive, suggestive or unduly intrusive. Specifi-
cally, the jury should not be made to feel that the court’s actions
are intended to force a verdict. Of course, the court might decide
that it is not legally or practically possible to respond to the jury’s
concerns at all. See Ariz. R. Civ. P. 39(h), cmt.; Ariz. R. Crim. P.
22.4, cmt.; National Center for State Courts, Jury Trial In-
novations § VI-11 (G. Thomas Munsterman et al. eds. 1997). See
1990); Arizona Supreme Court Committee on More Effective
Supreme Court Committee on More Effective Use of Juries
(1994); B. Michael Dann, “Learning Lessons” and “Speaking;
Rights”: Creating Educated and Democratic Juries, 68 Ind. L. J.

This procedure, when carefully guided by wise judicial discre-
tion, does not unduly invade the sanctity of jury deliberations or
transform the trial judge to the status of fact finder. But see United
States v. Yarborough, 400 F.3d 17 (D.C. Cir. 2005). Rather, it
strikes a careful balance between the confidentiality of deliber-
ations and the importance of responding to the jury’s expressed re-
quest for guidance and the undoubted values of avoiding needless
mistrials on account of deadlocked juries and assisting the jury in
reaching well-informed verdicts. It is also consistent with the long
line of cases allowing judges to reopen jury deliberations in crimi-
nal cases for additional proceedings. See M. C. Dransfield, Anno-
tation, Propriety of Reopening Criminal Case in Order to Present
Omitted or Overlooked Evidence, after Submission to Jury but

Subdivision B.

Subdivision B. provides that a trial court should be able to
send the jury back for further deliberations notwithstanding its
indication that it has been unable to agree. The general view is that a court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged. H. H. Hansen & D. E. Buckner, Annotation, *Time Jury May be Kept Together on Disagreement in Criminal Case*, 93 A.L.R. 2d 627, 639 (1964); *DeVault v. United States*, 338 F.2d 179 (10th Cir. 1964); *People v. Boyden*, 4 Cal. Rptr. 869 (1960). Statutes in a few states limit the number of times a court can order a disagreeing jury to continue deliberations. See, e.g., S.C. Code § 14-7-1330 (1975). That view has not been adopted here, however, as it is believed that a jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unhappy over its inability to agree.

A judge should not require a jury to deliberate for an unreasonable length of time or for unreasonable intervals, or threaten a jury with the prospect of such unreasonably lengthy deliberations. The length of time a jury may be kept deliberating is a matter within the discretion of the trial judge; abuse of that discretion requires reversal. The reasonableness of the deliberation period should not be fixed by an arbitrary period of time, but should depend upon such factors as: the length of the trial; the nature or complexity of the case; the volume and nature of the evidence; the presence of multiple counts or multiple defendants; and the jurors’ statements to the court concerning the probability of agreement. Annotation, 93 A.L.R. 2d at 627.

Subdivision B. does not recommend an absolute bar on a trial judge telling a jury how much longer it will be required to deliberate. There is a split of authority on the question of whether such action is proper. Compare *Wishard v. State*, 115 P. 796 (Okla. 1911) with *Butler v. State*, 207 S.W.2d 584 (Tenn. 1948). The argument against permitting such a communication is that minority jurors may surrender to the majority simply to avoid having to remain the announced time or that a contrary or disagreeable juror may be encouraged to “stick it out” to the indicated deadline. *Wade v. State*, 155 Miss. 648, 124 So. 803 (1929). However, if the time announced is not unduly long, these do not seem to be great risks. See, e.g., *Butler v. State*, 207 S.W.2d 584 (Tenn. 1948).
Principle 16

Subdivision C.

Although the common law rule was to the contrary, subdivision C. provides that a trial judge has discretionary power to discharge a jury in any trial without the consent of either party when, after sufficient and reasonable time for deliberation, it cannot agree on a verdict. See, e.g., United States v. Shavin, 287 F.2d 647 (7th Cir. 1961); People v. Mays, 179 N.E. 2d 654 (Ill. 1962); see also Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971). Subdivision C. permits discharge when “it appears that there is no reasonable probability of agreement.”

The language of this subdivision—or similar language—is common in statutes and rules of court. See, e.g., Ariz. R. Crim. P. 22.4; Ark. Code. Ann., § 43-2140 (1977); Cal. Penal Code § 1140 (1970); Ohio Rev. Code Ann. § 2945.36 (1974); Tex. Code Crim. Proc. art. 36.31 (1966). Court decisions likewise take the view that a trial judge should not discharge a jury merely because it reports that it has not been able to agree, but instead should determine whether there is a reasonable prospect of its being able to agree. Carus Icenogle, The Menace of the “Hung Jury,” 47 A.B.A. J. 280 (1961). One way of making this determination is through the questioning of jurors. The particular circumstances of the case should also be considered. Relevant factors include: the length of deliberation, People v. Caradine, 235 Cal. App. 2d 45, 44 Cal. Rptr. 875 (1965); the length of the trial, United States v. Fitz Gerald, 205 F. Supp. 515 (N.D. Ill. 1962); and the nature or complexity of the case. People v. Mays, 179 N.E.2d 654 (Ill. 1962).
Post-Verdict Activity

PRINCIPLE 17—TRIAL AND APPELLATE COURTS SHOULD AFFORD JURY DECISIONS THE GREATEST DEFERENCE CONSISTENT WITH LAW

Trial and appellate courts should afford jury decisions the greatest deference consistent with law.

Comment

Principle 17 is premised on the notion articulated in the Seventh Amendment to the Constitution that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

The prohibition contained in the Seventh Amendment has not been interpreted as prohibiting review. In both civil and criminal cases, appropriate review has been accepted as a necessary part of the judicial process. In recent years, commentators have expressed concern that appellate courts (particularly in civil cases) have arrogated to themselves an authority to review that treats jury verdicts as fair game for the most exacting scrutiny. This approach appears to go well beyond that envisioned by the Seventh Amendment and amounts, in some cases, to a second-guessing of the jury. Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237.

The Supreme Court of the United States has cautioned against such an approach in Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996); see also Hetzel v. Prince William Co., 523 U.S. 208 (1998) (per curiam). This Principle is intended to reiterate that caution. Nothing in the Principle is intended to change the developed law regarding grounds for challenging a jury verdict in a capital case. See, e.g., Wisehart v. Davis, 408 F.3d. 321 (7th Cir. 2005) (juror affidavit necessitated further inquiry into whether jury had improperly considered extraneous evidence that defendant took polygraph examination); Fullwood v. Lee, 290
Principle 17

F.3d 663 (4th Cir. 2002) (relying on juror affidavit to order evidentiary hearing on habeas claim that extraneous evidence prejudiced jury at penalty phase); Romine v. Head, 253 F.3d 1349, 1362-63 (11th Cir. 2001) (juror testimony admitted regarding effect on jury of prosecution argument).
PRINCIPLE 18—COURTS SHOULD GIVE JURORS LEGALLY PERMISSIBLE POST-VERDICT ADVICE AND INFORMATION

A. After the conclusion of the trial and the completion of the jurors’ service, the court is encouraged to engage in discussions with the jurors. Such discussions should occur on the record and in open court with the parties having the opportunity to be present, unless all the parties agree to the court conducting these discussions differently. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.

B. Under no circumstances should the court praise or criticize the verdict or state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.

C. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

D. Unless prohibited by law, the court should ordinarily permit the parties to contact jurors after their terms of jury service have expired, subject, in the court’s discretion, to reasonable restrictions.

E. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.

Comment

This Principle is, in large measure, drawn from Standard 16 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and from Standard 8 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

This Principle is based on the premise that jurors benefit from a post-verdict discussion with the court following the completion of their service. Post-verdict discussion should address the jurors’ questions and concerns regarding confidentiality, media access, post-service assistance and other relevant information.
Subdivision A.

Subdivision A. urges that such discussions be on the record with an opportunity for counsel to be present, if appropriate. Attorney participation is helpful to jurors in discussing such issues as post-service contacts with counsel, limitations placed on such contacts, and permissible topics of discussion following the completion of their service. The keeping of a record during these discussions, although more formal, maintains uniformity throughout the jurors’ service and allows the court to have a record of jurors’ questions and matters of concern with regard to their service and the trial process in general.

Subdivision B.

Subdivision B. recognizes the propensity of jurors to look to the judge for an opinion about their verdict. Often, jurors are looking for an affirmation that their decision was the correct one, doing so by seeking any sign, verbal or nonverbal, that the judge may provide in this respect. It is important that the judge remain the neutral party, neither praising nor criticizing the verdict. Criticizing the verdict can be extremely troubling for the jurors. Judges are encouraged to express their gratitude to the jurors for their service and refrain from commenting directly on the verdict.

NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS Appendix 12 (G. Thomas Munsterman et al. eds. 1997) [hereinafter INNOVATIONS].

Subdivision C.

Subdivision C. illustrates the established practice of instructing the jury on their right to discuss or not discuss the case with anyone, including the press. Most jurors have not been through the trial process before, and may be unprepared to deal with media requests and related public attention. Jurors should be instructed that they do not have to speak with anyone regarding their service, if that is their preference; however, they are free to speak with the media, counsel, family members or others, if they so choose. Judges may suggest that jurors discuss among themselves how

Subdivision D.

Subdivision D. addresses contact between jurors and counsel after the jurors’ service is complete. As a general rule, unless prohibited by the law of the jurisdiction, the court should exercise its discretion in favor of permitting counsel to contact jurors after their terms of jury service have expired. *See generally Delvaux v. Ford Motor Co., 764 F.2d 469, 471 (7th Cir. 1985)* (setting forth considerations both in favor and opposed to such contacts). Judges may explain that post-service discussions with counsel may be helpful to the attorneys professionally by identifying positive and negative elements of their trial strategy and performance. Jurors should also be instructed as to any limitations imposed by the court or other governing body on such contacts designed to provide jurors protection from harassment. *See, e.g., ABA MODEL CODE OF PROFESSIONAL CONDUCT 4.4; ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (prohibiting lawyers from contacting jurors for the purpose of harassment or embarrassment).*

Subdivision E.

Subdivision E. emphasizes the protection of jurors’ privacy rights after the completion of their service. Jurors should be informed by the court of their right to be free from the harassment of the media, counsel, parties or other individuals. The court should provide specific instructions regarding how one may seek relief. Providing such information is reassuring to jurors and instills a sense that the court genuinely cares about their well-being, in turn fostering positive feelings regarding their service and the judicial process as a whole. **INNOVATIONS, supra, at § VII-1.**
PRINCIPLE 19—APPROPRIATE INQUIRIES INTO ALLEGATIONS OF JUROR MISCONDUCT SHOULD BE PROMPTLY UNDERTAKEN BY THE TRIAL COURT

A. Only under exceptional circumstances may a verdict be impeached upon information provided by jurors.
   1. Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
   2. The limitations in A.1 above should not bar evidence concerning whether the verdict was reached by lot or contains a clerical error, or was otherwise unlawfully decided.
   3. A juror's testimony or affidavit may be received when it concerns:
      a. Whether matters not in evidence came to the attention of one or more jurors; or
      b. Any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

B. The court should take prompt action in response to an allegation of juror misconduct.
   1. Upon receipt of an allegation of juror misconduct, the court should promptly inform the parties and afford them the opportunity to be heard as to whether the allegation warrants further enquiry or other judicial action.
   2. Parties should promptly refer an allegation of juror misconduct to the court and to all other parties in the proceeding.
   3. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with the parties concerning the nature and scope of the inquiry, including:
      a. Which jurors should be questioned;
      b. Whether the court or the parties should ask the questions; and
      c. The substance of the questions.
Principles for

4. If the court ascertains that juror misconduct has occurred, it should afford the parties the opportunity to be heard as to an appropriate remedy.

5. If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.

Comment

This Principle is drawn from the ABA Standards for Criminal Justice Discovery and Trial by Jury (1996) and ABA Civil Trial Practice Standards (1998). Subdivision A. is substantially similar to Section 15-5.7 (“Impeachment of the Verdict”) of the ABA Standards for Criminal Justice Discovery and Trial by Jury and subdivision B. is substantially similar to Standard 9 of the ABA Civil Trial Practice Standards.

Subdivision A.

Trial judges are often confronted with requests to question former jurors about statements, conduct, events or conditions affecting the validity of a verdict. This subdivision addresses the issue of whether a court should receive evidence from a juror to impeach the verdict. The general rule is that “a juror’s testimony or affidavit is not receivable to impeach his own verdict.” 8 Wigmore, Evidence § 2345 (McNaughton rev. 1961). This rule reflects the policy decision that to intrude into the sanctity of the jury process would create a chilling effect on deliberations, as well as undermine the finality of jury determinations.

In a range of cases, however, inquiry into the circumstances surrounding a jury’s deliberations and verdict may be necessary to adequately protect a litigant’s rights. See, e.g., Tanner v. United States, 483 U.S. 107 (1987) (discussing circumstances under which inquiry into juror misconduct may be necessary to protect a criminal defendant’s Sixth Amendment right to fair trial); Jacob v. City of New York, 315 U.S. 752, 752-53 (1942) (explaining
that the right to jury trial in civil cases is such “a basic and fundamental feature of our system of federal jurisprudence” that it “should be jealously guarded by the courts”); see ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.15.1, and cmt. (rev. ed. 2003). This raises the question of whether, after the jury has been discharged, it is improper for counsel to interview jurors and how counsel should treat information that might be used to impeach a verdict. Some courts have held that it is improper to interview the jurors in an attempt at impeachment.

Subdivision A. does not impose a blanket no-impeachment rule. Rather, it recommends against receipt of evidence “to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined” upon an inquiry into the validity of a verdict. Nothing in this subdivision is intended to change existing law with respect to the admission of evidence regarding the mental processes by which a verdict was determined in the context of a capital case. See, e.g., Wisehart v. Davis, 408 F.3d. 321 (7th Cir. 2005) (juror affidavit necessitated further inquiry into whether jury had improperly considered extraneous evidence that defendant took polygraph examination); Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002), (relying on juror affidavit to order evidentiary hearing on habeas claim that extraneous evidence prejudiced jury at penalty phase); Romine v. Head, 253 F.3d 1349, 1362-63 (11th Cir. 2001) (juror testimony admitted regarding effect on jury of prosecution argument).

There are, of course, sound reasons for limiting post-trial inquiries into the basis for jury verdicts. These reasons apply even when an individual juror is willing to discuss his or her own misconduct. First, there is concern that relaxation of the restriction would create a danger of fraud and jury tampering. See State v. Freeman, 5 Conn. 348 (1824); King v. United States, 576 F.2d 432 (2d Cir. 1978); Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975). In addition, it could lead to harassment of jurors and elimination of the confidentiality of jury deliberations. As the Supreme Court pointed out in discussing the dangers:
Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation to the destruction of all frankness and freedom of discussion and conference.

*McDonald v. Pless*, 238 U.S. 264, 267-68 (1915). In addition, substantial dangers are inherent in the attempt to delve into the very thought processes of individual jurors in order to explain how the individual came to his or her decision. See, e.g., *Trousdale v. Texas & N.O.R. Co.*, 264 S.W.2d 489, 493-95 (Tex. Civ. App. 1953) (collecting cases).

Subdivision A. rejects the inclusion of testimony other than that of specific misconduct, whether the testimony is open to corroboration by other jurors or not. Such testimony might include, for example, an expression showing that a juror misunderstood the instructions. See *Perry v. Bailey*, 12 Kan. 539, 545 (1874).

Subdivision A. also bars evidence of “the effect of any statement, conduct, event, or condition upon the mind of a juror” even when the inquiry is for the purpose of showing that a potentially prejudicial occurrence did not influence the verdict. For example, after a coin has been flipped to determine the verdict, a juror involved should not be permitted to testify that his or her subsequent concurrence in the verdict flowed from personal conviction rather than the outcome of the toss. Some court decisions and statutes permit such evidence for purposes of upholding the verdict. See, e.g., *Beakley v. Optimist Printing Co.*, 152 P. 212 (Idaho 1915); *Linsley v. State*, 101 So. 273 (Fla. 1924); GA. CODE ANN. § 110-109 (1973). Both Rule 606(b) of the Federal Rules of Evidence and this subdivision have rejected that view. Inquiry into the thought process of individual jurors carries the same risks and uncertainties whether the attempt is to invalidate or to save the verdict. See, e.g., *Wiedemann v. Galiano*, 722 F.2d 335 (7th Cir. 1983) (excluding juror’s testimony whether introduced to support or to impeach the verdict). Rather than engage in speculation as to the thought processes of each individual juror, it is better to determine whether the “capacity for adverse prejudice inheres in the

Finally, it should be emphasized that the restrictions in subdivision A. apply to attempts to impeach a verdict and do not preclude a trial judge from making necessary and appropriate inquiries when an ambiguous or inconsistent verdict has been returned.

To this end, a juror’s testimony may be received regarding an alleged clerical error in the verdict. “[J]uror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation or mental processes.” Plummer v. Springfield Terminal Ry. Co., 5 F.3d 1, 3 (1st Cir. 1993); see also Karl v. Burlington Northern Ry. Co., 880 F.2d 68, 73-74 (8th Cir. 1989); Eastridge Dev. v. Halpert Assoc., 853 F.2d 772, 783 (10th Cir. 1988).

A verdict may not be reached by lot. Subdivision A. therefore provides for the receipt of evidence when this circumstance is alleged to have occurred in the jury room. A verdict reached by lot should simply not be permitted to stand. Comment, Impeachment of Jury Verdicts, 25 U. CHI. L. REV. 360, 371-72 (1958). If a verdict by lot is not permitted, then evidence, including testimony from jurors acting in that case, should be received on the question of whether the verdict was arrived at in that fashion. “[S]ince a determination by lot can hardly ever be established by other than jurors’ testimony, it becomes a mere pretense to declare a certain irregularity fatal and yet to exclude all practical means of proving it.” 8 WIGMORE, EVIDENCE at § 2354.

Subdivision B.

Not all allegations of juror misconduct are substantial or require examination. A juror’s statement that he or she acquiesced in a verdict but did so harboring doubts is facially insufficient to impeach the verdict. In contrast, a juror’s statement that jurors consulted an encyclopedia or text book during deliberations will ordinarily necessitate further inquiry.
Principle 19

Whenever an allegation of misconduct is received, it must promptly be brought to the attention of all concerned, regardless of whether the recipient deems the allegation likely to lead to juror disqualification or verdict impeachment. If the jury is still deliberating at the time the allegation is received, time is of the essence to permit the court to decide, on an adequate record, whether a remedy short of mistrial (or disqualification of too many jurors) is available and appropriate.
INDEX

Age Discrimination in Employment Act 83
American Publishing Co. v. Fisher, 166 U.S. 464 (1897) 23
Americans with Disabilities Act 11
Apodaca v. Oregon, 406 U.S. 404 (1972) 23
Ashton v. Commonwealth, 405 S.W.2d 562 (Ky. 1965) 26
assembling a jury 49–88, See also fair and impartial jury
ensuring fairness and impartiality 67–88
open, fair and flexible selection procedures 53
trial venue 49–52
Blanton v. N. Las Vegas, 489 U.S. 538, 542 (Ky. 1989) 4
Burch v. Louisiana, 441 U.S. 130 (1979) 24, 25
Butler v. State, 207 S.W.2d 584 (Tenn. 1948) 122, 123
Colgrove v. Battin, 413 U.S. 149 (1973) 18, 19
Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848 (1986) 4
Commonwealth v. Clark, 170 A.2d 847 (Pa. 1961) 117
Consorti v. Armstrong World Indus., 72 E.3d 1003, 1008 (2d Cir. 1995) 96
Darbin v. Nourse, 664 F.2d 1109, 1115 (9th Cir. 1981) 74
Dean v. Gaddesen Times Pub’g Corp., 412 U.S. 545 (1973) 16
deliberations 107–24
effective and impartial, facilitation of 113–19
juror review of tangible evidence 116
verdict form, guilt determination phase 115
verdict form, selection of 115
verdict forms, types of 114
impasses and court assistance to jurors 120–24
continuing in effort to break impasse 122
instructing jury before or after closing argument 110
instructions for reporting results 111
judge’s power to discharge a jury 123
juror instructions, plain and understandable 107
juror questions, handling of 117
jurors to decide method of conduct 111
limiting hours of 117
plain and understandable juror instructions 107
polling the jury 119
preliminary instructions to jurors 108
providing assistance to jurors who request it 120
selection of foreperson 111
sequestration of jury 118
setting appropriate conditions for 116
time requirement 26
Delvaux v. Ford Motor Co., 764 F.2d 469, 471 (7th Cir. 1985) 129
Devault v. United States, 338 F.2d 179 (10th Cir. 1964) 122
D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) 4, 5
Douglass v. First Nat’l Realty Corp., 543 E.2d 894, 899 n.37 (D.C. Cir. 1976) 6
Due Process Clause 4
Duncan v. Louisiana, 391 U.S. 145, 149 (1968) 4
Dunn v. Blumstein, 405 U.S. 330 (1972) 10
Duren v. Missouri, 439 U.S. 357 (1979) 66
Eastridge Dev. v. Halpert Assoc., 853 E.2d 772, 783 (10th Cir. 1988) 135
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 84
Equal Protection Clause 83
Eisaw v. Friedman, 586 A.2d 1164, 1167–68 (Conn. 1991) 95
Estes v. Texas, 381 U.S. 532, 545–46 (1965) 45

137
facts and law, promoting juror understanding of 92–106
court assistance to jurors 98–101
encouraging jurors to take notes 95
impaneling two or more juries in cases involving multiple claims 106
judge’s questioning of witnesses 100
judge’s right to express opinions 98
comments upon the evidence 99
credibility of evidence 99
improper statements 99
jury instructions 99
opinions concerning merits of cases 99
judicial control over contacts with jurors 102
juror discussion of evidence 103
advantages of 104
civil cases 103
limiting or prohibiting 104
juror notebooks 96
live testimony, encouragement of 106
single unitary trial in civil cases, advisability of 105
submission of written questions by jurors 96
techniques to improve understanding of the issues 105
fair and impartial jury, assembling 67–88
alternate juror system 85
anonymous juries, limited use of 87
challenge for cause 76
grounds for 76
client assistance with challenges 82
discrimination against prospective jurors 83–85
definition of constitutionally cognizable groups 83
Equal Protection Clause of the 14th Amendment 83
jurors should not be sworn in until challenges are completed 82
peremptory challenges 77–81
additional allowed by court 79
for constitutionally impermissible reasons 83–85
necessity of 78
permissible number of 79
procedures for exercising 79
struck jury system 80
pre-voir dire questionnaires 71
benefits of 72
purpose of 71
types of 71
procedural mechanisms for striking prospective jurors 82
voir dire process 73–75
challenges 73
initial questioning by court 75
judicial control of 74
juror exposure to case, examination of 75
sufficiency of 75
transcript of 73
Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002) 126, 133
Gant v. United States, 506 F.2d 518, 520 (8th Cir. 1974) 98
Gen. Signal Corp. v. MCI Telecomm. Corp., 66 F.3d 1500 (9th Cir. 1995) 90
general principles 2–48
judicial administration of jury system 28–31. See also.
jurors, completion of service 46–48. See also.
jury decisions unanimity of 23–27. See also.
jury service, right to participate in 8–16. See also.
jury service, protection of right by courts 28–31
jury trial, protection of right by courts 28–31
number of jurors 17–22
privacy of jurors, protecting 39–45. See also.
right to trial jury 2–7. See also Jury trial, right to trial essentials, juror education about 32–36. See also.
Georgia v. McCollum, 505 U.S. 42 (1992) 84
Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975) 134
Gray v. Mississippi, 481 U.S. 648 (1987) 76
Gray v. United States Dep’t of Agric., 39 F.3d 670 (6th Cir. 1994) 106
Green v. State, 583 So. 2d 647 (Fla. 1991) 84
Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982) 102
Index

Hicks v. Commonwealth, 805 S.W.2d 144, 151 (Ky. Ct. App. 1990) 90

impasses 120–24

Jacob v. City of New York, 315 U.S. 752, 752–53 (1942) 3, 133
Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987) 90

judicial administration of jury system
28–31
consolidation of administration 30
data collection and analysis, importance of 30
efficient use of juror resources 29
local requirements, sensitivity to 29
reforms, enactment of 29
technological innovations, implementation of 29
juror understanding of facts and law, promotion of 92
jury decisions, deference to 125–26
jury decisions, unanimity of 23–27
civil cases 25
criminal cases 25
deliberations, time requirement 26
hung juries 25
impact on jurors 24
less than unanimous verdicts, permissibility of 23
majority, size of 23
non-unanimous verdict, acceptability of 26
protection of jury representativeness 24
jury selection. See Selection of jury, ensuring fairness of
jury service, completion of 46–48
removal of juror 46–48
jury nullification 47
refusal to deliberate 48
threats, fears of 47
value of 46
jury service, right to participate in 8–16
Americans with Disabilities Act 11
efficient jury management 13
eligibility requirements 9–11
age 9
citizenship 10
communication skills 10
criminal history 11
residency 10
juror fees 15
minimizing juror time commitment 12
minimizing number of jurors 13
prohibition against employers penalizing for jury duty 16
prohibition against discrimination 11
providing suitable environment 15
jury trial, conduct of 89–106
juror understanding of the facts and the law 92
length of trials 89–91, 107
trial schedule, informing jurors about 89–91, 109
jury trial, right to 2–7
civil matters 3
criminal prosecutions 5–7
trial waiver, consent by prosecution and trial court 5
waiver of and substitution of trial judge 7
waiver of trial, pro se defendants 6
waiver, withdrawal of 6
criminal trials 3–4
Due Process Clause 4
financial considerations 7
Fourteenth Amendment 4
prison sentences 4
Seventh Amendment 3
Sixth Amendment 4
waiver of 4–5

Karl v. Burlington Northern Ry. Co., 880 F.2d 68, 73–74 (8th Cir. 1989) 135
King v. United States, 576 F.2d 432 (2d Cir. 1978) 134

Lane v. Wallace, 579 F.2d 1200 (10th Cir. 1978) 100
Lozano v. Florida, 584 So. 2d 19 (Fla. Ct. App. 1991) 51

McDonald v. Pless, 238 U.S. 264, 267–68 (1915) 134
Meggs v. Fair, 621 F.2d 460 (1st Cir. 1980) 104
Index

Miller-El v. Dretke, 125 S. Ct. 2317 (2005) 84
Minneapolis & St. Louis R.R. Co. v. Bombolakis, 241 U.S. 211, 217 (1916) 3
misconduct, allegations of 131–36
ambiguous or inconsistent verdicts 135
impeachment of verdict 132
limiting post-trial inquiries 133
prompt investigation of 136
verdict reached by lot 135
Morgan v. Illinois, 504 U.S. 719, 729 (1992) 76
number of jurors 17–22
criminal cases 20
Fourteenth Amendment 17
impact on jury effectiveness 18–20
minimum of six 18
reduction in, approval of 21
requirement of twelve 17–20
Seventh Amendment 17
Sixth Amendment 17
Pariser v. City of New York, 146 F.2d 431, 433 (2d Cir. 1945) 100
Patton v. United States, 281 U.S. 276 (1930) 21
People v. McNee, 47 P.2d 813 (Cal. App. 1935) 99
People v. Boyden, 4 Cal. Rptr. 869 (1960) 122
People v. Caradine, 235 Cal App. 2d 45, 44 Cal. Rptr. 875 (1965) 123
People v. Cleveland, 21 P.3d 1225, 1237 (Cal. 2001) 48
People v. Hawkins, 43 Cal. Rptr. 2d 636 (1995) 100
People v. Mays, 179 N.E.2d 654 (Ill. 1962) 123, 124
People v. Miller, 170 P. 817 (Cal. 1918) 99
People v. Wheeler, 583 P.2d 748 (Cal. 1978) 55, 56
Plummer v. Springfield Terminal R. Co., 5 F.3d 1, 3 (1st Cir. 1993) 135
Poff v. State, 241 A.2d 898 (Md. 1968) 99
post-verdict activities 127–30
advice and information for jurors 127–30
discussions with jurors 128
judge's opinion of verdict 128
juror misconduct, allegations of 131–36. See also
media questioning of jurors 129
post-trial handling of juror information 44
post-trial inquiries into juror bias 44
privacy of jurors, protecting 39–45
Protection of jurors' privacy rights 129
Powers v. Ohio, 499 U.S. 400 (1991) 11, 84
background investigations of prospective jurors 44
balancing with party and public interests 40–42
ensuring relevance of information sought 42
examination of juror outside presence of other jurors 43
insulating the jury from the media 45
integrity of selection process 43
jury selection process, closing 40
jury selection process, openness of 40
method for voir dire examination 42
post-trial handling of juror information 44
post-trial inquiries into juror bias 44
presentation of sensitive information, juror options 43
record retention 43
surveillance of jurors, prohibition against 45
types of information collected from jurors 41
use of information, explanation of 42
Rogers v. United States, 319 F.2d 5 (7th Cir. 1963) 22
Romine v. Head, 253 F.3d 1349, 1362–63 (11th Cir. 2001) 126, 133
selection of jury, ensuring fairness of 53–66
age considerations 62
automatic excuses or exemptions, elimination of 61
challenge to the jury array 65
deferral of juror service 62
exemptions, excuses and deferrals 60
personal hardship 62
strict excuse policy, adoption of 61
exemptions, occupational 61
inclusiveness 56–57
defined 56
juror lists 57
mental disability considerations 62
qualifications, determining 58
random selection procedures 59
appropriate timing of 59
exceptions to 59, 60
means of 59
representativeness challenges to 57
defined 56
monitoring 66
source lists, periodic examinations of 58
summons for jury service practicality of 64
requirements of 64
*Simants v. Nebraska*, 277 N.W.2d 219, 220 (Neb. 1979) 35
*State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984) 74
*State v. Bryant*, 126 S.E. 107 (N.C. 1925) 99
*State v. Cambara*, 902 F.2d 144, 147–49 (1st Cir. 1990) 80
*State v. Freeman*, 5 Conn. 348 (1824)
*State v. Green*, 121 N.W.2d 89 (Iowa 1963) 117
*State v. Green*, 151 S.E.2d 606 (N.C. 1966) 99
*State v. Huerstel*, 75 P.3d 698 (Ariz. 2003) 120
*State v. Kociolek*, 118 A.2d 812, 816 (N.J. 1955) 135
*State v. Pelican*, 580 A.2d 942 (Vt. 1990) 66
*State v. Rappert*, 375 N.E.2d 1250 (Ohio 1978) 26
*Stokes v. State*, 532 A.2d 189, 190 (Md. 1987) 46
*Tabbs v. State*, 403 A.2d 796, 798 (Md. 1979) 46
*Thompson v. Utah*, 170 U.S. 343, 350 (1898) 17
trial essentials, juror education about 32–36
deferral requests 33
explanations during trial 37
instructions
  comprehensibility of 35–36
  comprehensiveness of 35
final 38
jury summons 33
orientation programs 33–35
trial schedule, informing jurors about 89–91, 109
trail venue 49–52
change of venue 51
changes of venue, deciding 49
civil trials 50
criminal trials 50
out-of-locality juries 51
taint of juror pool 51
verdict potential for community violence 51
## Index

<table>
<thead>
<tr>
<th>Trials, length of 89–91, 109</th>
<th>United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994) 88</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chess clock approach 90</td>
<td>United States v. Ross, 468 F.2d 1213 (9th Cir. 1972) 66</td>
</tr>
<tr>
<td>Fixed amount of time for case presentation 90</td>
<td>United States v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991) 47</td>
</tr>
<tr>
<td>Informing jurors of trial schedule 89</td>
<td>United States v. Saadya, 750 F.2d 1419, 1422 (9th Cir. 1985) 6</td>
</tr>
<tr>
<td>Reasonable time limits, court's power to impose 90</td>
<td>United States v. Shackelford, 777 F.2d 1141 (6th Cir. 1985) 102</td>
</tr>
<tr>
<td>United States v. Block, 753 F.2d 770 (11th Cir. 1985) 100</td>
<td>United States v. Spock, 416 F.2d 165, 180–83 (1st Cir. 1969) 115</td>
</tr>
<tr>
<td>United States v. Castner, 30 F.3d 1267 (4th Cir. 1995) 100</td>
<td>United States v. Van Horn, 553 F.2d 1092 (5th Cir. 1977) 99</td>
</tr>
<tr>
<td>United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) 95</td>
<td>United States v. Venske, 296 F.3d 1284 (11th Cir. 2002) 36</td>
</tr>
<tr>
<td>United States v. DiBace-Estrada, 526 F.2d 637 (5th Cir. 1976) 99</td>
<td>Van Leirsburg v. Sioux Valley Hosp., 831 F.2d 169 (8th Cir. 1987) 100</td>
</tr>
<tr>
<td>United States v. Egbonnia, 969 F.2d 757, 762–63 (9th Cir. 1992) 48</td>
<td>-- waiver of right to trial by jury 4</td>
</tr>
<tr>
<td>United States v. Fritz Gerald, 205 F. Supp. 515 (N.D. Ill. 1962) 123</td>
<td>Washington v. State, 98 So. 605, 606 (Fla. 1923) 77</td>
</tr>
<tr>
<td>United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984) 22</td>
<td>Wiedemann v. Galano, 722 F.2d 335 (7th Cir. 1983) 135</td>
</tr>
<tr>
<td>United States v. Gonzalez-Torres, 980 F.2d 788 (1st Cir. 1992) 100</td>
<td>Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983) 66</td>
</tr>
<tr>
<td>United States v. Guerrero-Peralta, 446 F.2d 876, 877 (9th Cir. 1971) 22</td>
<td>Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945) 103</td>
</tr>
<tr>
<td>United States v. Klee, 494 F.2d 394 (9th Cir. 1974) 104</td>
<td>Wishard v. State, 115 P. 796 (Okla. 1911) 122</td>
</tr>
</tbody>
</table>
Taking the Stand

Thinking Outside the Jury Box: The D.C. Circuit Needs to Embrace Common Sense
By Gregory E. Mize

In a famed decision affirming the convictions of several Watergate burglars, the U.S. Court of Appeals for the District of Columbia Circuit stated, “The judge . . . is not a passive by-stander in the arena of justice, a spectator at a ‘sporting event;’ rather he or she has the most pressing affirmative responsibility to see that justice is done in every case.”[1] Thirty years later panels of the circuit are saying a trial judge must rigidly embrace the role of mere spectator when a jury is inexplicably stalled during deliberations. More than that, the court is now instructing federal trial judges to largely isolate themselves from deliberating juries who voice a need for guidance with respect to fact-related issues.

I write to suggest that the circuit should steer toward its decades-old doctrine endorsing jurists who manage jury trials in a way that promotes the search for truth. In addition, I will show how offers of assistance to jurors at an impasse in deliberations are consistent with the adversary system as well as with social science research. Better yet, the practice makes good common sense.

***

The most recent bad news for local jurors came in the case of United States v. Yarborough.[2] In that gun prosecution, the jury sent a note to the court, after 90 minutes of deliberations, asking for transcripts of the police officers’ testimony. With consent of the parties, the trial judge went into the jury room to tell jurors about the unavailability of transcripts.

Upon his return to the courtroom, the judge informed counsel that the jurors orally posed two questions. One juror asked about what would happen if they were unable to reach a verdict. Another wanted clarification about the legal definition of possession. The judge declined to answer the inquiries immediately. Instead he relayed these occurrences to the parties. No further action was requested or taken. Deliberations continued for a full day without results.

On the following morning, the judge informed counsel of a jury communication that arose as he adjourned the panel on the prior afternoon. Specifically, the foreperson asked the judge if he would “answer the question I asked about possession.” The judge responded by encouraging the jurors to read the legal instruction and to continue to deliberate while he consulted the attorneys. He also told the jury to inform him of any further difficulties in writing. The appellate opinion does not say what, if anything, counsel suggested upon hearing a report from the court. However, after some deliberating on that morning, the jury sent a note saying, “We are at a standstill. We have not been able to make any new progress. What do we do next?”

The judge then called the jury to the courtroom and orally asked the foreperson, “Is a reason why you are not able to make any new progress continuing confusion or disagreement about the instructions?” After receiving a no, the judge asked, “You think you got the instructions down; is that correct?” The foreperson replied, “Yes.” Consequently the court released the jury for lunch and consulted counsel.
The judge expressed a desire to give the jury the D.C. Circuit’s standard anti-deadlock charge (established in United States v. Thomas[3]) or a different formulation recommended by the Council for Court Excellence (CCE) as part of a major petit jury study conducted in 1998. Over the objection of defense counsel, who urged use of the pattern anti-deadlock charge,[4] the court spoke these words to the jury:

You’ve indicated to me that you’re having trouble reaching a unanimous verdict. I think the record should reflect that you have now been deliberating for a longer period of time than it took you to hear the evidence in the case. I’m very mindful of that.

My responsibility is to do whatever I can to assist you in the work you’re doing, but I have another very important responsibility, and that is not to coerce, pressure, push, or lean on you in any way at all. You are the only judges of the facts, and you will remain the only judges of the facts.

You have very carefully not mentioned to me or to anyone, as far as I know, how you are divided. And that’s exactly appropriate, and I appreciate your maintaining that degree of secrecy. I have no idea how you’re divided. I don’t want to know it until or unless you reach a unanimous verdict.

I am not interested in forcing a decision here. What I am interested in is offering to help you, if you think I can help you, and when I say if I can help you, I may enlist the assistance of the lawyers here.

What I’m proposing is that it may be helpful for you in the privacy of the jury room . . . to carefully identify where you agree and where you disagree, and then discuss how the law and the evidence affect those issues; and then if you still have agreement . . . what might be useful is for you to identify for me any questions you have about the evidence or the instructions for which you would like to have assistance from the Court or from the lawyers.

If you choose this option—and I do not insist that you do—but if you choose this option, then write down as clearly and simply as you can where some further assistance might help you in reaching a verdict.

I’m repeating myself much too much, but I have to make very, very clear that I have no wish or intention to force a verdict from you, and neither . . . am I asking you to stay in that jury room forever.

If you consider what I have to say and quickly conclude that this is not going to be of any help, then write a note about that, and tell me that it’s not going to be of any help.

But if you think it will be of help, then tell me as soon as you care to whether and how the Court can help you to reach a unanimous verdict.

And with that, I’m going to ask you to go back and consider what I’ve just said. And thank you very much.[5]
The jury resumed deliberations. Shortly thereafter the jury asked in a note for clarification of the law on possession and constructive possession. Without objection from the parties, the court met the request. Less than an hour later, the jury found the defendant guilty.

Yarborough’s appeal focused on the rendering of the offer-to-help instruction quoted above. The D.C. Circuit reversed the conviction on the grounds that the judge’s charge violated boundaries set by *United States v. Thomas*. The court rejected the government’s argument that the instruction was a noncoercive offer of assistance and not an anti-deadlock exhortation to reexamine one’s views. Instead the court said the CCE model charge “openly invites an intrusion into the basic functions of the jury and does so in a manner that is rife with the potential for coercion.” [6]

Although recognizing that the offer to help is based upon a jury instruction approved by the Arizona Supreme Court, [7] the three-judge panel opined that the trial court’s “invitation to dialogue” with the jury about its difficulty in reaching unanimity “oversteps the bounds of a federal court’s proper role when presiding over a jury trial.”[8] Despite the fact that the Yarborough jury responded to the judge’s invitation to dialogue with a request for clarity about the legal definitions of possession and constructive possession, the appellate court surmised that the jury was hung up over the evidence in the case.

This interpretation of the jury’s inquiry led to another curious conclusion: a federal trial judge should never respond to a deliberating-jury question about the evidence. To reach this restrictive doctrine, the Yarborough court relied on another D.C. Circuit case that is also the focus of this article.

In *United States v. Ayeni* [9] the court was faced with the question of whether it was reversible error for a trial judge to allow parties to give supplemental closing arguments to a jury that said it was “hopelessly deadlocked.” Upon learning of the jury’s impasse in that criminal case, the judge responded by also giving the Arizona model offer of assistance. The jury came back with a note disclosing three questions: “What is the lesser count Mr. Ayeni is charged with; why was the handwriting expert called to testify; do[] the defense and prosecution agree that Mr. Ayeni’s signatures in the witness voucher record books are authentic?”

Over the defendant’s objection, the court gave each side time to present supplemental arguments in response to the last two questions. The subsequent conviction was reversed on the grounds that the allowance of additional argument was a fatal abuse of discretion. The circuit court reasoned that the district court’s response to the jury’s questions was not only unnecessary, but improperly “allowed the lawyers to hear the jury’s concerns and then, as if they were sitting in the jury room themselves, fashion responses targeted to those concerns.”[10]

The per curiam opinion made clear that it was not saying supplemental arguments are never permissible. However, it did say, “[W]e strongly discourage the use of this innovation by the trial judges of this circuit.”[11]

In a concurring opinion, Judge David Tatel went beyond voicing discouragement. He opined that supplemental closing arguments in response to factual questions from a jury “always invade the sanctity of the jury’s deliberations and intrude on its acknowledged role as the exclusive trier of
fact.”[12] By such lights, lawyer-speak to a deliberating jury is rarely permissible—perhaps only after a court has given a supplemental legal instruction that introduces a new theory in the case.

This view flowed from selected jurisprudence that likens the jury deliberation room to a sacred province beyond the touch of court or counsel. Here is a sample of the “forbidden territory” motif: “Juries find facts via a deliberative process that takes place in seclusion, and when counsel offer arguments tailored to address the factual concerns that arise during that deliberative process, the process—and thus the jury’s role as sole fact-finder—has been invaded.”[13]

Guided by this logic, the concurrence concludes that even though nothing said by either attorney during supplemental closings was “inherently inappropriate,” the presentations were fatally improper because they were said in response to factual questions from the jury. In this context the lawyers are viewed as quasi-jurors. Even though the lawyers were given equal time to speak to the jury, the court thought the defendant was denied an impartial jury.

The concurring opinion does not foreclose the possibility that supplemental closing arguments are legal in some future situation. Indeed, Judge Tatel suggests that the rule-making process employed by the Arizona Supreme Court may justify the use of the jury trial innovation attempted by the Ayeni trial judge. Specifically, he states, “A more formal procedure would permit the kind of rigorous and thorough examination of the benefits and drawbacks of supplemental arguments that so novel and untested a change in longstanding jury procedures requires.”[14]

I write now to critique these circuit decisions. I hope, thereby, to begin the serious examination invited by Judge Tatel. For reasons stated below, I believe our legal culture should encourage helpfulness to deliberating jurors rather than avoid it.

***

Together with voting, the American jury system forms the bedrock of our democracy. As the late chief justice William H. Rehnquist stated, “Trial by a jury of laymen . . . was important to the founders because juries represented the layman’s common sense . . . and thus keep the administration of the law in accord with the wishes and feelings of the community.”[15]

With the Batson line of cases, the Supreme Court made clear that prospective jurors have protected interests. The Court in Powers v. Ohio[16] found race-based use of peremptory strikes to exclude otherwise qualified persons from jury service to be an equal protection violation that “forecloses a significant opportunity to participate in civic life.” More recently, the high court in Apprendi v. New Jersey[17] underlined the central role of the jury, not the judge, to make all factual findings that are a predicate for a felony penalty. The importance of jury service again comes to our attention through the current wave of high-profile corporate fraud prosecutions.

As thousands of Americans each day assume these weighty responsibilities, should trial courts shrink from jurors who become confused by the evidence–law mixture? The D.C. Circuit opinions, I believe, answer that question too quickly in the affirmative.

Yarborough and Ayeni are founded on a paradigm that deserves reexamination. Our adversary system has long assumed that the jury must be a passive group until the court tells the members to begin deliberations. Passivity of the decision maker is thought to be essential to promoting his
Faithful to history, the D.C. Circuit would have jurors sit on the shelf as nonactors until deliberations begin. Thereafter a role reversal is demanded. The court and counsel become passive as the jurors enter their secret conclave to decide the facts. If they hit a wall, just give them the Thomas pattern instruction.

There are good reasons to break away from the old binary model. In the Watergate case referenced above, the appeals court rejected the argument that Judge Sirica’s active questioning of witnesses overstepped conventional boundaries. The court observed that extensive inquiry was consistent with the judicial role. The decision set down a fresh view: the active search for truth is meritorious. Judges (and jurors) need not perform straightjacket roles at trial.

In Arizona v. Fulminante the Supreme Court confirmed that the central goal of trial by jury is the search for truth. Since then, empirical research on the jury has shown that a jury’s path to verdict is inherently an active process. Research in social cognition indicates that jurors naturally come to trial with preconceptions that help them interpret evidence. Jurors are often inclined to fill in gaps in evidence and resolve inconsistencies in line with the overall story they tend to create. Recent studies confirm that a significant minority of jurors consult with fellow jurors or outsiders during trial.

Judge B. Michael Dann in 1993 made an influential call to the legal profession to face up to empirical findings. He and a growing number of others argue that the traditional trial paradigm of lawyers-are-active, jurors-are-passive is make-believe. If jurors are actively supplementing holes in the evidence, then trial practice should fill in the gaps and not pretend everything will work out somehow in the end. Dann urged colleagues in the law to undertake practices that make the courtroom more like a classroom than a theater.

The juror-as-active-learner concept has inspired jury reforms throughout the country. Since 1995, 30 states have undertaken some type of self-study of their jury trial systems. Many states have established trial practices that are founded on the premise that jurors, like judges, are active learners and must have the tools to do their work. Many judges are now customarily instructing jurors about how they can properly take notes during trial and ask written questions of witnesses. To help courts guide deliberating juries, the American Judicature Society, with assistance from the U.S. Department of Justice, produced a resource manual to improve jury deliberations.

Under the leadership of American Bar Association (ABA) President Robert J. Grey Jr., the ABA House of Delegates this year promulgated Principles for Juries and Jury Trials. The 19 principles, with accompanying commentary, “express the best of current-day jury practice in light of existing legal and practical constraints.” Principle 16 provides, “Deliberating jurors should be offered assistance when an apparent impasse is reported.” The complementary practice standard in subpart 16A states, “If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to
determine whether and how the court and the parties can assist them in their deliberative process. After receiving the jurors’ response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.’” (Emphasis added.)

ABA Jury Principle 16 is a remarkable consensus among judges and trial lawyers, both criminal and civil, in the nation’s largest legal organization. In one voice they say it is wise to reach out to deliberating jurors who are stalled.

***

As the D.C. Circuit would have it, whenever a judge or lawyer substantively responds to factual questions from a deliberating jury, that individual makes a forbidden invasion into sacrosanct territory. Having presided over hundreds of jury trials during 12 years of active service on a busy urban court, I believe from experience that such jurisprudence overlooks the real-world dynamics of judge–jury communication and undermines the jury’s place in the administration of justice.

First, these appellate decisions miss the fact that even so-called legal questions from a jury give the court and counsel a peek into their deliberations. A jury request for advice on a legal issue is usually not a neat and pure package. Jury calls for help are often simultaneously questions about facts and clarifications of law. These practical truths are borne out in the very cases cited by the circuit judges.

In Bollenbach v. United States[30] the high court was reviewing a federal trial judge’s response to a jury note asking whether members of the jury could find the defendant guilty of conspiracy to transport stolen securities across state lines “[i]f the defendant were [sic] aware that the bonds which he aided in disposing of were stolen.” The Court remarked that, by virtue of this jury communication, the judge (and lawyers) learned the jury was “obviously” evaluating the defendant’s testimony that he knew the bonds came into New York from the west.[31]

The Supreme Court did not criticize the trial court for participating in jury deliberations. Rather, it found the content of the trial court’s legal instruction to the jury to be reversible error. In doing so, the Court turned the often quoted line (used also in Ayeni), “When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.”[32]

Similarly in United States v. Walker[33] the U.S. Court of Appeals for the Ninth Circuit reviewed a trial court’s response to a jury note saying, “Our interpretation of Count I is that the defendant had to have the intent to steal and purloin the Sea Wind [a ship] before leaving the Palmyra area. If we were to determine that the intent occurred at a later time on the trip to Hawaii, would that necessitate a not guilty verdict on Count I?” Here again, court and counsel were not faulted for getting a clear peek into jury deliberations.[34]

How else can a jury be helped if its needs are not described along the lines demonstrated in Bollenbach and Walker? On any given business day, trial judges in the United States are facing these kind of hybrid questions from deliberating juries. Jury after jury is told that its members, like the court, are judges—judges of the facts. Courts repeatedly inform jurors to judge the case based only on the evidence presented in the courtroom. The D.C. Circuit, in artificially telling district judges to avoid “factual questions,” is promoting jury ignorance rather than competence.
If either Yarborough or Ayeni were tried before a court as opposed to a jury, would we think twice about the propriety of a judge, having taken the matter under advisement, reopening the case to hear additional argument or evidence to resolve his or her questions? Is the D.C. Circuit saying that jurors cannot enjoy the same benefits?

The circuit opinions assume that an attorney’s role of advocacy and education and the judge’s task of assisting a jury with evidentiary quandaries end when deliberations begin. Should that invariably be so until a verdict is rendered or a mistrial declared?

The circuit rulings cut off the availability of help when juror need is often greatest and most apparent. If not then, when?

Is it better to let the judges of the facts flounder and decide, or hang in a state of confusion? The Ayeni concurrence discussed the historic values attained by a hung jury. Yes, indeed. But is there not value in avoiding unnecessary mistrials and whole new trials when an offer of assistance might have helped the jury reach a fair and accurate verdict?

What value is there in leaving a jury with questions that can be fairly addressed? Isn’t there fair value in finality?

Regarding the circuit’s concern about “unwarranted intrusions,” courts of appeals generally accept incursions when the need is evident in other contexts. In cases like the notorious trial of Scott Peterson in California, judges receive communications from the deliberation room that a juror is doing case research or some other misconduct is occurring. When a jury is polled concerning unanimity of its final verdict, sometimes a juror will indicate disagreement. At the occurrence of either scenario, judges undertake a sensitive and probing examination of one or more jurors. The questioning sometimes covers events in the deliberation room in order to get to the bottom of the matter and take decisive action. I suspect the D.C. Circuit, faced with such case circumstances, would say these intrusions are necessary and licit. Why say a jury’s announced impasse followed by a particularized need is less deserving of court intervention?

I suggest to my fellow trial professionals that the jury room and jury deliberations should not be off-limits to the degree suggested by the stiff reasoning of Ayeni and Yarborough. I further posit that the circuit policy, if extended beyond its jurisdiction, would dangerously handcuff the American trial bench.

***

The U.S. Court of Appeals for the District of Columbia Circuit finds the offer to help, in response to the jury’s query about what to do next, to be presumptively coercive.

When a stalled jury in a criminal case in Massachusetts similarly stated, “Please advise as to what we should do next,” the trial court there also gave the jury a similar offer-to-help instruction. The appeals court found no undue coercion. Since 1995 the Supreme Court of Arizona has determined, as a general rule, that trial judges should give juries at impasse the offer of help.
Appellate courts and bar organizations outside the D.C. Circuit are increasingly showing reliance on the teachings of social sciences. More and more court rules and practice standards favor giving jurors the tools to do their important job.

The reasons for the D.C. Circuit’s resistance to follow these national trends were wisely forecast by Judge Dann a decade ago. The judge–lawyer guild has an attitude of ownership over the historic adversary model. Perhaps this is due to the habits of legal education, deep-seated risk aversion in order to avoid reversal, and preference for the certainty of the status quo over an uncertain future. Add into the analysis a measure of distrust of the common juror. As Judge William Schwarzer said, “Jurors are rarely brilliant and rarely stupid, but they are treated as both at once.”

In keeping with these habits, the D.C. Circuit assumes that when a trial judge repeatedly says in his or her offer-to-help instruction that he or she has absolutely no intention of forcing a verdict or even a specification of the jury’s need, the jury cannot retain its sovereignty over fact finding. The court has locked on to the notion that jurors, upon hearing reargument by the lawyers, will collapse and breach their prior oath to decide the case only on the basis of the evidence and the law.

From my many years of service on our busy local court, I suggest it is time for our federal neighbors to listen to empirical research, the legal academy, and common sense. Jurors are to be trusted. Although our legal instructions are dense with legalese, studies show that jurors do their best to apply the law to the facts. They get it right the vast majority of the time. So when they need assistance with the facts or the law, let us unite in the view that they should be given an offer of help.

Notes

[8] Thomas, 400 F.3d at 22.
[10] 374 F.3d at 1316.
[11] Id. at 1317.
[12] Id. (emphasis added).
[13] Id. at 1320.
[14] Id. at 1325.
Thankfully other federal circuits and state supreme courts support trial judges acting effectively to remedy practical and revealing issues disclosed by deliberating juries. United States v. Hans, 738 F.2d 88, 92–93 (3d Cir. 1984) (when a deliberating jury asks to see physical evidence referred to by trial witnesses, the trial court may grant the request as long as cautionary instruction is given and counsel have opportunity to make arguments to jury); Trawick v. Manhattan Life Insurance, 484 F.2d 535, 538 (5th Cir. 1973) (“Whether there should be reargument is a matter for the discretion of the trial court, subject to review for abuse of discretion. Counsel should be able to reargue ‘if justice requires it.’”); see Annot., 87 A.L.R. 849 (gathering state supreme court opinions).


Hans, supra note 18, at 90.


Hans, supra note 18.

Dann, supra note 19.


The principles are online at www.abanet.org/juryprojectstandards/principles.pdf.


Id. at 612.

Id. at 612–13.

575 F.2d 209 (9th Cir. 1978) (Kennedy, J.). This case was cited by Judge Tatel in his Ayeni concurrence.

The Ninth Circuit reversed the conviction because of the content of a legal instruction to a deliberating jury, not because the instruction was deemed a participation in deliberations.


Commonwealth v. Gomez, 55 Mass. App. Ct. 247, 770 N.E. 2d 477 (2002). The panel did conclude that the innovative instruction was a dangerous undertaking absent a demonstrated need and over the objection of either party.

Supra note 7.

Dann, supra note 19, at 1236 n.51.

According to a study conducted by Louis Harris & Associates, over 98 percent of state and federal judges believe that jurors try earnestly to apply the law as they have been instructed. Louis Harris & Assoc., Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases 79–80 (1987); see also Paula L. Hannaford et al., How Judges View Civil Juries, 48 DePaul L. Rev. 247, 254 (1998).


Gregory E. Mize is a judicial fellow at the National Center for State Courts. From 1990 to 2002 he was a judge on the Superior Court of the District of Columbia.

“Taking the Stand” appears periodically in Washington Lawyer as a forum for D.C. Bar members to address issues of importance to them and that would be of interest to others. The opinions expressed are the author’s own.
Statement of Professor Valerie P. Hans, Cornell Law School

Jury Pool Diversity in New York State

Public Hearing on Jury Diversity
Assembly Standing Committees on Judiciary and Codes
New York State Assembly, New York, NY
April 30, 2009

Background and Overview of Statement

I am honored by your invitation to present testimony regarding the issue of jury diversity in New York. I am Professor of Law at Cornell Law School, hold a Ph.D. in Social Psychology, and have spent the last thirty years researching, writing, and teaching about the American jury system. My writings include six books and over 100 research articles, many of which focus on the jury system, including the methods used to generate representative juries. I am a Research Affiliate of the National Center for State Courts, and was a member of the Advisory Committee for the Jury Summit 2001 held in New York City, hosted by the National Center for State Courts and the New York State Unified Court System. I have followed with great interest the impressive jury reform efforts in New York, led by former Chief Judge Judith Kaye.

I applaud you for focusing on the critically important topic of jury diversity. Although representativeness on juries is critical, many courts face challenges in assembling representative jury pools. In my statement, I examine the available evidence in New York, and then turn to considering the remedies that the New York Assembly is considering to promote jury diversity through Assembly Bill 11433. I conclude with a recommendation in favor of the proposal to gather accurate demographic data of jury pools across the state of New York, but I recommend against, at this time, the specific remedies of expanding current source lists and quarterly updating that would be mandated by the bill.

The Importance of Jury Diversity

My work on juries, and my review of jury research, has led me to appreciate the key importance of jury diversity. A representative decision making body is best able to serve the important purposes of trial by jury in the criminal and civil justice systems. A jury that reflects the full range of social, economic, and political perspectives as well as different life experiences is better at fact finding and at incorporating community values. A representative jury that delivers fair and just verdicts also promotes the legitimacy of the legal system in the eyes of citizens. Jury service educates citizens about the court system, appears to lead to more positive views about the jury system and the courts, and may also increase the likelihood of voting, so it is critically important that it be extended to all segments of society.
Research shows how diversity on juries promotes better fact-finding. As my coauthor Neil Vidmar and I wrote: “a diverse group is likely to hold varying perspectives on the evidence, encouraging more thorough debate over what the evidence proves…. The inclusion of minorities and women in a representative jury adds their life experiences and insights to the collective pool of knowledge. Research on heterogeneous decision-making groups supports the claim that diverse juries are better fact-finders. Minority jurors contribute their unique knowledge to the general discussion. Furthermore, when whites anticipate participating in a diverse jury, they tend to give more careful assessment of the evidence.”¹ In short, the decision making is of better quality in diverse juries.

Legal opinions at the national and state level underscore the value of jury representativeness and the constitutional necessity of drawing juries from representative cross-sections of the population. As the Supreme Court concluded in Taylor v. Louisiana: “The unmistakable import of this Court’s opinions, at least since 1940…is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial…. The requirement of a jury’s being chosen from a fair cross section of the community is fundamental to the American system of justice.”² Furthermore, the ABA’s Principles for Juries and Jury Trials includes Principle 2: “Citizens have the right to participate in jury service and their service should be facilitated.”³

Meeting the Challenges of Achieving Representative Juries: Problems and Remedies

Even though representative juries have important benefits, many jurisdictions face considerable difficulties in assembling panels that fully reflect their communities. Some of the key contributors to representativeness problems arise from (a) using source lists that are not completely inclusive; (b) having an excessive number of reasons for disqualification, exemption, and exclusion from jury service; (c) experiencing differential response rates to jury summonses; and (d) requiring lengthy or onerous terms of service.

The American Bar Association, the American Judicature Society, research scholars, and state jury reform commissions, including New York’s Jury Project, have all examined the effectiveness of different methods of improving jury pool representativeness. The ABA’s Principles for Juries and Jury Trials recommends (a) a limited set of juror eligibility requirements; (b) avoidance of discrimination in jury selection; (c) use of short terms of service such as one day/one trial; (d) minimization of waiting time; (e) a suitable environment; and (f) reasonable fees to compensate jurors for their service.⁴ And more specifically, we know from research and court experience that the following approaches lead to increased representativeness of jury pools: the use of multiple source lists; frequent updating of source lists; multiple follow-ups to jury summonses for non-responders; reduction or elimination of exemptions; and shorter terms of service.

⁴ Id. at 7-14.
Employing these approaches, many states have dramatically improved the representativeness of their jury pools, although a number fall short of the goal of fully representative juries.

New York’s Efforts to Achieve Representative Juries

In New York, the jury system has undergone tremendous transformation. As you may know, New York in the past used a permanent qualified list from which to draw potential jurors, updated it infrequently, and allowed a large number of exemptions from jury duty for all manner of occupational and other reasons. What is more, New York routinely sequestered juries during deliberation, reducing the ability of people with family and other obligations to serve.

Today, following substantial jury reforms, the operation of New York’s statewide jury system is, in my view, admirable for its strong commitment to achieving jury representativeness and its endorsement of best practices in assembling and employing juries. New York has eliminated its former permanent qualified list approach and all automatic exemptions from jury service, has reduced the length of jury service, and has increased its juror daily pay to $40.00, one of the highest rates in the country. New York employs five source lists: a list of registered voters; holders of drivers’ licenses or ID’s issued by the Division of Motor Vehicles; New York state income tax filers; recipients of family assistance; and recipients of unemployment insurance. In addition, New Yorkers are able to volunteer for jury service. So far as I know, New York ranks above most if not all other states in the number of source lists that are combined to create a master list for jury summonses. According to the 2008 Best Practices for Jury System Operations report, New York’s combined source list is updated annually, consistent with recommended practices. New York also participates in the U.S. Post Office’s automatic address updating, which is done every 90 days. Two follow-ups are automatically sent to non-responders. All of these elements – the use of multiple source lists, the regular updating, the follow-ups for nonresponders, the short term of service, and the reasonable jury pay – should in theory produce jury pools that are generally representative of the jurisdictions.

It is surprising and disturbing, then, to read the 2005 Citizen Action of New York study that concluded there was very substantial racial and ethnic underrepresentation in Manhattan jury pools. Researchers for the project conducted the study in Manhattan jury assembly rooms. They recorded the apparent race and apparent Hispanic ethnicity of each prospective juror present in the assembly room during each day of observation. The study was conducted for approximately 12 weeks from late 2006 to early 2007 at two courthouses. Researchers recorded their observations of the race and ethnicity of

7 Kaye & Pfau, supra note 3.
8 Bob Cohen & Janet Rosales, Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform (June 2007).
roughly 14,000 prospective jurors in the assembly rooms. The researchers then compared the proportions of racial and ethnic groups in their study and the 2000 U.S. Census. The comparison showed very substantial disparities in apparent race and ethnicity of jury pool participants, as judged by the Citizen Action observers, compared to census figures.

Although it is an admirable effort, problems with the project should limit our reliance on it. The Citizen Action researchers could not ask members of the jury pool directly about their racial or ethnic background, and had to rely on visual cues alone, introducing an unknown amount of error into their tallies. The researchers were clearly aware of the issue, and attempted valiantly to deal with it, for example, by collapsing some of the racial categories, and by comparing rates of attribution to different ethnic groups by different researchers. But, the problem remains and may have led to an undercount of minority jurors. The second issue is that although census figures can provide a starting point for comparison, they are not conclusive evidence for several reasons. The most important is that the census includes people who would not meet the qualifications for jury service and thus would not eligible for jury duty, in particular, those who have been convicted of a felony, noncitizens, those who cannot understand or communicate in English, and people younger than 18. All of these characteristics are found more frequently among nonwhites than among whites, and need to be taken into account in the comparisons. And finally, the study is of the two courthouses in Manhattan, leaving the jury diversity situation in the rest of New York open to speculation. Nonetheless, the project raises concerns about the extent to which New York jury pools adequately reflect the group of all jury-eligible citizens of New York.

Recommendations

Because of the importance of jury diversity in New York jury pools on the one hand, and the uncertain and limited nature of the Citizen Action data on the other, I believe it is desirable for the New York Unified Court System to collect and analyze systematic demographic data of jury pools across the state of New York. I support much of the portion of Assembly Bill 11433 that requires collection of such information: “The Commissioner of Jurors shall collect demographic data for jurors who present for jury service, including each juror’s race, religion, ethnicity, age and sex, and submit the data in an annual report to the Governor, the Speaker of the Assembly and the Majority Leader of the Senate.” (I would not include the juror’s religion.) I also support the portion of Assembly Bill 11433 that envisions making the statistical data available to policymakers and the public. These data could be very useful both to those involved in jury system operations and to those involved in broader research on the courts and juries.

It might also be desirable to undertake an in-depth study of the multiple phases of the jury selection in one or more counties where there are the greatest concerns about jury

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9 Id. at 1.
10 Id. at 5-6.
11 It does not appear that the census figures used in the Citizen Action report were limited to those 18 and older. See id., p. 2 note 5.
diversity. Such a study might examine the effects on jury pool representativeness of the different stages of jury recruitment, including qualification questionnaires, nonresponses, disqualifications, postponements, excuses, and failures to show up for jury duty.

I believe other requirements of Assembly Bill 11433, the ones pertaining to quarterly updating and expansion of source lists, are not necessary at this time, and would create additional burdens on a court system that is, in my view, already following best practices in attempting to generate diverse jury pools. One major challenge of multiple source lists is the time-consuming process of eliminating duplicate names. It’s critical to do so because otherwise an individual might have a double, a triple, or an even greater chance of being called, lessening the equality of jury duty burdens and benefits. I would rather see the courts schedule an annual updating process (supplemented by the U.S. Post Office address corrections) and have the time to carefully identify and remove duplicate names, than to engage in more frequent updating which might compromise the quality of the merged lists.

Regarding expansion beyond the current five lists, I believe that adding some of the new lists proposed in the bill might be counterproductive, time-consuming, and reduce the quality and comprehensiveness of any combined list. In 1994, the New York Jury Project report recommended against several options identified in the current bill, and their discussion bears repeating:

Telephone or other utility subscriber lists are frequently mentioned as a possible source of new names. Approximately eighty different telephone and public utility companies currently operate in New York, with subscriber lists of varying quality and comprehensiveness. Subscribers appear on more than one list, and many subscribers are businesses or corporations rather than individuals. Most individuals who have telephone or utility service in their own names are also drivers or taxpayers or voters; many are all three. And many whose names do not appear on utility subscriber lists – for example, tenants whose gas and electricity are provided for by their landlords, or members of the approximately 5% of U.S. households that have no telephone – are the same people who are least likely to be registered voters, licensed drivers or taxpayers…. Entries on telephone and other utility subscriber lists are also weighted heavily toward men, which could introduce an element of gender bias….\(^{12}\)

Thank you for your consideration of my views on this important topic. Again, I very much appreciate your efforts to make New York’s juries fully representative of the population.

\(^{12}\) The Jury Project: Report to the Chief Judge of the State of New York (March 31, 1994), at 5-6.
S 2613-A KLEIN  Same as A 2374-A  Lancman (MS)
ON FILE: 01/06/10 Judiciary Law
TITLE...Enacts the "jury pool fair representation act"
02/25/09 REFERRED TO JUDICIARY
06/01/09 AMEND (T) AND RECOMMIT TO JUDICIARY
06/01/09 PRINT NUMBER 2613A
01/06/10 REFERRED TO JUDICIARY
02/09/10 1ST REPORT CAL.123
02/22/10 2ND REPORT CAL.
02/23/10 ADVANCED TO THIRD READING
02/24/10 SUBSTITUTED BY A2374A

A2374-A Lancman (MS) AMEND=A
01/15/09 referred to judiciary
06/02/09 amend (t) and recommit to judiciary
06/02/09 print number 2374a
06/09/09 reported referred to rules
06/22/09 reported
06/22/09 rules report cal.567
06/22/09 ordered to third reading rules cal.567
06/22/09 passed assembly
06/22/09 delivered to senate
06/22/09 REFERRED TO RULES
01/06/10 DIED IN SENATE
01/06/10 RETURNED TO ASSEMBLY
01/06/10 ordered to third reading cal.204
02/09/10 passed assembly
02/09/10 delivered to senate
02/09/10 REFERRED TO JUDICIARY
02/24/10 SUBSTITUTED FOR S2613A
02/24/10 3RD READING CAL.123
STATE OF NEW YORK

2613--A
2009-2010 Regular Sessions

IN SENATE

February 25, 2009

Introduced by Sens. KLEIN, STEWART-COUSINS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the judiciary law, in relation to enacting the "jury pool fair representation act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "jury pool fair representation act".
2 § 2. The judiciary law is amended by adding a new section 528 to read as follows:
3 § 528. Collection of demographic data. The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.
4 § 3. This act shall take effect on the ninetieth day after it shall have become a law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.  

LBD01061-03-9
NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S2613A

SPONSOR: KLEIN

TITLE OF BILL:
An act to amend the judiciary law, in relation to enacting the "jury pool fair representation act"

PURPOSE OR GENERAL IDEA OF THE BILL:
This bill would require the recording of demographic data on jury pools to determine whether jury pools in this state represent a fair cross-section of the community.

SUMMARY OF SPECIFIC PROVISIONS:
The bill adds section 508 to the Judiciary Law, requiring the commissioner of jurors to collect and report demographic data on jury pool participation based on race and/or ethnicity, age and sex, and to annually report such data to the governor, legislative leaders and the chief judge of New York, in order to provide the courts and policymakers with a more accurate picture of jury pools and whether such jury pools are representative of the communities residing in the particular jurisdiction.

JUSTIFICATION:
In 2006 Citizen Action-New York released a study suggesting that minorities are severely under-represented in civil jury pools in New York County, confirming what practitioners in that jurisdiction have observed for years. Numerous witnesses at an Assembly hearing on this legislation in the Spring of 2009 testified to a similar conclusion. In order to determine the real the nature and scope of the problem, and in order to adopt appropriate corrective policies, it is necessary to formally collect demographic data on jury pools. Only then can we begin to act to ensure that our juries truly represent a fair cross-section of the community.

LEGISLATIVE HISTORY:
New Bill.

FISCAL IMPLICATIONS:
Minimal. The data can be easily collected by adding appropriate questions to existing juror questionnaires and forms.

EFFECTIVE DATE:
Ninety days after enactment.
Jury diversity bill now law

by John Fulmer

Published: June 22nd, 2010

The Jury Pool Fair Representation Act was included among a package of 18 bills signed by Gov. David A. Paterson earlier this month.

The legislation "will help provide us with the information necessary to improve jury representation and help us better realize our goals of a fair and equitable court system," Paterson noted in a release.

The Act enables the collection and submission of demographic data of jurors into an annual report, designed to address several recent studies that show New York State's minority populations are widely under-represented on juries.

It's an issue the Monroe County Bar Association has been involved with for more than five years. The Monroe County Public Defender's Office actually initiated a statistical study of local jury pools in 2003.

Rochester attorney Karen Bailey Turner said recently she is excited by the legislation's progress. The Brown & Hutchinson associate is the chairwoman of the MCBA's Criminal Justice Section and the current president of the Rochester Black Bar Association.

"Our local bar associations have been advocating for the diversification of jury pools for quite some time," Bailey Turner wrote in an e-mail this week.

She credited a seminal study on jury diversification now being conducted in Monroe County "as a result of the tireless efforts of [fellow Rochester attorney] Michael Wolford" and the MCBA's Diversity Committee, which brought this issue to the state's attention."

The county Public Defender's Office, RBBA, Greater Rochester Association for Women Attorneys "and several other organizations have also taken significant steps to educate the public about the perceived lack of diversity in the jury system.

"Without a doubt, the absence of diverse jury pools supports the pervasive notion that the criminal justice system does not treat defendants fairly," Bailey Turner wrote.

Local push

Wolford, chairman of the MCBA's diversity committee, told The Daily Record in May 2009 that the association addressed the diversity issue in 2005, when trial judges "made very clear there was an under-representation of minorities on juries, although there were no statistics to back up that assumption."

His committee asked Rochester Institute of Technology Professor John Klofas, chairman of the Criminal Justice Department, to design a study of the county's jury pool to determine the rate of minority representation. Seventh Judicial District Administrative Judge Thomas VanStrydonck, Appellate Division, Fourth Department Presiding Justice Henry J. Scudder and the county's commissioner of jurors supported the study, but it never was approved.

Wolford and his committee reactivated the study in 2008 and Justice Scudder added it to the state Administrative Board's agenda.

The bill Paterson signed this month was spurred by a 2006-2007 study by Citizen Action of New York. The advocacy group sent two researchers "to study the physical characteristics of prospective jurors and label each one as black, white, Asian or other, and then to decide again whether they were Hispanic or non-Hispanic."

Rules prohibited researchers from speaking with the more than 12,000 jurors studied.
Many saw the "bill as a way to provide a more precise analysis of the diversity of jury pools throughout the state, and then use the data to remedy problems that may exist," The New York Times reported May 7, adding that it will take some time before the data is made available, but it is not "too early to start handicapping the results."

The Times' interviews with lawyers, politicians and court officials predicted a variety of results: "Defense lawyers were nearly unanimous in their belief that the jury pools in the Bronx, Brooklyn and Queens were representative of those boroughs. Manhattan, on the other hand, drew more skepticism."

The article stated that outlying boroughs, with higher populations of traditionally minority groups, would have juries more likely to acquit, and that presumably more upscale Manhattanites would comprise juries more likely to believe police, unable to conceive police might lie on the witness stand.

The Act

The Jury Pool Fair Representation Act, which amends Judiciary Law §506(a), was written to expand the source lists of prospective jurors and requires the lists to be updated quarterly.

New source lists for jurors, might include income and property taxpayers and persons receiving student aid assistance, the senior citizen rent increase exemption, workers compensation, family and individual assistance; persons residing in public housing and persons subscribing to gas, electric, telephone and cable television services.

In a telephone interview Tuesday, Justice Scudder said that had been changed.

"There were too many source lists," he said, "and they were getting the same people."

Past studies

Monroe County Public Defender Tim Donaher said that while the bill has been pared down since its introduction last year, his office is encouraged by its passage. The issue has long been a local concern, he said, as there was much anecdotal evidence but a dearth of empirical data showing juries did not truly reflect the county's population. Donaher said he's heard of 100-person jury pools, "and in some cases, there would not be one minority."

In any case, Donaher said the issue is complex and complicated. Wolford has been "the point person" to whom much of the credit must be given for keeping the issue in the forefront, he said.

The public defender's office did its share, too: In 2003, lawyers in his office began their own study in which they compiled information on felony trials. Lawyers filled out a standard form — The Batson Review Form — on which they identified African-American jurors "in the entire jury pool for the defendant.

According to documents provided by Donaher this week, his office compiled data on 25 trials and found only five had juries "somewhat reflective [of] the community."

The data underwent statistical analysis and, in 2004, Donaher's office used the results to bring a motion on behalf of several of clients "asking that the prospective panel of jurors in each case be discharged on the grounds that each Defendant's Sixth Amendment rights had been violated due to systematic under-representation of African-Americans on their respective jury pools. Each motion was denied."

An intern for the office, Sam Valleriani, conducted another such study in 2005, this time monitoring 36 felony trials. He determined only 12 had juries that were "somewhat reflective of the community." The data was again analyzed by the same person, James Halavin, a mathematics professor at RIT, who decided African-Americans were being under-represented on local juries.

Beginning in January, jurors who appeared to serve in Monroe County were asked to fill out a "Juror Information Card," identifying his or her age, gender, Hispanic origin and race.

"The purpose is to simply make sure we have an unassailable study that can serve as the foundation for going forward if there is a problem of under-representation," Justice Scudder told
The Daily Record in November 2009.

It marked the first systematic countywide jury study conducted in New York State.

On Tuesday, Justice Scudder said the county study is a little more in-depth than the one allowed by the newly signed bill and has been used as a template for the state-mandated jury-data collection. This month’s bill is silent on how the collected data will be used, however, and it appears there is no end date for its collection. Justice Scudder said just who will use the data, and in what way, has yet to be determined.

Monroe County’s study, however, already is being analyzed by a team of experts, who hope to come up with a remedy for any lack-of-minority-representation problems.

Such studies are routinely performed by many courts throughout the country, according to Paula L. Hannaford-Agor, director of the Center for Jury Studies at the National Center for State Courts.

She is one of three nationally known experts acting as consultants on the Monroe County project. The other consultants are Cornell Law School Professor Valerie P. Hans, who has written four books on the jury, and G. Thomas Munsterman, director emeritus and founder of the Center for Jury Studies at the National Center for State Courts.

“We need to have data that can’t be attacked,” Justice Scudder said, adding that he prefers to refrain from speculating on how it will change jury selection here until everything’s collected and analyzed.

“I want to wait to see what the data says before figuring out what to do,” he said.

In November, state Office of Court Administration Management Analyst Elissa Krauss said she expects to present preliminary results on the county’s study by the end of the year.

Jury diversity consists of two Constitutional rights, Donaher said, one concerning a defendant’s right to trial by his peers, but another concerning a juror’s right to serve on a jury. Minorities often are faced with jury-service problems that most white, middle-class or affluent people don’t have, Donaher said, including a more transient population, language barriers and being poorly paid for time spent in court. Poor and lower-class workers may have trouble obtaining child care, or their employers are reluctant to lose them for the duration of a lengthy trial, he said.

“Many poor people are transient,” he said, “and the truth is many poor people are minorities.”

Poorer people find jury duty a financial burden, he also said: “They are woefully undercompensated. I think they get paid $40 a day. That’s $5 an hour, less than the minimum wage.”
THE STATE-OF-THE-STATES SURVEY
OF JURY IMPROVEMENT EFFORTS:
A COMPENDIUM REPORT

By Hon. Gregory E. Mize (ret.),
Paula Hannaford-Agor, J.D. &
Nicole L. Waters, Ph.D.

April 2007
ACKNOWLEDGEMENTS

The State-of-the-States Survey began as the cornerstone component of the NCSC’s National Program to Increase Citizen Participation in Jury Service Through Jury Innovations (National Jury Program). We understood from the beginning that it would be a substantial undertaking, although if we had known just how substantial we might have reconsidered the scope and depth of the surveys. As it was, the study took a great deal more time and effort than we initially imagined, and we are indebted to the many people who helped make it a reality at last.

First and foremost, we are grateful to the 68 individuals, law firms, and organizations that contributed financially to the National Jury Program. This was the first major research study by the NCSC Center for Jury Studies that was financed almost entirely through private donations. These individuals, law firms, and organizations recognized the intrinsic value of the jury trial and were willing to support efforts to document and improve how it functions in the American justice system. We are particularly grateful to the Robins, Kaplan, Miller & Ciresi Foundation, which contributed funds to get the National Jury Program underway, and to the U.S. Chamber of Commerce and the State Justice Institute, which provided funding to analyze the State-of-the-States data and to write and distribute this report. We are also indebted to NCSC President Mary McQueen, who provided bridge funding so we could continue data collection for the State-of-the-States Survey at a time when financial contributions were lagging behind project expenses. The names of all of the National Jury Program contributors are listed in Appendix A.

Endeavors of this magnitude require super-human organizational skills. For that, we are forever indebted to NCSC Research Analyst Chris Connelly, who patiently and painstakingly undertook the job of mailing surveys, answering questions from respondents, and then following up to ensure the highest possible response rates. In the process, he talked with hundreds of judges, state court administrators, clerks of court, and lawyers in every state – some of them multiple times – and then oversaw the data entry and cleaning process for the datasets. It is due to his diligence in these efforts that the State-of-the-States Survey is the most comprehensive study of jury operations and practices ever yet undertaken. We are also grateful to our colleagues Monica Wait, who cleaned and analyzed the data and produced all of the state-by-state tables for the NCSC website; Tom Munsterman and Anne Skove, who provided necessary comments on the draft report to help us separate the wheat from the chaff; and to Brenda Otto, who provided administrative support for the project.

Finally, this project could not have been completed without the cooperation of the many supreme court justices, state court administrators, and trial court chief judges who served as liaisons for us to the judges and courts within their respective states and courts. They distributed the surveys to the judges, court administrators, and lawyers for completion, provided essential contacts with private bar organizations, and encouraged all to participate in the study. Of course, the study would not have been possible without the participation of all of those judges, court administrators, clerks of court, lawyers, and, most importantly, citizens who make the American jury system work every day.

Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters
# TABLE OF CONTENTS

Acknowledgements ........................................................................................................................................... i

I. Introduction ........................................................................................................................................................................... 1

   The State-of-the-States-Survey of Jury Improvement Efforts .................................................................................. 2

II. The Volume and Frequency of Jury Trials in State Courts ...................................................................................... 7

III. Statewide Jury Improvement Efforts .......................................................................................................................... 9

   State and Local Infrastructure for Jury Operations .................................................................................................. 10

IV. Local Court Survey .......................................................................................................................................................... 17

   Jury Automation in Local Courts ............................................................................................................................... 18

   Jury Yield in Local Courts .......................................................................................................................................... 20

   Juror Privacy .................................................................................................................................................................. 25

V. Judge & Lawyer Survey .................................................................................................................................................... 27

   Voir Dire ........................................................................................................................................................................ 27

   Trial Practices ................................................................................................................................................................. 31

VI. Conclusions ........................................................................................................................................................................ 41

Appendices .......................................................................................................................................................................... 45

   Appendix A: Financial Contributors to the National Program to Increase Citizen Participation in Jury Service Through Jury Innovations .......................................................................................... 47

   Appendix B: Statewide, Local Court, and Judge & Lawyer Surveys From the State-of-the-States-Survey of Jury Improvement Efforts .............................................................................................. 49

   Appendix C: State-by-State Response Rates .................................................................................................................. 69

   Appendix D: Notes on Methodology Used to Calculate National Statistics ................................................................. 73

   Appendix E: State Tables on Key Jury Operation and Practice Measurements ............................................................... 75
I. INTRODUCTION

Over the past two decades, the American jury system has become the focus of unprecedented interest by the legal community and by the broader American public. Some of the interest is in response to criticisms about the continued utility of the jury system. The rate of civil and criminal jury trials has steadily declined in recent years, eclipsed by non-trial dispositions such as settlement, plea agreements, and summary judgment. Proponents of the jury system, on the other hand, have maintained that trial by jury continues to play a critical role in the American justice system in protecting the rights of criminal defendants, in resolving intractable civil disputes, and in promoting public trust and confidence in the courts.

Beginning in the early 1990s, these debates prompted renewed efforts by judges, lawyers, and scholars to examine jury performance and to consider the potential effects of various proposals for reform. A popular approach adopted by many states were judicially created commissions or task forces that were instructed to examine various jury reform proposals and make recommendations about their suitability for implementation. National efforts also took place during this time including the 1992 Brookings Institution symposium on the civil jury and the 2001 National Jury Summit in New York City.

Most recently, Robert J. Grey, Jr., made the American jury the focus of his tenure as the 2004-2005 President of the American Bar Association. Under his leadership, the ABA undertook a yearlong effort to update, consolidate, and harmonize the various sets of jury trial standards developed by the ABA Criminal Justice Section, the Section on Litigation, and the Judicial Division into a unified set of principles. In contrast to other legal reform efforts that have tended to focus strictly on legal principles, the new ABA Principles for Juries and Jury Trials rely heavily on a large body of empirical research about juror behavior.

Many of these efforts have profoundly affected court policies as evidenced by revised court rules and case law, and the development of judicial and legal education curricula. While these policy changes are fairly easy to track on a statewide level, the fact remains that they can vary from court to court. For example, in a state the size of Texas, which has over 300 different general jurisdiction courts, it is extraordinarily difficult to keep track of administrative practices, procedures, data, and local reform efforts. It becomes even more difficult to determine what actually occurs during trials themselves. In all but a handful of jurisdictions, most jury trial techniques are permitted “in the sound discretion of the trial court.” But we have little idea how often judges choose to exercise that discretion. In this report, we share the findings from the State-of-the-States Survey of Jury Improvement Efforts, a national study designed to examine precisely these questions.

1 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEG. STUD. 459 (2004).
4 AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS (2005).
The State-of-the-States Survey is the cornerstone of a much larger initiative by the NCSC Center for Jury Studies – the National Program to Increase Citizen Participation in Jury Service (National Jury Program).\(^5\) The National Jury Program provides information and technical assistance to state courts about best practices in jury system management and trial procedures. Its ultimate goals are to assist courts to summons and impanel more representative juries; to manage their jury systems in an effective, efficient, and informative manner; to facilitate informed decision-making by trial jurors; to increase public trust and confidence in the jury system and in courts; and to better inform citizens about the judicial branch of government. The State-of-the-States Survey was designed to document local practices and jury operations in the context of their respective state infrastructures and thus provide a baseline against which state court policymakers could assess their own systems vis-à-vis their peers and nationally recognized standards of effective practices. The State-of-the-States Survey also examines the effectiveness of various implementation strategies for affecting change. Finally, it provides direction for future research and technical assistance efforts by the NCSC Center for Jury Studies.

**The State-of-the-States Survey of Jury Improvement Efforts**

The State-of-the-States Survey is the product of a multiyear effort to gauge the current status of jury improvement efforts in the nation’s state courts. It derives from three separate, but related, questionnaires or “surveys.” The first was the Statewide Survey completed by all 50 states and the District of Columbia to document statewide jury improvement efforts and the state infrastructure governing jury system management and trial procedures. For example, it collected contact information for jury task forces and sample copies of forms and procedures used in jury management. This survey not only identified the programmatic priorities for state courts, but also provided a mechanism to determine the types of efforts (e.g., judicial education, technical assistance, formal rule and statutory changes) that most often lead to effective implementation of jury improvements. The survey was typically completed by the Office of the Chief Justice or the Administrative Office for each participating state.

The second State-of-the-States questionnaire was the Local Court Survey. It was distributed to the states’ general jurisdiction trial courts and focused on local jury operations related to qualification, summoning, terms and conditions of service, and supporting technology. This survey asked about jury improvement efforts initiated at the local level. As with the Statewide Survey, the NCSC Center for Jury Studies relied on the respective offices of the Chief Justice or the State Court Administrator to distribute the surveys to each of the local courts. In some instances, these offices also collected the surveys and returned them for data entry. In other instances, these central offices instructed local courts to mail the completed surveys directly to the NCSC.

\(^5\) For a full description of the National Jury Program, see the NCSC Center for Jury Studies website at [http://www.ncsconline.org/D_Research/cjs](http://www.ncsconline.org/D_Research/cjs).
The responses for 43 of the 1,396 Local Court Surveys reflected multi-county judicial circuits, districts, or divisions. Thus, the complete local court dataset represents 1,546 individual counties from 49 states and the District of Columbia. On average, these courts reflect 65 percent of their respective state populations and collectively they represent jurisdictions encompassing 70 percent of the total US population. Appendix C provides the response rates for each of the states. Heavily populated counties are slightly over-represented in the dataset compared to their actual representation. See Table 1. For example, courts representing communities of 500,000 or more people (urban areas) comprised 6.7 percent of the dataset although they make up only 3.6 percent of US localities. Courts representing communities of 100,000 to 500,000 people (large suburban areas) comprised 18.7 percent of the dataset compared to 13.2 percent of U.S. localities. Small suburban (25,000 to 100,000 population) jurisdictions were represented roughly in proportion to their numbers in the U.S., but rural areas (less than 25,000 population) were slightly underrepresented. As we see in Section IV, urban courts tend to have higher levels of jury trial activity, which has important implications for jury operations for a variety of reasons.

The final State-of-the-States component was the Judge & Lawyer Survey in which respondents were asked to describe the actual jury practices employed in their most recent jury trial. Data collection for this phase was the most challenging insofar that it required multiple distribution approaches in each state. The NCSC first requested the offices of the chief justice, the state court administrator, or the chief judge of large, metropolitan courts to distribute the surveys to trial judges through local communication networks. Occasionally this approach was supplemented with additional requests through state judicial education agencies or other trial judge organizations. In addition, NCSC staff contacted numerous state and local bar organizations, preferably electronically, to request its distribution to criminal and civil trial attorneys. The number of outreaches to mandatory and voluntary bar associations in each state ranged from a minimum of four to, in one instance, dozens. The NCSC also solicited the cooperation of several national bar organizations including sections of the American Bar Association, the American Board of Trial Advocates, and the American Trial Lawyers Association for distribution to their respective members.

Data collection for the Judge & Lawyer Survey began with requests to judge and lawyer groups in the states known to be warmly disposed toward jury trial innovations. Researchers quickly realized that, even in these states, judges, lawyers and court administrators were understandably focused upon the current tasks at hand and not readily disposed toward helping collect data, even

<table>
<thead>
<tr>
<th>Population Size of Responding Courts</th>
<th>Local Court Dataset</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 25,000</td>
<td>560 41.9</td>
<td>1,582 50.3</td>
</tr>
<tr>
<td>25,000 to 100,000</td>
<td>437 32.7</td>
<td>1,035 32.9</td>
</tr>
<tr>
<td>100,000 to 500,000</td>
<td>250 18.7</td>
<td>415 13.2</td>
</tr>
<tr>
<td>More than 500,000</td>
<td>90  6.7</td>
<td>112  3.6</td>
</tr>
<tr>
<td></td>
<td>1,337</td>
<td>3,144</td>
</tr>
</tbody>
</table>

Vermont was the only state that did not participate in this component of the State-of-the-States Survey.

For the duration of this Compendium Report, we will use the terms “urban,” “large suburban,” “small suburban,” and “rural” to refer to these four categories of population size.
for a well-respected national organization such as the NCSC Center for Jury Studies. Hence, there had to be repeated and numerous outreaches to judge associations (most states did not have an active one) and mandatory or voluntary bar associations in each state. In some states, dozens of phone calls and emails had to be sent over the course of many months. On occasion, successful results were the product of waiting a year or so until new leadership took charge of an association. In short, the State of the States survey took much longer to accomplish than originally estimated. This phenomenon suggests that future research efforts will likely be time consuming and challenging.

The final Judge & Lawyer Survey dataset consisted of 11,752 surveys describing the practices employed in state and federal jury trials in all 50 states, the District of Columbia, and Puerto Rico. The vast majority of trials reported in the surveys took place between 2002 and 2006. See Table 2 for a description of the dataset. State trial judges accounted for more than one-third of the survey respondents. Based on national statistics in 2004, this sample of state trial judges reflects more than one-third (36.0%) of the judicial officers assigned to general jurisdiction courts.8

Attorneys practicing in the state courts accounted for more than half of the surveys. A total of 255 federal judges9 and 628 attorneys practicing in federal court also participated in the study, providing an unexpected opportunity to compare jury trial practices in state and federal courts. The remaining 3% of surveys were submitted by other legal practitioners or the respondent type was unknown.

One complication associated with the Judge and Lawyer Survey was the possibility that multiple respondents could describe the same case. In designing the survey, NCSC staff considered the option of asking survey respondents to provide identifying information such as a docket number about each case, but ultimately thought that the added complexity of asking respondents to remember that information as well as the loss of anonymity would discourage participation. We chose to err on the side of potentially “double counting” some trials rather than sacrifice the number of respondents. The relationship between

The NCSC reports that there were 11,349 judicial officers assigned to general jurisdiction courts in 2004. Richard Y. Schaufler et al. (eds.), Examining the Work of State Courts, 2005, 17 (2006). It is possible that some of the respondents were limited jurisdiction court judges, especially in trials for misdemeanor and “other” cases. But most states restrict trial by jury to courts of general jurisdiction. See generally David B. Rottman & Shauna M. Strickland, State Court Organization 2004, Part VIII (Court Structure Charts), 265-319 (2006).

Federal district court judge respondents comprised 39% of all US federal district court judges. 28 U.S.C. § 133(a).
the percentage of Judge & Lawyer Surveys submitted to the NCSC and the county population expressed as a percentage of the state population was fairly consistent for all but seven of the 1,890 counties where jury trials took place. If the dataset did double-count some trials, it appears that the duplicate trials were distributed uniformly among those localities. Thus, it is unlikely that duplicate trials biased the findings of this study by placing disproportionate weight on the trial practices from a small number of jurisdictions.
II. THE VOLUME AND FREQUENCY OF JURY TRIALS IN STATE COURTS

A perennial challenge for policymakers and researchers concerned with jury trial procedures and operations is the difficulty in obtaining basic statistics about the number of jury trials that take place in state courts each year. Some states do not publish any statistics about the number of jury trials or they may combine bench and jury trials into the same category. Other states only report jury trials that took place in their general jurisdiction courts, but not in limited jurisdiction courts. The State-of-the-States Survey provided an opportunity to estimate the number of jury trials that take place in state courts annually based on direct reports from a fairly comprehensive survey of local courts. To make these estimates, the NCSC Center for Jury Studies calculated the number of jury trials in each state, the trial rates per 100,000 population, and other basic statistics by extrapolating from the proportion of state population reflected in the Local Court Surveys. See Table 3.

Annually, state courts conduct an estimated 148,558 jury trials each year. Federal courts conducted an additional 5,463 jury trials in 2006. California has the largest volume of jury trials – approximately 16,000 per year. Vermont and Wyoming had the lowest volume (126 trials annually). These are not particularly surprising numbers given the respective populations of these states. What is surprising is the rate of jury trials. The average was 59 trials per 100,000 population, but varied substantially from a low of 15 trials in Alabama to a high of 177 trials in Alaska. Some of this variation can be explained by state law governing the circumstances under which parties may demand a jury trial (e.g., amount in controversy in civil trials, potential sentence in criminal trials), but also depends on local litigation culture including pretrial procedure, judicial management strategies, and the number of court resources available for conducting jury trials (e.g., facilities, staffing, judicial caseloads). The majority of jury trials are criminal trials – 47 percent felony and 19 percent misdemeanor. Just under one-third of trials are civil trials, and the remaining 4 percent involve family, juvenile, traffic, municipal ordinance, and “other” trials.

Table 3: National Jury Trial Rates and Characteristics

<table>
<thead>
<tr>
<th></th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Counties Represented</td>
<td>1,546</td>
</tr>
<tr>
<td>% of US Population Represented</td>
<td>70.3</td>
</tr>
<tr>
<td>Trial Rate per 100,000 population</td>
<td>58.6</td>
</tr>
<tr>
<td>Estimated number of jury trials annually</td>
<td>148,558</td>
</tr>
<tr>
<td>% Felony</td>
<td>46.7</td>
</tr>
<tr>
<td>% Misdemeanor</td>
<td>18.7</td>
</tr>
<tr>
<td>% Civil</td>
<td>30.6</td>
</tr>
<tr>
<td>% Other</td>
<td>4.0</td>
</tr>
<tr>
<td>Estimated number of summonses mailed</td>
<td>31,857,797</td>
</tr>
<tr>
<td>% Adult population represented (age 18+)</td>
<td>14.8</td>
</tr>
<tr>
<td>Estimated number of jurors impaneled</td>
<td>1,526,520</td>
</tr>
<tr>
<td>% Adult population represented (age 18+)</td>
<td>0.8</td>
</tr>
</tbody>
</table>

10 The Court Statistics Project is a collaborative effort by the NCSC, the Conference of State Court Administrators, and the U.S. Department of Justice, Bureau of Justice Statistics, to collect and analyze data relating to the work of state courts, including the number of jury trials conducted annually in state courts. For reports and online tables, see http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

11 See Appendix E for detailed information about the methods used to calculate figures in Table 3.

To secure enough jurors to hear cases, state courts mail an estimated 31.8 million jury summonses annually to approximately 15 percent of the adult American population. This figure obviously depends on the number of jury trials conducted in each state, but also on local juror utilization practices. For example, some courts are better than others at synchronizing the number of jurors needed with the number of jury trials to be held. In addition, this figure is affected by the number of jurors to be selected for each trial, which can range from as few as six to as many as twelve jurors, plus alternates. Another factor is the number of peremptory challenges available to each party during jury selection, which helps determine the size of the panel to be sent to the courtroom for jury selection. The number of peremptory challenges in non-capital felony trials ranges from three per side in Hawaii and New Hampshire to twenty per side in New Jersey. Capital felony trials tend to allocate more peremptory challenges to the parties, while misdemeanor and civil trials tend to allocate fewer.

A large proportion of jurors summoned for jury service ultimately will not be needed. Many of those living in jurisdictions employing telephone call-in systems or other forms of communication technology (see Section V) will be told not to report for service due to last-minute settlements and plea agreements. Others will be disqualified or exempted from service, excused for hardship, removed from consideration for a particular trial due to preexisting knowledge about the case or the parties that might affect their impartiality, or removed by peremptory challenge. Despite the large quantity of summonses, only 1.5 million Americans are impaneled for service each year, less than 1 percent of the adult American population.

Although the probability of being impaneled in any given year is quite small, more than one-third of all Americans (37.6%) are now likely to be impaneled as trial jurors sometime during their lifetime. This represents a tremendous increase in the distribution of the burden of jury service over the past three decades. In 1977, a national public opinion survey found that just 6% of adult Americans had served as trial jurors. By 1999, this figure had increased to 24%, and in 2004, the American Bar Association reported that 29% of the adult American population had served as trial jurors. In spite of declining numbers of jury trials, a larger and larger proportion of American citizens have first-hand experience with jury service, due to more inclusive master jury lists, shorter terms or service, and other policies designed to make jury service more convenient and accessible for all citizens.

13 ROTTMAN & STRICKLAND, supra note 7, at Table 42 (2006).
14 Id. at Table 41.
15 Id.
18 Galanter, supra note 1.
III. STATEWIDE JURY IMPROVEMENT EFFORTS

Jury trials are often perceived as local affairs, but they take place in an institutional framework established within each state. Indeed, the entire court system itself reflects statewide institutional characteristics such as the degree of local court autonomy dictated through formal statutes, rulemaking procedures, and funding mechanisms. These institutional structures and norms, in turn, affect how each state chooses to undertake comprehensive improvement efforts and the relative effectiveness of those implementation efforts. In this respect, jury improvement efforts are no exception. In this section, we examine the different approaches that states have taken to undertake jury improvement efforts, the focus and implementation strategies of those efforts, and the extent of state versus local control over jury operations.

As a preliminary matter, it is instructive to note that 20 states reported the existence of an established office or formal organization responsible for managing or overseeing jury operations for the state. In some instances, these programs have been established within the administrative office of the courts to provide automation and other forms of technical support to local courts (e.g., master jury list compilation). In other states, these offices function in an oversight capacity through permanent committees of state judicial councils. A few states delegate some of the educational and outreach functions to external organizations, such as Jury Education and Management (JEM) Forum in California; the Ohio Jury Management Association (OJMA); the New York Fund for Modern Courts, which operates the state’s Citizen Jury Project; and the Pennsylvania Association for Court Management, which has a standing committee on jury management. The relatively high number of states with permanent jury offices or organizations demonstrates a high degree of state court recognition for the visibility and prominence of jury operations in court management.

With respect to more recent jury improvement efforts, the preferred approach in most states has been a statewide commission or task force to examine issues related to jury operations and trial procedures. Three-quarters of the states (38) have appointed such an entity in the past 10 years, of which nearly one-third were still active when the State-of-the-States Survey was administered. The vast majority of these commissions were established by the chief justice or under the authority of the court of last resort and consisted of 15 to 20 individuals representing a variety of constituencies. See Table 4.

| Table 4: Statewide Task Force / Commission Composition |
|-----------------------------------------------|------------------|
| Representation by ... | % of Task Forces / Commissions |
| Trial judges | 97.3 |
| Civil litigation lawyers | 86.5 |
| Criminal defense lawyers | 78.4 |
| Prosecutors | 75.7 |
| Court administrators | 70.3 |
| Jury managers | 64.9 |
| Clerks of court | 64.9 |
| Private citizens / Former jurors | 62.2 |
| Appellate judges | 59.5 |
| Other individuals | 45.9 |
| State legislators | 43.2 |

Trial judges were included as members in virtually all states, and the vast majority of task forces included representation from major constituencies within the organized bar (e.g., criminal prosecutor and defense, plaintiff and civil defense) and administrative support for the jury system (e.g., court administrators, clerks of court, jury managers). A high percentage of the task forces (62%) included private citizens and former jurors. Of course, citizens and former jurors are
intimately affected by courts’ jury trial policies. Because community values are represented on a jury, it is important to represent community opinions and values on a jury task force. State legislators and members representing “other” constituencies were the only groups included in less than half of the task forces.

Jury commissions and task forces generally undertook only two or three primary objectives. The most common focus involved making recommendations for legislative and rule changes related to jury operations and trial procedures. Education of judges and court staff were also reported as a frequent focus of activity. See Table 5. One-third of the states (17) reported that their commissions and task forces were engaged in program evaluations, pilot demonstrations, or survey research. Because these activities typically require substantial levels of staff expertise or other resources, these types of supplemental activities were more common in states with centralized offices or formal organizations beyond a jury task force.

State and Local Infrastructure for Jury Operations

The degree to which jury operations are directed by state law varies tremendously by jurisdiction. For example, just over half of the states (27) give discretion to local courts to establish maximum terms of service. Of the 24 state-mandated jurisdictions, 10 set the maximum term of service at one day or one trial (Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Massachusetts, and Oklahoma). Collectively, these states represent 28.6 percent of the U.S. population. See Table 6. The remaining thirteen states permit longer terms of service, some of which limit the maximum number of days that a person must serve in any given period of time. For example, Georgia law specifies that citizens cannot be required to serve more than two consecutive weeks in any given term of court or more than four weeks in any 12-month period. Kentucky and North Dakota statutes have similar provisions, limiting jury service to 30 days and 10 days, respectively, within any 2-year period. As we discuss in Section IV, the actual number of days that a citizen serves on jury service may be considerably less than term of service, which specifies the maximum amount of time that a person must serve.

Table 5: Focus of Current or Ongoing Jury Improvement or Reform Efforts

<table>
<thead>
<tr>
<th>Focus of Efforts</th>
<th>% of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative or rule changes</td>
<td>65</td>
</tr>
<tr>
<td>Judicial education</td>
<td>41</td>
</tr>
<tr>
<td>Public education / outreach</td>
<td>31</td>
</tr>
<tr>
<td>Court staff education</td>
<td>29</td>
</tr>
<tr>
<td>Evaluations</td>
<td>18</td>
</tr>
<tr>
<td>Survey research</td>
<td>18</td>
</tr>
<tr>
<td>Pilot or demonstration programs</td>
<td>14</td>
</tr>
<tr>
<td>Technology</td>
<td>14</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
</tr>
<tr>
<td>Attorney education</td>
<td>12</td>
</tr>
<tr>
<td>Court observations</td>
<td>10</td>
</tr>
<tr>
<td>Juror Fees</td>
<td>6</td>
</tr>
</tbody>
</table>

19 These states encompass nearly half (49.3%) of the total U.S. population.

20 GA. CODE ANN. § 15-12-3 (2007).

Table 6: State-Established Maximum Terms of Service

<table>
<thead>
<tr>
<th>Term of Service</th>
<th>States</th>
<th>% US Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>One Day or One Trial</td>
<td>AZ, CA, CO, CT, DC, FL, HI, IN, MA, OK</td>
<td>28.6</td>
</tr>
<tr>
<td>Two to five days (one week)</td>
<td>NY, SC</td>
<td>8.2</td>
</tr>
<tr>
<td>Six days to 1 month</td>
<td>GA, KY, ME, NH, ND, OH, RI</td>
<td>9.9</td>
</tr>
<tr>
<td>Greater than 1 month to 6 months</td>
<td>NM</td>
<td>.6</td>
</tr>
<tr>
<td>Longer than 6 months</td>
<td>MT, UT, VT, WV</td>
<td>2.0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>49.3</td>
</tr>
</tbody>
</table>

**Juror Compensation**

All fifty states and the District of Columbia provide compensation to jurors as reimbursement for out-of-pocket expenses as well as token monetary recognition of the value of their service. See Table 7. Traditionally, the juror fee was a flat per diem with a supplemental mileage reimbursement. Recently, states have begun to recognize the relationship between the amount of juror fees, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool. As a result, a number of states have increased juror fees, but in doing so, have changed the structure of the payment system from a flat daily rate to a graduated rate in which jurors receive a reduced fee, or no fee, for the first day(s) of service with an increased fee if impaneled as a trial juror or required to report for additional days. Eight states and the District of Columbia require employers to compensate employees for a limited period of time (e.g., 3 to 5 days) while they are serving. Other states specify a minimum daily fee but permit local jurisdictions to supplement it. See Table 8. Over half of the courts also pay mileage reimbursement with rates varying from $.02 to $.49 per mile; the median rate was $.325 per mile. Arizona has also implemented a Lengthy Trial Fund to compensate jurors for lost income up to $300 per day.

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23 The states are Alabama (ALA. CODE § 12-6-8(c)); Colorado (COLO. REV. STAT. § 13-71-126); Connecticut (CONN. GEN. STAT. § 51-247(a)); Georgia (Attorney General Unofficial Opinion # U 89-55, Attorney General Official Opinion 95-13); Massachusetts (MASS. GEN. LAWS ch. 234A § 48); Nebraska (NEB. REV. STAT. § 25-1640); New York (N.Y. JUD. LAW Art. 16 § 521); and Tennessee (TENN. CODE ANN. § 22-4-108(B)(1)).

<table>
<thead>
<tr>
<th>State</th>
<th>Initial Rate or Flat Daily Rate</th>
<th>Graduated Rate</th>
<th>Trigger for Graduated Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$ 10.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>$ 5.00</td>
<td>$ 25.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Arizona *</td>
<td>$ .00</td>
<td>$ 12.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Arkansas</td>
<td>$ 15.00</td>
<td>$ 35.00</td>
<td>Sworn Juror</td>
</tr>
<tr>
<td>California</td>
<td>$ .00</td>
<td>$ 15.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Colorado</td>
<td>$ .00</td>
<td>$ 50.00</td>
<td>Beginning 4th Day</td>
</tr>
<tr>
<td>Connecticut</td>
<td>$ .00</td>
<td>$ 50.00</td>
<td>Beginning 6th Day</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>$ 30.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>$ 20.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>$ .00</td>
<td>$ 30.00</td>
<td>Beginning 4th Day</td>
</tr>
<tr>
<td>Hawaii</td>
<td>$ 30.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>$ 10.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>$ 10.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>$ 12.50</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>$ 25.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>$ 10.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$ .00</td>
<td>$ 50.00</td>
<td>Beginning 4th Day</td>
</tr>
<tr>
<td>Michigan</td>
<td>$ 25.00</td>
<td>$ 40.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Minnesota</td>
<td>$ 20.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>$ 12.00</td>
<td>$ 25.00</td>
<td>Sworn Juror</td>
</tr>
<tr>
<td>Nebraska</td>
<td>$ 35.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>$ .00</td>
<td>$ 40.00</td>
<td>Sworn Juror</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>$ 20.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>$ 5.00</td>
<td>$ 40.00</td>
<td>Beginning 4th Day</td>
</tr>
<tr>
<td>New Mexico</td>
<td>$ 41.20</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>$ 40.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>$ 12.00</td>
<td>$ 30.00</td>
<td>Beginning 6th Day</td>
</tr>
<tr>
<td>North Dakota</td>
<td>$ 25.00</td>
<td>$ 50.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>$ 20.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>$ 10.00</td>
<td>$ 25.00</td>
<td>Beginning 3rd Day</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>$ 9.00</td>
<td>$ 25.00</td>
<td>Beginning 4th Day</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>$ 15.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>$ 10.00</td>
<td>$ 50.00</td>
<td>Sworn Juror</td>
</tr>
<tr>
<td>Tennessee</td>
<td>$ 11.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>$ 6.00</td>
<td>$ 40.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Utah</td>
<td>$ 18.50</td>
<td>$ 49.00</td>
<td>Beginning 2nd Day</td>
</tr>
<tr>
<td>Vermont</td>
<td>$ 30.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>$ 30.00</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>$ 40.00</td>
<td>n/a</td>
<td></td>
</tr>
</tbody>
</table>

* Arizona also employs a Lengthy Trial Fund to compensate jurors up to $300 per day for lost income while on jury service. The LTF is available to jurors retroactively to the 4th day of service beginning on the 6th day of trial.
<table>
<thead>
<tr>
<th>State</th>
<th>State Mandated Minimum Rate</th>
<th>Flat Daily Rate Structure</th>
<th>Graduated Rate Structure</th>
<th>Trigger for Graduated Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td># Courts Reporting</td>
<td>Average Flat Rate</td>
<td># Courts Reporting</td>
</tr>
<tr>
<td>Georgia</td>
<td>$ 5.00</td>
<td>56</td>
<td>$ 24.27</td>
<td>4</td>
</tr>
<tr>
<td>Illinois</td>
<td>$ 4.00</td>
<td>76</td>
<td>$ 13.15</td>
<td>7</td>
</tr>
<tr>
<td>Indiana</td>
<td>$ 15.00</td>
<td>33</td>
<td>$ 39.09</td>
<td>44</td>
</tr>
<tr>
<td>Kansas</td>
<td>$ 10.00</td>
<td>9</td>
<td>$ 10.00</td>
<td>1</td>
</tr>
<tr>
<td>Maryland</td>
<td>$ 15.00</td>
<td>22</td>
<td>$ 17.50</td>
<td>n/a</td>
</tr>
<tr>
<td>Mississippi</td>
<td>$ 25.00</td>
<td>30</td>
<td>$ 28.50</td>
<td>3</td>
</tr>
<tr>
<td>Missouri</td>
<td>$ 6.00</td>
<td>32</td>
<td>$ 15.91</td>
<td>32</td>
</tr>
<tr>
<td>Ohio</td>
<td>$ 10.00</td>
<td>1</td>
<td>$ 20.00</td>
<td>3</td>
</tr>
<tr>
<td>South Carolina</td>
<td>$ 10.00</td>
<td>19</td>
<td>$ 16.16</td>
<td>n/a</td>
</tr>
<tr>
<td>Washington</td>
<td>$ 10.00</td>
<td>22</td>
<td>$ 11.59</td>
<td>1</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>$ 16.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>$ 10.00</td>
<td>2</td>
<td>$ 30.00</td>
<td>4</td>
</tr>
</tbody>
</table>

**Jury Source Lists**

Another area of jury operations in which states can either retain control or delegate authority to local courts is the choice of source list(s) that can be used to compile the master jury list. The total number of unique names derived from all source lists used to compile the master jury list defines the total population from which prospective jurors may be qualified and summoned. Thus, the choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool.\(^{25}\) Thirty states mandate that courts within the jurisdiction use only the designated source lists, while 15 states and the District of Columbia permit local courts to supplement the required lists with additional lists. The remaining five states do not mandate the use of any specific source list, but enumerate the permissible lists that can be employed for this purpose.

For those states that mandate which source lists to use, the ones that occur most frequently are the voter registration list (38 states) and the licensed driver list (35 states). See Table 9. Nineteen states mandate the use of a combined voter/driver list. Eleven mandate the use of three or more lists – typically, registered voters, licensed drivers, and state income or property tax lists, although other combinations are also common. Seven states restrict the number of source lists to a single list: Mississippi and Montana mandate the use of the registered voters list only; Florida, Michigan, Nevada, and Oklahoma mandate the use of the licensed drivers list only; and Massachusetts employs a unique statewide census for its master jury list.

\(^{25}\) A substantial body of federal and state constitutional and statutory law requires that the pool from which prospective jurors are summonsed reflect “a fair cross section of the community,” specifically, its racial, ethnic, and gender demographic characteristics. *See Duren v. Missouri*, 439 U.S. 357 (1979). Because a broadly inclusive list of the jury-eligible population is more likely to mirror the demographic characteristics of the community, the National Center for State Courts recommends that the master jury list include at least 85 percent of the total community population. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4-5 (1996).
Looking beyond the mandated lists, we find that 21 states permit courts to supplement the mandated lists with additional source lists including state and local income or property tax rolls, unemployment compensation recipient lists, public welfare recipient lists, and “other” lists. In most instances, “other” referred to state identification card holders, which is often maintained by the same agency that maintains the list of licensed drivers. But at least two states maintain unique lists to be used for the master jury list. In Massachusetts, each locality conducts an annual census – a statutory requirement dating back to the colonial period. Today, the primary purpose of the census is the master jury list. Alaska uses a list of residents who applied for payment from the Alaska Permanent Fund Corporation, which pays income to Alaskan residents from a statewide investment fund that originated from the profits from the Alaskan oil pipeline.26

In addition to the issue of whether to mandate or permit certain types of lists, 29 states provide direct assistance to local courts by compiling the master jury list at the state level and making it available to local courts. Where this option exists, the vast majority of local courts (78.3%) use the state-provided list rather than compile their own. Moreover, in states permitting local courts to supplement the required source lists, local courts employ just over half (57.9%) of the lists available to them. These two findings combined suggest that most local courts are either satisfied with the inclusiveness and diversity of their jury pools and do not see the need to supplement the source lists with additional lists, or they may lack the technological capability or staffing to manage multiple source lists, or both.

Statutory Exemptions

Traditionally, many states exempted whole classes of citizens from jury service on the grounds that their professional or civic obligations in the community were so essential that they should be spared from jury service (e.g., political officeholders, law enforcement, healthcare providers). In most jurisdictions, terms of service were considerably longer than today, so jury service by these individuals was considered a hardship on the community that would be deprived of the services of those individuals. The trend in recent years has been to eliminate occupational and status exemptions altogether under the theory that no one is too important or too indispensable to be summarily exempted from jury service, particularly in jurisdictions with relative short terms of service. Instead, local courts have the discretion to accommodate or excuse jurors on an individual basis. For example, New York eliminated all of its occupational exemptions in 1994, adding more than one million jury-eligible citizens to the master jury list as a result. Within the first several years, New York Governor George Pataki, New York City Mayor Rudy Guiliani, and New York Court of Appeals Chief Judge Judith Kaye were all summonsed, and reported for service, as jurors in New York State courts.

26 See [http://www.apfc.org/homeobjects/tabPermFund.cfm](http://www.apfc.org/homeobjects/tabPermFund.cfm) for more information.
In the Statewide Survey, the NCSC identified 10 distinct categories of exemptions. See Table 10. The most common category (47 states) was “previous jury service,” a classification exempting citizens who have recently performed jury service, typically within the past 12 to 24 months. Another popular category (27 states) of exemption was age, typically extended to older citizens. Most of the categories designated various occupational or status roles for which citizens could claim an exemption from jury service (e.g., political officeholders, judicial officers, sole caregivers of young children including nursing mothers, or sole caregivers of incompetent adults). The “Other Exemptions” category included a variety of occupations including clergy or other religious designations, journalists, mariners, public accountants, and teachers. Alaska provides an exemption to teachers from schools that fail to meet adequate progress standards under the No Child Left Behind Act.

### Table 10: Statutory Exemption Categories

<table>
<thead>
<tr>
<th>Category</th>
<th># States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Previous Jury Service</td>
<td>47</td>
</tr>
<tr>
<td>Age</td>
<td>27</td>
</tr>
<tr>
<td>Political Officeholder</td>
<td>16</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>12</td>
</tr>
<tr>
<td>Other Exemptions</td>
<td>12</td>
</tr>
<tr>
<td>Judicial Officers</td>
<td>9</td>
</tr>
<tr>
<td>Healthcare Professionals</td>
<td>7</td>
</tr>
<tr>
<td>Sole Caregiver</td>
<td>7</td>
</tr>
<tr>
<td>Licensed Attorneys</td>
<td>6</td>
</tr>
<tr>
<td>Active Military</td>
<td>5</td>
</tr>
</tbody>
</table>

Nevertheless, states vary considerably in the number of exemptions authorized by statute. The median number of exemption categories was 3 per state. Louisiana is the only state that has no exemptions whatsoever. Twelve states and the District of Columbia provide exemptions only for previous jury service. Florida provides exemptions in the nine out of the ten categories, the most of any state. See Table 11.

### Table 11: Number of Exemption Categories by State

<table>
<thead>
<tr>
<th># States</th>
<th>State(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>LA</td>
</tr>
<tr>
<td>1</td>
<td>AL, AR, CO, DC, ID, IA, MT, NM, NY, UT, VT, WA, WI</td>
</tr>
<tr>
<td>2</td>
<td>CA, IL, IN, KS, KY, MD, NV, NH, ND, PA, SD</td>
</tr>
<tr>
<td>3</td>
<td>AZ, DE, MI, NC, OR, SC, WY</td>
</tr>
<tr>
<td>4</td>
<td>AK, MA, MN, MO, NJ, OH, TX, WV</td>
</tr>
<tr>
<td>5</td>
<td>CT, GA, ME, MS, NE</td>
</tr>
<tr>
<td>6</td>
<td>HI, RI</td>
</tr>
<tr>
<td>7</td>
<td>OK, TN, VA</td>
</tr>
<tr>
<td>8</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>FL</td>
</tr>
</tbody>
</table>

**One-Step versus Two-Step Jury Qualification and Summoning**

A final area of state versus local control over jury operations involves the process through which local courts qualify and summon citizens for jury service. Eighteen states and the District of Columbia specify that local courts employ a one-step process in which jurors are summoned and qualified simultaneously, while five states mandate that local courts employ a two-step process.

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27 The most common age to qualify for an exemption was 70 (16 states). The exemption in the remaining states ranged from 65 (4 states) to 75 (3 states).

28 ALASKA STAT. § 09.20.030(b).
in which citizens are first surveyed to determine their eligibility for jury service, and then only qualified jurors are summoned for service. The remaining 25 states leave this decision to the discretion of the local courts.

We see from these various examples that states vary a great deal in terms of how closely jury operations are dictated at the state level or left to the discretion of local courts. Table 12 ranks all of the states and the District of Columbia according to their respective restrictiveness or permissiveness vis-à-vis local jury operations. The rankings are based on a composite index reflecting whether all source lists are required, whether the state permits localities to supplement the jury fee, whether the term of service is mandated at the state level, whether the state authorizes more than the median number of exemptions, and whether the state mandates the summoning/qualification process. The index ranges from 0 (most permissive) to 5 (most restrictive).

<table>
<thead>
<tr>
<th>Table 12: State Control Over Jury Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most Restrictive</td>
</tr>
<tr>
<td>Mostly Restrictive</td>
</tr>
<tr>
<td>Somewhat Restrictive</td>
</tr>
<tr>
<td>Somewhat Permissive</td>
</tr>
<tr>
<td>Mostly Permissive</td>
</tr>
<tr>
<td>Most Permissive</td>
</tr>
</tbody>
</table>

Interestingly, the degree of state restrictiveness over jury operations has no significant relationship to number of jury improvement efforts underway in those states. The only restrictiveness factor that had a significant relationship to the number of jury improvement efforts was whether the term of service is determined at the state or local level. When the term of service is determined at the state level, the number of jury improvement efforts was 3.33 compared to 2.00 when the term of service is determined at the local level. This suggests that jury reform has not followed either an exclusively top-down or exclusively grassroots approach, or even one dictated by exigencies associated with the volume or frequency of jury trials. Rather, the various approaches derive from unique institutional and political cultures in each jurisdiction. Given that reality, we now take a closer look at variations in local court operations.

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29 Pearson = .016, ns. The only restrictiveness factor that had a significant relationship to the number of jury improvement efforts was whether the term of service is determined at the state or local level. When the term of service is determined at the state level, the number of jury improvement efforts was 3.33 compared to 2.00 when the term of service is determined at the local level. $F(1, 49) = 4.404, p = .041$.

30 Pearson (Number of jury trials) = .219, ns; Pearson (Trial rate) = -.064, ns.
As discussed in the previous section, some jury operations may be dictated at the state level while others are left to the discretion of the local courts. While state statutes and court rules can define the institutional structure in which jury operations take place, they do not always provide an accurate picture of how local jury systems actually operate. Nor does the existence of statewide jury improvement efforts, or lack thereof, necessarily indicate the extent of locally initiated improvement efforts. The Local Courts Survey was designed to provide a more complete picture of jury operations nationally by highlighting local jury operations and improvement priorities in greater detail and examining the impact of state infrastructures and statewide initiatives on local operations and initiatives.

Nationally, we find that approximately half (51.8%) of courts report some type of jury improvement activities in the past five years. Over one-third (34.4%) reported some type of formal jury office or jury management committee responsible for oversight of local jury operations. Not surprisingly, these efforts tend to be concentrated in urban and large suburban courts with higher volumes of jury trials. Yet even in rural jurisdictions (e.g., population less than 25,000), more than one in three courts (36.7%) reported some type of jury improvement activity.

The single most popular focus of local jury improvements was upgrading jury automation, but other, more substantive efforts captured the attention of a substantial portion of courts. See Table 13. The majority of courts (75.2%) that reported any improvement efforts actually focused on multiple areas. The median number was three, but nearly 10% reported 7 or more different efforts underway. Courts also tended to undertake certain improvement efforts in conjunction with others. For example, courts that reported recent efforts to improve jury yield were also often engaged in specific efforts to decrease non-response rates. Other courts focused on in-court techniques to improve juror comprehension and jury instructions simultaneously.

The existence and magnitude of local jury improvement efforts correlated, not surprisingly, with population size and jury trial volume. Courts with more jury trials and those in urban communities were more likely than rural courts to initiate improvement efforts. Statewide leadership in the form of a centralized jury management office or statewide task force/commission clearly played a substantial role in motivating local court activity. For example, local courts were significantly more likely to undertake local improvement efforts in

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states with a statewide jury task force or commission (56% of local courts) compared to those in which no statewide effort was underway (34% of local courts).  

This “trickle-down” effect of statewide leadership appeared to spur the existence of local court improvement efforts in some interesting ways. Certainly it affected the number of areas in which local courts try to improve jury operations. In states with a jury task force, the average number of efforts that local courts undertook was 3.2 compared to 1.6 in states with no statewide task force. In particular, statewide activities focused on court staff education and on changes to legislation or court rules appeared to have an impact on how many jury improvement efforts were undertaken at the local level, increasing the number of local court efforts on average by 50 to 70 percent. Whether increased activity on the local level results more from the educational efforts of the statewide task forces or in reaction to changes in state law is not known, and may not be possible to differentiate given the typical approach by many states of delivering local education about proposed or enacted changes to state law. As a practical matter, both motivations may play a part.

**Jury Automation in Local Courts**

As noted above at Table 13, upgrades to jury technology was the single most frequently reported focus of local jury improvement efforts, undertaken by 59 percent of courts reporting any improvement efforts. Although the Statewide Surveys didn’t specifically inquire about this aspect of jury operations, several states indicated concerted efforts to improve jury system technology. In other states, it was clear from the Local Court Surveys that various automation improvements had been initiated on a statewide basis. For example, in the District of Columbia, Massachusetts, New York, and North Carolina, all or nearly all of the local courts reported ongoing upgrades to jury system technology. Other examples that suggested a coordinated statewide effort included Arizona, in which three-quarters of the local courts reported the use of video during juror orientation; Iowa, in which more than half (54%) of local courts reported that citizens can check their reporting status on-line; California, which reported a statewide effort to equip jury assembly rooms with Internet access; South Dakota, which reported a legislative mandate to improve jury management technology; Missouri, which is implementing a statewide jury management system (30% of local courts reported that this had been completed in their jurisdiction); and Alaska, which is in the process of implementing an online jury software program. The apparent discrepancy between some of the Statewide Survey descriptions of improvements in jury automation and reports by local courts about technology improvements in their jurisdictions may be due to an implementation lag in the local courts or possibly that some local courts did not report these improvements because they were initiated at the state level rather than at the local level.

Approximately two-thirds of courts use some form of commercial software for their jury management systems. This market tends to be dominated by two national vendors – Jury

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32 $F(1, 1,342) = 39.00, p < .001$. The existence of a statewide jury office had a similar, albeit diminished, effect (57% versus 44%). $F(1, 1,172) = 21.599, p < .001$.

33 $F(1, 1,394) = 44.310, p < .001$.

34 Court Staff Education $F(1,46) = 4,323, p = .043$; Change Legislation/Court Rules $F(1, 46) = 6.873, p = .012$. 

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18
Systems, Inc. (based in Encino, California) and ACS Government Systems (based in Lexington, Kentucky). Combined, these two firms held 42 percent of the commercial jury management contracts in the State-of-the-States Survey courts. These national vendors also tended to dominate in more populous jurisdictions compared to other commercial vendors. For example, the national vendors held 83% of the commercial contracts for courts in counties greater than 500,000 population and 59% of the commercial contracts for courts in counties with a population between 100,000 and 500,000, but only 35% of commercial contracts in courts with populations less than 100,000.

The remaining commercial vendors appear to concentrate their market on a statewide or regional basis. Just over one-third of local courts (34.8%) reported that they maintain in-house jury management systems. Courts in rural and smaller suburban jurisdictions were more likely to use commercial jury management software than those in more populous areas that, presumably, can afford to develop and support an in-house system. Not surprisingly, the use of more sophisticated forms of automation was more prevalent in courts located in urban areas compared to those in suburban and rural areas. See Table 14.

<table>
<thead>
<tr>
<th>Table 14: Percent of Courts Using Various Types of Technology</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Population Size</strong></td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>N = 84</td>
</tr>
<tr>
<td>Commercial Jury Software</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Juror Qualification</td>
</tr>
<tr>
<td>Online</td>
</tr>
<tr>
<td>IVR Technology</td>
</tr>
<tr>
<td>Reporting Technology</td>
</tr>
<tr>
<td>Telephone Call-In System</td>
</tr>
<tr>
<td>Online</td>
</tr>
<tr>
<td>Automated Call-Out System</td>
</tr>
<tr>
<td>Orientation</td>
</tr>
<tr>
<td>Basic Information Online</td>
</tr>
<tr>
<td>Orientation Video Online</td>
</tr>
<tr>
<td>Orientation Video on Cable Television</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Orientation Video Online</td>
</tr>
<tr>
<td>Orientation Video on Cable Television</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Orientation Video on Cable Television</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

The most popular form of technology, by a large margin, continues to be the telephone. Nearly two-thirds of courts employ a telephone call-in system to inform citizens about whether they should report for jury service. One-third of urban courts have implemented Interactive Voice Recognition (IVR) technology to permit citizens to respond to qualification questionnaires using their telephones. Some commercial vendors have developed an interface between the court’s jury management system and the telephone system to enable courts to send an automated voice message to citizens the day before they are scheduled to report reminding them of their

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35 Chi-Square = 58.782, $p < .001$. 
obligation or informing them that their service will not be needed that day, but this feature does not appear to have caught on in most courts yet. Indeed, it appears that rural and smaller suburban courts are actually more likely to telephone jurors manually to inform them about reporting status than larger suburban and urban courts are to use an automated call-out system.

Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes. Less than 20% provide basic juror orientation information online and barely more than half that percentage use the Internet for juror qualification or informing jurors about their reporting status. This technology was somewhat more prevalent for various applications in urban courts, but with the exception of posting orientation information online, fewer than half of the courts serving populations greater than 500,000 used Internet technology. Interestingly, courts that rely on commercial jury management software were actually less likely to employ all of the more sophisticated types of automation, even after controlling for population size.

Several factors may be influencing courts’ decisions to use or not use these technologies. For example, courts employing either JSI or ACS commercial software were significantly more likely to use Internet or IVR technology for qualification, reporting, and orientation purposes than courts using state or regionally based commercial vendors. This suggests that state and regionally based vendors may not have incorporated the capacity for their jury management systems to interface with the courts’ telephone and Internet systems yet. Existing technology options may also be prohibitively costly for less populous courts, or possibly, those courts may be unwilling to employ technologies that they believe are not readily available to the majority of citizens in their communities due to the digital divide.

**Jury Yield in Local Courts**

The term “jury yield” refers to the number of citizens who are found to be qualified and available for jury service expressed as a percentage of the total number of qualification questionnaires or summonses mailed. It is a critical concept in jury system management insofar as it provides a standard measure of efficiency for jury operations. In essence, it measures the upfront administrative effort and cost that the court undertakes in securing an adequate pool of prospective jurors for jury selection. Courts employing a two-step qualification and summoning

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37 This finding derives from a series of logistic regression models in which a dummy variable (Commercial Vendor) was included as an independent variable to examine the probability that various types of IVR or Internet technology were employed in the court’s jury system controlling for population size. IVR Qualification Cox & Snell R Square = .098, Commercial Vendor Wald = 32.045, B = -1.413, p < .001; Online Qualification Cox & Snell R Square = .112, Commercial Vendor Wald = 27.855, B = -1.088, p < .001; Online Orientation Information Cox & Snell R Square = .134, Commercial Vendor Wald = 45.997, B = -1.000, p < .001; Online Video Orientation Cox & Snell R Square = .088, Commercial Vendor Wald = 61.692, B = -2.277, p < .001; Reporting Information Online Cox & Snell R Square = .086, Commercial Vendor Wald = 34.289, B = -1.125, p < .001; and Telephone Call-In System Cox & Snell R Square = .064, Commercial Vendor Wald = 8.162, B = -.415, p = .004.

38 Qualification by IVR F (1,638) = 5.532, p = .019; Qualification Online F (1,638) = 36.878, p < .001; Reporting Online F (1,638) = 12.713, p < .001; Orientation Online F (1,638) = 23.326, p < .0001.
process often differentiate between the qualification yield (the proportion of citizens that is qualified for jury service) and the summoning yield (the proportion of jury-eligible citizens that is available for jury service on the date summoned). In one-step courts, qualification and summoning are combined and therefore the yield is expressed as a unitary measure.39

A number of factors affect jury yield. Some factors are related to the court’s jury operations and procedures (e.g., qualification criteria, exemptions, term of service, follow-up procedures for non-response, and juror compensation) and others are related to local community conditions such as mobility rates, U.S. citizenship rates, and socio-economic conditions. Typically, urban and larger suburban courts experience lower jury yields than smaller suburban and rural courts. See Table 15.

<table>
<thead>
<tr>
<th>Table 15: Jury Yields by Population Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population Size</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>500,000 or More</td>
</tr>
<tr>
<td>One-Step Courts (n)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>38.2% (60)</td>
</tr>
<tr>
<td>Two-Step Courts (n)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>43.2% (18)</td>
</tr>
</tbody>
</table>

An important question for local courts is what happened to those people who were mailed summonses, but were not qualified or available for jury service. Some people move, but fail to leave a forwarding address, so the jury summons is returned “undeliverable.” Others are disqualified due to lack of citizenship, residency, under the age of 18, previous criminal background, or English fluency or literacy. Some claim a statutory exemption from jury service and others will be excused for medical reasons, financial hardship or some other inability to serve. Some simply do not respond to the qualification questionnaire or fail to appear for jury service. See Table 16. The average rate for these categories ranges from 7 percent to 15 percent in one-step courts, and 5 percent to 9 percent in two-step courts, again with considerable variation based on population size.

39 The Local Court Survey only inquired about jury yield with respect to summoning; therefore, most of the discussion in this section refers either to reported yields for one-step courts only, or provides separate statistics for one-step and two-step courts. For instructions on how to calculate jury yield in one-step versus two-step courts, see COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS at http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure8.pdf.
Table 16: Average Undeliverable, Disqualification, Exemption, Excusal and Non-Response Rates, by Population Size

<table>
<thead>
<tr>
<th>Population Size</th>
<th>500,000 or More</th>
<th>100,000 to 500,000</th>
<th>25,000 to 100,000</th>
<th>Less than 25,000</th>
<th>All Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>One-Step Courts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Undeliverable</td>
<td>15.1</td>
<td>14.4</td>
<td>16.0</td>
<td>13.5</td>
<td>14.6</td>
</tr>
<tr>
<td>Disqualified</td>
<td>12.4</td>
<td>10.1</td>
<td>7.5</td>
<td>7.4</td>
<td>8.4</td>
</tr>
<tr>
<td>Exempted</td>
<td>4.0</td>
<td>6.7</td>
<td>8.4</td>
<td>7.6</td>
<td>7.3</td>
</tr>
<tr>
<td>Excused</td>
<td>9.4</td>
<td>9.5</td>
<td>9.1</td>
<td>9.1</td>
<td>9.2</td>
</tr>
<tr>
<td>Non-Response/FTA</td>
<td>15.0</td>
<td>10.9</td>
<td>8.6</td>
<td>6.7</td>
<td>8.9</td>
</tr>
<tr>
<td>Two-Step Courts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Undeliverable</td>
<td>6.6</td>
<td>10.2</td>
<td>8.2</td>
<td>10.0</td>
<td>9.2</td>
</tr>
<tr>
<td>Disqualified</td>
<td>6.5</td>
<td>9.6</td>
<td>7.8</td>
<td>6.6</td>
<td>7.5</td>
</tr>
<tr>
<td>Exempted</td>
<td>2.9</td>
<td>3.4</td>
<td>4.7</td>
<td>6.3</td>
<td>5.1</td>
</tr>
<tr>
<td>Excused</td>
<td>4.4</td>
<td>6.4</td>
<td>5.2</td>
<td>6.5</td>
<td>5.9</td>
</tr>
<tr>
<td>Non-Response/FTA</td>
<td>13.1</td>
<td>6.2</td>
<td>5.9</td>
<td>5.4</td>
<td>6.0</td>
</tr>
</tbody>
</table>

More to the point, how can courts increase the jury yield by minimizing the number of people who fall into the *not qualified* and *unavailable* categories? As a practical matter, courts have few options other than acceptance when the people who are summoned for jury service are disqualified (e.g., non-citizen, non-resident, under age 18, previous felony conviction, not fluent in English) as these criteria are minimum qualifications for jury service established by state legislatures. However, courts have developed a number of approaches to minimize other factors that affect jury yields. With respect to undeliverable summonses, for example, many courts have borrowed techniques from commercial mail-order companies such as contracting with National-Change-of Address (NCOA) vendors to provide updated addresses for people who have moved since the master jury list was compiled. Courts using multiple source lists to compile the master jury list should use the most frequently maintained list, or the most recently updated address, when deciding which of two or more duplicate records to retain.\(^{40}\) Analyses of the impact of the number and types of source lists on undeliverable rates were difficult to interpret, however. The use of state tax, unemployment compensation, and public welfare lists resulted in significantly reduced undeliverable rates in two-step courts.\(^{41}\) But unemployment and public welfare lists had no effect on undeliverable rates in one-step courts, and state tax lists correlated with significantly higher undeliverable rates in one-step courts.\(^{42}\) Additional research is needed to investigate these divergent findings and, if possible, to identify ways of maximizing the benefits of supplemental source lists.

Exemptions are established by state statute. As we discussed in the previous section, the number of exemption categories ranges from zero in Louisiana to nine in Florida. The number of exemption categories had a significant effect on exemption rates in one-step courts within those

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\(^{41}\) State Tax List $F(1, 432) = 25.384$, Unemployment List $F(1, 432) = 38, 867$, Public Welfare List $F(1, 432) = 37.158$, all $p < .001$.

\(^{42}\) State Tax List $F(1, 633) = 17.611$, $p < .001$. 

22
states— from an average of 4.7 percent in states with only one exemption to 14.3 percent in states with seven exemption categories. Florida, which had the highest number of exemption categories (9), had the second highest exemption rate (12.2%).

Similarly, term of service and juror compensation rates affect excusal rates. In Table 6, we saw that 28.6 percent of the U.S. population lives in states that mandate a one day or one trial term of service. Table 17 presents the actual breakdown for term of service for all of the courts represented in the Local Court Survey dataset. We find that more than one-third of local courts, and nearly two-thirds of the U.S. population, live in jurisdictions that have a one day or one trial term of service. It is clear from the difference between these percentages that courts in more populous jurisdictions are more likely to adopt one day or one trial terms of service than those in less populous jurisdictions.

<table>
<thead>
<tr>
<th>Term of Service</th>
<th># of Courts</th>
<th>% of Courts</th>
<th>Average # Jury Trials Annually</th>
<th>Estimated % of US Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>One Day or One Trial</td>
<td>490</td>
<td>35.1</td>
<td>129</td>
<td>63.4</td>
</tr>
<tr>
<td>Two to five days (one week)</td>
<td>213</td>
<td>15.3</td>
<td>85</td>
<td>17.8</td>
</tr>
<tr>
<td>Six days to 1 month</td>
<td>327</td>
<td>23.4</td>
<td>46</td>
<td>11.7</td>
</tr>
<tr>
<td>Greater than 1 month to 6 months</td>
<td>283</td>
<td>20.3</td>
<td>21</td>
<td>5.9</td>
</tr>
<tr>
<td>Longer than 6 months</td>
<td>82</td>
<td>5.9</td>
<td>15</td>
<td>0.2</td>
</tr>
</tbody>
</table>

As we discussed in Section III, the term of service defines the maximum amount of time that a person may be required to serve on jury duty. Although some courts establish the maximum term of service at six months or longer, it is clear from the average volume of jury trials conducted in these courts that very few citizens, if any, would ever actually report to their local courthouse for that period of time. Indeed, half of the courts in this category had four or fewer trials annually – less than one every three months. or many of these courts, the functional term of service is likely to be one day or one trial – or could be with little or no administrative effort on the part of the court – even if it is not stated as such.

Returning to the relationship between term of service and excusal rates, courts with a one day or one trial term of service had significantly lower excusal rates than those with longer terms of service (6.0 percent versus 8.9 percent, respectively). See Table 18. Moreover, courts with juror fees exceeding the national average ($21.95 flat fee or $32.34 graduated rate) also had significantly lower excusal rates – 6.8 percent compared to 8.9 percent for courts whose juror fees were lower than the national average. Courts with both a one day or one trial term of

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43 We did not calculate the exemption rate in two-step courts because presumably anyone claiming the exemption had already done so at the qualification step.

44 Estimates for the proportion of US population were calculated using the methods described in Appendix E.

45 F=23.966 (1, 1,100), p < .001.

46 F=16.445 (1, 1,195), p < .001.
service and higher than average juror fees had excusal rates of 4.0 percent compared to 9.3 percent for those with longer terms of service and lower than average juror fees.

<table>
<thead>
<tr>
<th>Table 18: Average Excusal Rates, by Term of Service and Juror Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juror Fee Exceeds National Average</td>
</tr>
<tr>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Juror Fee is Less than National Average</td>
</tr>
<tr>
<td>Juror Fee is Less than National Average</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Courts across the country have been increasingly challenged by citizens who fail to return their qualification questionnaires or who fail to appear (FTA) for jury service. Twenty percent of one-step courts reported non-response/FTA rates of 15 percent or higher. Even more remarkable, 10 percent of two-step courts, which had already located and qualified the prospective juror, reported FTA rates of 16 percent or higher. To address these problems, 80 percent of courts in the State-of-the-States Survey reported some type of follow-up program to track down non-responders and FTAs. See Table 19. The most common approach in both one-step and two-step courts was simply to send a second qualification questionnaire or summons. Two-step courts conducted order-to-show-cause (OSC) hearings about twice as often as one-step courts. Less than 15 percent of courts imposed fines on non-responders, although most state statutes permit this penalty. About one-fourth of courts had other types of follow-up programs, which often involved issuing a bench warrant ordering the local sheriff’s office to physically compel the juror’s presence in court.

<table>
<thead>
<tr>
<th>Table 19: Non-Response and FTA Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>One-Step Courts (N=793)</td>
</tr>
<tr>
<td>No Program</td>
</tr>
<tr>
<td>Second Summons</td>
</tr>
<tr>
<td>OSC Hearings</td>
</tr>
<tr>
<td>Fines</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Multiple Programs</td>
</tr>
<tr>
<td>Two-Step Courts (N=531)</td>
</tr>
<tr>
<td>No Program</td>
</tr>
<tr>
<td>Second Summons</td>
</tr>
<tr>
<td>OSC Hearings</td>
</tr>
<tr>
<td>Fines</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Multiple Programs</td>
</tr>
</tbody>
</table>

Several factors affected the number of follow-up programs a court might employ. Two-step courts had significantly more follow-up programs, on average, than one-step courts, presumably because they have to conduct follow-up on two different stages of jury operations. Motivation also played a part – courts focusing on decreasing non-response/FTA rates reported more follow-up programs. This was especially true in urban and larger suburban courts, which tended to have higher non-response/FTA rates than less populous jurisdictions.

Follow-up programs had various degrees of effectiveness. After controlling for population size and one-step or two-step jury operations, the Local Court Survey data showed that only those follow-up programs that involved a second summons or qualification, or that involved some other approach (e.g., bench warrant),
significantly reduced non-response/FTA rates.\textsuperscript{47} OSC hearings and fines had no effect, possibly due to the infrequency with which they are typically imposed. Courts that had no follow-up program had significantly higher non-response/FTA rates.\textsuperscript{48}

**Juror Privacy**

As in other areas of contemporary life, courts have begun to recognize the need to respect jurors’ legitimate expectations of privacy. Unlike judges, clerks of court, and other public officials, jurors do not deliberately seek out this particular form of public service and do not, therefore, automatically surrender all expectations of privacy. In particular, they have a right to expect that personal information will be disclosed only to those individuals with a legitimate need for it and that the information will only be used for the purposes of jury administration and jury selection. To meet those expectations, courts have increasingly placed restrictions on the types of information that prospective jurors are required to disclose, to whom that information may be subsequently released, and at what point in the trial process (e.g., pre-trial, jury selection, post-trial) it can be released.\textsuperscript{49}

Attorneys and their clients arguably have the greatest legitimate interest in access to juror information. The extent to which courts makes juror information available to attorneys before jury selection begins is a reasonable indication of the extent to which courts have enacted policies and procedures to protect juror privacy. Table 20 indicates the percentage of local courts that reported providing attorneys with access to juror information before jury selection begins. The vast majority of courts disclose the names of prospective jurors to attorneys before voir dire, but a substantial number of courts restrict access to additional information. For example, more than one-third of courts reported that they will not provided attorneys with a full street address, making it difficult, if not impossible in many jurisdictions, for attorneys to conduct background investigations on prospective jurors. More than one-quarter (26.7\%) of courts reported that they provide no address information whatsoever on prospective jurors. Nearly half of all courts restrict access to qualification information.

In many states, access to juror information is restricted by state statute or court rule. Thus, we found that access to some of these categories of information was restricted in all of the Local Court respondents. For example, access to jurors’ full street address was uniformly denied in courts in Arizona, Delaware, Hawaii, New Jersey, and the District of Columbia. New Jersey and the District of Columbia do provide access to jurors’ zip codes, however. Similarly, Delaware, Massachusetts, North Carolina, and the District of Columbia restrict

<table>
<thead>
<tr>
<th>Type of Juror Information</th>
<th>% of Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juror Name</td>
<td>88.3%</td>
</tr>
<tr>
<td>Full Street Address</td>
<td>63.5%</td>
</tr>
<tr>
<td>Zip Code Only</td>
<td>12.8%</td>
</tr>
<tr>
<td>Qualification Information</td>
<td>55.2%</td>
</tr>
</tbody>
</table>

\textsuperscript{47} F (7, 1,121) = 18.750, p < .001.

\textsuperscript{48} One-Step Non-Response/FTA Rate \( F (1, 648), p < .001 \); Two-Step Non-Response/FTA Rate \( F (1, 470), p = .096 \).

access to juror qualification information.

In addition to basic information such as name and address, the majority of courts obtain preliminary voir dire information from prospective jurors, such as marital status (64%), occupation (72%), number and ages of minor children (52%), and other information not directly related to juror qualification criteria or contact information (28%). To gauge the extent to which local courts provide this type of information to attorneys, the NCSC Center for Jury Studies created a numerical index ranging from 0 to 4 to indicate the number of categories (marital status, occupation, number and ages of minor children, and other) of voir dire information that courts make available to attorneys before jury selection begins. Nationally, local courts provided information on an average of 2.21 categories of voir dire information (median 3 categories), but again there was a great deal of state-to-state variation. The median index for six states (Alaska, California, Colorado, North Carolina, Oklahoma, and Utah) was less than 1, indicating very little access to juror information before voir dire. The statewide median for Hawaii, Minnesota, Massachusetts, and New Hampshire was 4, indicating that local courts routinely provide this information to attorneys.

All of these preliminary operational matters obviously have substantial implications for the efficiency and cost-effectiveness of each court’s jury system. More sophisticated technologies can reduce staff time and associated costs as well as provide better management information to court administrators to assess performance and focus on problem areas. Improved jury yields essentially translate as reduced administrative costs per juror summoned for service. Restrictions on access to juror information do not necessarily reduce costs or boost efficiency, although in some instances courts that have reviewed their approach to juror privacy have declined to collect juror information for which they do not perceive a legitimate need for jury administration or selection purposes. It should not be overlooked, however, that operational matters also provide citizens with their first impressions of jury service. It establishes what they can expect from courts in terms of convenience in communication with the jury office, demands on their time, reimbursement for out-of-pocket expenses, and the levels of respect for privacy. It is clear from examining the Local Court Surveys that state courts differ a great deal across all of these dimensions. As we discuss in the next section, citizens also experience a variety of practices in the courtroom during jury selection (voir dire) and during trial.
V. JUDGE & LAWYER SURVEY

The previous section focused on local court operations such as how prospective jurors are qualified and summoned for jury service, how long they serve, and what type of improvements efforts courts have undertaken. In this section, we examine data from the Judge & Lawyer Survey, which focused primarily on in-court procedures and trial innovations. Just as local court operations can vary from court to court, even within states, in-court practices and procedures can vary from judge to judge, even within local courts. To some extent, in-court practices are affected by court rules and case law proscribing acceptable and unacceptable procedures, but the majority of states leave a great deal of discretion in the hands of the trial judge to determine how to manage the jury trial and what tools or assistance, if any, can be provided to jurors. How this discretion is exercised often depends greatly on local litigation culture. This component of the State-of-the-States Survey is the first known study to document on a national basis the extent to which judges employ various practices and procedures during voir dire, trial, and jury deliberations.

Voir Dire

Jury selection practices vary tremendously from state to state across a number of key characteristics. For example, all courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Although most judges frown on the practice, many lawyers also view the voir dire as the beginning of trial advocacy – that is, their first opportunity to gain favor with the trial jurors or even present evidence if they can.

Other key differences in voir dire among states are the number of peremptory challenges available to each side; the legal criteria for ruling on challenges for cause; and the basic mechanics of voir dire such as judge-conducted or lawyer-conducted questioning, the use of general or case-specific questionnaires, and panel versus individual questioning.

Figure 1 illustrates the continuum of voir dire questioning from an exclusively judge-conducted voir dire on the left to an exclusively attorney-conducted voir dire on the right. Although attorney-conducted voir dire is common in state courts and judge-conducted voir dire is the norm in federal courts, there is still substantial state-to-state variation. See Table 21. In addition, attorney
participation in voir dire was slightly, but significantly, higher\(^{50}\) in civil trials than in criminal trials in 19 states, suggesting that judges in those jurisdictions are less restrictive in jury selection in civil trials. In two states – Massachusetts and New Jersey – the pattern was reversed, with judges exerting greater control in civil trials and giving lawyers slightly more participation in criminal trials.

The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.\(^{51}\) Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges. On the other hand, many judges prefer to conduct most or all of the voir dire themselves. They argue that attorneys waste too much time and unduly invade jurors’ privacy by asking questions that are only tangentially related to the issues likely to arise at trial.

Who questions the prospective jurors is not the only aspect of voir dire that can differ substantially from judge to judge and from court to court. The methods that judges and attorneys use to question jurors and to learn jurors’ responses also vary considerably, both in form and in combinations of forms. See Table 22. For example, the vast majority of judges and attorneys (86%) reported that in their most recent jury trial, at least some questions were posed to the full panel, usually with instructions to answer by a show of hands. Another common approach is to question each juror individually in the jury box, moving from juror to juror until the entire venire panel has been questioned.

<table>
<thead>
<tr>
<th>Table 21: Who Conducts Voir Dire in State Courts?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Predominantly or Exclusively Judge-Conducted Voir Dire</td>
</tr>
<tr>
<td>Judge and Attorney Conduct Voir Dire Equally</td>
</tr>
<tr>
<td>Predominantly or Exclusively Attorney-Conducted Voir Dire</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table 22: Voir Dire Methods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Questions to prospective jurors in the venire…</td>
</tr>
<tr>
<td>Full Panel</td>
</tr>
<tr>
<td>Individuals in the Jury Box</td>
</tr>
<tr>
<td>Individuals at Sidebar / Chambers</td>
</tr>
<tr>
<td>General Questionnaire</td>
</tr>
<tr>
<td>Case Specific Questionnaire</td>
</tr>
</tbody>
</table>

Judges and attorneys have gradually become more aware of jurors’ reluctance to disclose sensitive or embarrassing information in the presence of the entire jury panel and courtroom observers. Approximately one-third reported

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\(^{50}\) The average difference in ratings between criminal and civil voir dire in these states was only .45 higher on a scale of 1 (exclusively judge-conducted voir dire) to 5 (exclusively attorney-conducted voir dire). The only state with a difference greater than 1 was New York, for which survey respondents indicated that criminal voir dire was slightly dominated by judges (2.81), but civil voir dire was heavily dominated by lawyers (4.58).

that jurors were given the opportunity to answer questions in the relative privacy of a sidebar conference or in the judge’s chambers. Other judges and lawyers provide jurors with written questionnaires to remove the necessity of disclosing information orally.

Most of these techniques are used in combination with one another. Fewer than one-third of jury trials relied on a single voir dire technique. In nearly half of the trials, voir dire involved direct questioning of the entire panel with supplemental individual questioning in the jury box or at sidebar. Seventeen percent (17%) of trials involved all three methods. Written questionnaires supplemented oral voir dire in 38 percent of the trials and were the only form of voir dire in 1 percent of the trials.

Capital felony trials required the greatest amount of time to impanel a jury; the median was 6 hours in state courts and 7 hours in federal courts. Non-capital felony trials and civil trials required 2 hours, and misdemeanor trials only 1.5 hours in state courts and 1 hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (1 hour or less). South Carolina relies heavily on the use of written questionnaires that are distributed to attorneys before voir dire, rather than oral questioning in court. Connecticut consistently had the longest voir dire time – 10 hours in felony trials and 16 hours in civil trials, ostensibly due to the statewide practice of predominantly attorney-conducted individual voir dire with each prospective juror. See Appendix F, Tables 2 and 3, for state-by-state comparisons of voir dire length in felony and civil trials.

Not surprisingly, a number of trial characteristics in addition to case type can affect the length of jury selection including the number of jurors to be impaneled, the number of peremptory challenges, and the relative level of evidentiary and legal complexity that jurors are likely to encounter during trial. Table 23 indicates the average number of minutes that are added to or subtracted from the length of voir dire by these factors as well as by the use of various voir dire practices. The values were calculated using linear regression methods, which also incorporate the level of variation to assess whether those values indicate a statistically measurable difference in voir dire length as a result of those factors (indicated with asterisks) or whether those values are more likely the result of random chance.

To illustrate how to read this table, consider the example of a civil trial in which the judge and lawyers conduct voir dire on a more-or-less equal basis by questioning jurors individually in the jury box (the Reference trial). Neither the evidence nor the applicable law is expected to be complex. The final jury will be composed of 12 jurors and each side may exercise up to 3 peremptory challenges during jury selection. Using the regression model to calculate the values in Table 23, jury selection for this type of trial would require an average of 114 minutes to complete, or just under 2 hours. Imagine now that instead of a civil trial, this is misdemeanor trial, but all of the other factors have stayed the same. As a result, voir dire would take on average 25 minutes less to complete as indicated by the -25 value next to the trial characteristic for misdemeanor. Now imagine that it is the same misdemeanor trial, but the attorneys predominantly conduct the voir dire examination of jurors, which adds 25 minutes on average to the length of voir dire.
There are two important caveats with respect to the use of this table. First, although a number of the factors included in the regression model were statistically significant, the model itself was not particularly robust – that is, these trial characteristics and voir dire procedures explain only a small proportion of the variation in voir dire length.\(^52\) It is highly likely that this aspect of trial procedure is also affected by local legal culture, demographic and attitudinal characteristics of the local jury pool, and individual judge and lawyer preferences, which we were unable to incorporate into the regression model. Second, readers should not overlook weak (single asterisk) or non-existent (no asterisk) statistical significance for several of these factors. These indicate that the values generated by the model have greater than 5 percent probability of resulting from random chance rather than reflecting an accurate measure of the length of voir dire.

<p>| Table 23: Effect of Trial Characteristics and Voir Dire Practices on Length of Voir Dire |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|</p>
<table>
<thead>
<tr>
<th><strong>Trial Characteristics</strong></th>
<th><strong># Minutes Added or Subtracted</strong></th>
<th><strong>Voir Dire Practices</strong></th>
<th><strong># Minutes Added or Subtracted</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Casetype</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital Felony</td>
<td>707 ***</td>
<td>Exclusively by Judge</td>
<td>- 47 ***</td>
</tr>
<tr>
<td>Felony</td>
<td>8</td>
<td>Predominantly by Judge</td>
<td>- 14</td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>- 25 **</td>
<td>Equally by Judge &amp; Attorneys</td>
<td>Reference</td>
</tr>
<tr>
<td>Civil</td>
<td>Reference</td>
<td>Predominantly by Attorney</td>
<td>25 **</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exclusively by Attorney</td>
<td>105 ***</td>
</tr>
<tr>
<td><strong>Evidentiary Complexity</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all Complex</td>
<td>Reference</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moderately Complex</td>
<td>60 ***</td>
<td>Individual Jurors in Jury Box</td>
<td>Reference</td>
</tr>
<tr>
<td>Extremely Complex</td>
<td>119 ***</td>
<td>Individual Jurors at Sidebar</td>
<td>82 ***</td>
</tr>
<tr>
<td><strong>Legal Complexity</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all Complex</td>
<td>Reference</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moderately Complex</td>
<td>43 ***</td>
<td>General Written Questionnaires</td>
<td>- 13 *</td>
</tr>
<tr>
<td>Extremely Complex</td>
<td>85 ***</td>
<td>Case-Specific Questionnaires</td>
<td>227 ***</td>
</tr>
<tr>
<td><strong>Number of Trial Jurors Impaneled</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Jurors</td>
<td>71 ***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Jurors</td>
<td>47 ***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 Jurors</td>
<td>Reference</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Number of Peremptory Challenges Available to Parties</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 per side</td>
<td>Reference</td>
<td>** p &lt; .05</td>
<td></td>
</tr>
<tr>
<td>6 per side</td>
<td>38 ***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 per side</td>
<td>114 ***</td>
<td>** p &lt; .01</td>
<td></td>
</tr>
</tbody>
</table>

In spite of these weaknesses, these analyses do indicate a measurable relationship between several trial characteristics and voir dire practices and the average length of voir dire. Not surprisingly, as the issues to be decided at trial become increasingly serious, judges and attorneys spend greater amounts of time examining jurors. Thus, felony voir dire on average is about an

\(^52\) Adjusted R Square=0.217.
hour longer than civil trials, and voir dire in capital felony trials more than 13 hours longer. Increasing levels of trial complexity also contribute to longer voir dire, although evidentiary complexity has a stronger impact than legal complexity. Ironically, as the size of the jury increases, the amount of time needed to impanel the jury decreases. As a general rule, judge-conducted voir dire takes less time than attorney-conducted voir dire. Oral questions posed to the entire panel takes substantially less time, while individual voir dire at sidebar and the use of case-specific questionnaires tends to increase the length of voir dire.

**Trial Practices**

Once the jury has been impaneled, the evidentiary portion of the trial begins. This aspect of trial practice has perhaps undergone the most dramatic changes in recent years. In particular, a sea change has occurred in the way judges and attorneys view the jury’s role during trial. The traditional view is that jurors are passive receptacles of evidence and law who are capable of suspending judgment about the evidence until final deliberations, of perfectly and completely remembering all of the evidence presented at trial, and of considering the evidence without reference to preexisting experience or attitudes. This view has rapidly given way to a contemporary understanding of how adults perceive and interpret information, which posits that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial.\(^{53}\) This view of juror decision-making has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall and comprehension of evidence, and juror confidence and satisfaction with deliberations.\(^{54}\) The Judge & Lawyer Survey asked trial practitioners to report their experiences with these types of techniques in their most recent trials. Table 24 provides an overview comparing the responses of practitioners in state court to those in federal court.


\(^{54}\) G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2d ed. 2006); AMERICAN BAR ASSOCIATION, supra note 4.
Table 24: Trial Innovations

<table>
<thead>
<tr>
<th>Note taking (%)</th>
<th>State Courts</th>
<th>Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurors could take notes</td>
<td>69.0</td>
<td>71.2</td>
</tr>
<tr>
<td>Jurors given paper for notes</td>
<td>63.7</td>
<td>68.4</td>
</tr>
<tr>
<td>Jurors given a notebook</td>
<td>5.8</td>
<td>11.2</td>
</tr>
<tr>
<td>Allowed juror questions during trials (%)</td>
<td>15.1</td>
<td>10.9</td>
</tr>
<tr>
<td>Criminal Trials</td>
<td>14.0</td>
<td>11.4</td>
</tr>
<tr>
<td>Civil Trials</td>
<td>16.1</td>
<td>10.9</td>
</tr>
<tr>
<td>Could discuss evidence before deliberations (%)</td>
<td>1.5</td>
<td>0.9</td>
</tr>
<tr>
<td>Criminal Trials</td>
<td>0.7</td>
<td>0.3</td>
</tr>
<tr>
<td>Civil Trials</td>
<td>2.2</td>
<td>1.3</td>
</tr>
<tr>
<td>Juror instruction methods (%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preinstructed on substantive law</td>
<td>17.7</td>
<td>16.9</td>
</tr>
<tr>
<td>Instructed before closing arguments</td>
<td>41.2</td>
<td>35.5</td>
</tr>
<tr>
<td>Given guidance on deliberations</td>
<td>54.4</td>
<td>52.7</td>
</tr>
<tr>
<td>At least 1 copy of written instructions provided</td>
<td>68.5</td>
<td>79.4</td>
</tr>
<tr>
<td>All jurors received copy of written instructions</td>
<td>32.6</td>
<td>39.0</td>
</tr>
</tbody>
</table>

It now appears that permitting jurors to take notes is a widely accepted practice in most jurisdictions. More than two-thirds of the trials in both state and federal courts permitted juror notetaking, and the vast majority of those provided writing materials for jurors to do so. In spite of its support in many jurisdictions, as well as the overwhelming empirical research attesting to its effectiveness,\(^{55}\) juror notetaking was permitted in less than half the trials in 14 states, 8 of which were located in New England or the Mid-Atlantic region of the United States. One factor in judges’ decisions to permit juror notetaking was the complexity of the case; jurors serving in trials with more complex evidence were significantly more likely to be permitted to take notes and to be provided with notetaking materials than jurors in less complex trials.\(^{56}\)

A second factor was the existence, or lack thereof, of statutes, court rules, or caselaw expressly stating the extent of judicial discretion to permit or prohibit juror notetaking. For example, Arizona, Colorado, Indiana and Wyoming mandate that trial judges permit jurors to take notes;\(^{57}\) judges have no discretion to prohibit the practice. Only Pennsylvania and South Carolina reported on the Statewide Survey that juror notetaking was prohibited.\(^{58}\)

This question of legal authority for different jury trial practices is one that has important implications for jury improvement efforts. We will highlight the general issue using juror

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\(^{56}\) Jurors Permitted to Take Notes \(F(6, 11,351) = 25.460\), Jurors Given Writing Materials \(F(6, 11,351) = 35.529\), both \(ps < .001\).

\(^{57}\) ARIZ. R. CIV. PROC. Rule 39(p); ARIZ. R. CRIM. PROC. Rule 18.6(d); COLO. R. CIV. PROC. Rule 47(t); COLO. R. CRIM. PROC. Rule 16(f); IND. R. CT. Jury Rule 20; WYO. R. CIV. PROC. Rule 39.1(a); WYO. R. CRIM. PROC. Rule 24.1(a).

\(^{58}\) Pennsylvania prohibits juror notetaking in criminal trials only. PA. R. CRIM. PROC. Rule 644. South Carolina reported that juror notetaking was prohibited in both criminal and civil trials, but did not report the authority for the prohibition.
notetaking as an illustration, but readers should understand that the existence or absence of positive law had some impact on all of the trial techniques examined in the Judge & Lawyer Survey. The Statewide Survey requested that respondents indicate whether these trial practices were required, permitted in the discretion of the trial judge, or prohibited and to provide the legal authority (statute, court rule, or court opinion). Table 25 shows the percentage of trials in which jurors were permitted to take notes based on responses to the Statewide Survey concerning the existence of legal authority governing juror notetaking. Not surprisingly, in states where juror notetaking is required, the percentage of trials in which jurors were permitted to take notes is extremely high. Overall, jurors were permitted to take notes in more than two-thirds of the trials in states that leave the decision on juror notetaking to the discretion of the trial judge, but state-by-state rates of juror notetaking ranged from a low of 19 percent in Rhode Island to a high of 96 percent in Arkansas. See Appendix F, Table 7. What is extremely surprising is the apparent lack of compliance in those states that prohibit juror notetaking. According to the Judge & Lawyer Survey reports, of the 206 criminal trials that took place in Pennsylvania and South Carolina (the only two states that prohibit juror notetaking), more than one-fourth of the judges permitted jurors to take notes, and of the 36 civil trials that took place in South Carolina, nearly half (42%) permitted jurors to take notes! In fact, in 23% of both the criminal and civil trials, jurors were actually given writing materials with which to take notes!

<table>
<thead>
<tr>
<th>Juror Notetaking …</th>
<th>% of Trials in which Jurors were Permitted to Take Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Civil Trials</td>
</tr>
<tr>
<td>Prohibited</td>
<td>42</td>
</tr>
<tr>
<td>Permitted</td>
<td>70</td>
</tr>
<tr>
<td>Required</td>
<td>97</td>
</tr>
</tbody>
</table>

The apparent non-compliance with the prohibition on juror notetaking by Pennsylvania and South Carolina trial judges is quite puzzling. Certainly one possibility may be that judges and lawyers in those states have learned enough about the benefits of this technique (and the absence of any disadvantages) that they simply ignore the prohibition. As we find throughout this discussion, many of these techniques are employed in combination with one another, suggesting that judicial and lawyer education about these techniques in many jurisdictions may have begun to show measurable effects.

Yet another possibility is the extent to which the trial bench and bar may be unaware of prohibitions on different trial court practices – if, in fact, any legal authority for the prohibitions actually exists. For example, the South Carolina Statewide Survey reported that juror notetaking is prohibited in both criminal and civil trials, but it did not report the legal authority for the prohibition. A search of the South Carolina statutes, court rules, and reported judicial opinions did not reveal the source of the prohibition. In fact, the only judicial opinion that discusses juror notetaking – a 1985 appeal from a capital felony trial – indicated that juror notetaking is a matter of trial court discretion, and not prohibited at all. 59 Perhaps the individual who completed South Carolina’s Statewide Survey was simply mistaken. Or perhaps the prohibition on juror notetaking in South Carolina simply reveals a widespread perception within the South Carolina

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59 South Carolina v. South, 331 S.E.2d 775 (S.C. 1985)(“Finally, South contends the lower court erred in allowing jurors to take notes. Such was a proper exercise of discretion.”). Id. at 778.
legal community about this technique. This possibility in South Carolina concerning juror
notetaking, and in other states concerning the norms for other trial practices for which no legal
authority can be found, may explain non-apparent non-compliance rates, but also the great
variation in the use of these techniques in states that leave these decisions in the sound discretion
of the trial judge.

We have already seen how trial complexity affects the length of voir dire. It also affects judicial
decisions about trial techniques, and thus deserves some additional explanation. Two of the survey
questions asked respondents to rate the level of evidentiary and legal complexity on a scale of 1 (not
at all complex) to 7 (extremely complex). See Table 26. Overall, 18 percent of trials were rated as very
complex (6 or 7) on at least one measure of complexity and 7 percent on both measures. It is
important to recognize that in studies of trial complexity, judges and lawyers tend to perceive
complexity at lower levels than jurors. Therefore, when judges and lawyers rate complexity as a 6 or 7,
jurors’ perceptions of complexity will, quite literally, be off the scale.

Survey respondents rated trial complexity in predictable ways. On average, capital felony trials
were rated the most complex on both evidentiary and legal scales. Civil trials were rated slightly
more complex than non-capital felony trials. Misdemeanor trials were the least complex. On
average, trials in federal court were rated more complex than those in state courts.

Trials that are highly complex – e.g., 6 or higher on a 7-point scale – are trials in which juror
notebooks can be extremely helpful, but overall juror notebooks were not very popular, even in
complex trials. Only 11 percent of trials involving complex evidence and law provided
notebooks for jurors. Notebooks were used twice as often in civil trials (8%) as in criminal trials
(4%), and nearly twice as often in federal court (11%) as in state court (6%).

One of the more controversial techniques involves permitting jurors to submit written questions
to witnesses. A substantial and growing body of empirical research has found that this practice,
if properly controlled by the trial judge, improves juror comprehension without prejudicing

60 Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, & G. Thomas Munsterman, The Hung Jury:
The American Jury’s Insights and Contemporary Understanding, 39 CRIM. L. BULL. 33, 46 (2003).

61 The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief
summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a
glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their
backgrounds. Munsterman et al. supra note 52, at 102-03.

62 F (1, 11,750) = 69.358, p < .001.

63 F (1, 11,277) = 41.422, p < .001.
litigants’ rights to a fair trial. The crux of the controversy stems from philosophical arguments about the role of the jury in the context of an adversarial system of justice. The practice is mandated for criminal trials in three states, prohibited in eleven states, and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in four states, prohibited in ten states, and left to the discretion of the trial judge in the rest.

Compliance with prohibitions juror questions was greatly improved over that for juror notetaking. None of the 1,175 criminal trials in states that prohibit juror questions violated the prohibition, and only 6 percent of the 1,394 civil trials did not follow the rule. In states that mandate that jurors be permitted to submit questions to witnesses, jurors were permitted to do so in 84% of the criminal trials and 86% of the civil trials.

Given the ongoing controversy in many jurisdictions, what is most surprising from these data is that jurors were allowed to ask questions in 14.5 percent of all trials, and 15.6 percent of civil trials. Rules or case law expressly permitting or prohibiting juror questions had a significant impact on the practice. Evidentiary complexity also played a role, with judges permitting juror questions in 17 percent of the most complex cases, but only 12 percent of the least complex cases. Judges were also significantly less likely to permit juror questions in federal court compared to state courts.

Another controversial technique is to allow jurors in civil trials to discuss the evidence among themselves before final deliberations. Arizona, Colorado, and Indiana have enacted court rules

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64 Shari S. Diamond, Mary R. Rose, Beth Murphy, & Sven Smith, Juror Questions During Trial: A Window into Juror Thinking, 59 VANDERBILT L. REV. 1927 (2006); Larry Heuer & Steven Penrod, Juror Notetaking & Question Asking During Trials, 18 L. & HUMAN BEHAV. 121 (1994).

65 ARIZ. R. CRIM. PROC. Rule 18.6(e); COLO. R. CIV. PROC. Rule 47(u); COLO.R. CRIM. PROC. Rule 24(g); BURNS IND. JURY R. Rule 20(7).

66 Matchette v. Georgia, 364 S.E.2d 545 (1988); Minnesota v. Costello, 646 N.W.2d 204 (2002); Wharton v. Mississippi, 784 So.2d 985 (1998); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). The Statewide Surveys for Illinois, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law. Arkansas recently prohibited juror questions by court rule. See ARK. R. CRIM. P. Rule 33.8. The rule was enacted after data collection for the State-of-the-States Survey was complete.

67 ARIZ. CIV. PROC. Rule 39(b)(10); COLO. R. CIV. PROC. Rule 47(u); IND. R. CT. Jury Rule 20; WYO. R. CIV. PROC. Rule 39.4.

68 Minnesota v. Costello, 646 N.W.2d 204 (2002); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). The Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.

69 Cox & Snell R Square = .171, Juror Qs Permitted (Criminal) Wald=446.098, p < .001; Juror Qs Permitted (Civil) Wald =14.274, p < .001.

70 Id. Evidentiary Complexity Wald = 23.048, p < .001; Legal Complexity Wald = .510, ns.

71 Id. State Court Wald = 9.781, p = .002

72 MUNSTERMAN et al., supra note 52, at 124-25.
explicitly permitting this practice. Maryland has caselaw that apparently condones the practice. Elsewhere, the practice is implicitly permitted by virtue of the fact that no legal authority explicitly prohibits it. In most states it is prohibited altogether. Overall, juror discussions were permitted in only 2 percent of state jury trials and only 1 percent of federal court trials. Surprisingly, one-third of the trials in which jurors were permitted to discuss the evidence took place in states that prohibit the practice. Given the large number of states (29) in which unauthorized juror discussions took place, it appears that this particular technique has generated enough interest to encourage a small number of judges to secure the consent of counsel and to permit juror discussions in individual cases, even though they are expressly prohibited.

A substantial amount of research suggests that juror comprehension of the law is affected by the timing and form of jury instructions. One technique growing in prevalence (18%) is to pre-instruct jurors about the substantive law – that is, to provide a basic overview of the black letter law governing the case in addition to administrative housekeeping rules and general legal principles. Pre-instructions provide jurors with a legal context in which to consider the evidence, helping them better understand and evaluate evidence as they hear it and remember evidence more accurately. Eight states report that they require judges to pre-instruct jurors on the substantive law before the evidentiary portion of the trial, although most of the required instructions deal with basic legal principles such as burden of proof and admonitions concerning juror conduct rather specific instructions on the elements of crimes or claims to be proven at trial. Two states – Nevada and Texas – prohibit pre-instructions.

As before, the existence of rules concerning pre-instructions affected judges’ decisions to pre-instruct juries. Judges were also significantly less likely to pre-instruct in civil trials compared to criminal trials. Federal judges were marginally more likely to pre-instruct than state judges, but trial complexity was unrelated to judges’ decisions to pre-instruct. It does appear

73 ARIZ. R. CIV. PROC. Rule 39(f); COLO. JURY INSTRUCTIONS 1:4, 1:8;
77 COLO. R. CIV. PROC. Rule 47(a)(2)(V), 47(a)(5); COLO. R. CRIM. PROC. Rule 24(a)(5); IND. R. Ct. Jury Rules 20(a); MO. R. S. CT. Rule 27.02; N.Y. CRIM. PROC. LAW §§ 260.30, 270.40; OR. R. CIV. PROC. Rule 58B(2); OR. REV. STAT. § 136.330; TENN. R. CRIM. PROC. Rule 51.03(1); TENN. R. CIV. PROC. Rule 30(d)(1); WYO. R. CIV. PROC. Rule 39.3, WYO. R. CRIM. PROC. Rule 24.3. No legal authority could be found for the requirement in South Carolina.
78 Neither state cited legal authority for the prohibition in their respective Statewide Surveys.
79 Cox & Snell R Squared = .054, Pre-instruction Rule (Civil) Wald = 22.531, p < .001; Pre-instruction Rule (Criminal) Wald = 11.416, p = .001.
80 Id. Criminal Trial Wald = 94.564, p < .001.
81 Id. Jurisdiction Wald = 3.726, p = .054.
82 Id. Evidentiary Complexity Wald = .851, Legal Complexity Wald = .022, both ps, ns.
that many judges who pre-instructed their juries view this technique as part of a set of jury trial practices; those who did so were also significantly more likely to permit jurors to take notes, to submit questions to witnesses, to permit juror discussions before deliberations, to deliver final instructions before closing arguments, and to provide jurors with a written copy of the instructions.\footnote{Id. Juror Notetaking $Wald = 22.471$, $p < .001$; Juror Questions $Wald = 116.235$, $p < .001$; Juror Discussions $Wald = 32.536$, $p < .001$; Instructions Before Closing $Wald = 16.867$, $p < .001$; and Written Instructions $Wald = 3.705$, $p = .054$.}

Other techniques to improve juror comprehension of the law involve instructing the jury before closing arguments and to provide written copies of the instructions to jurors for use during deliberations.\footnote{MUNSTERMAN et al., supra note 52, at 142-43, 151-52.} The rationale for the former is that closing arguments are more meaningful within the legal framework provided by the instructions. However, fewer than half of the trials in the study did so. Because jury instructions are often quite lengthy, written instructions ensure that jurors are able to consider all of the instructions during deliberations, not just those portions that they can remember. At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials, and nearly three-quarters of federal jury trials. However, only one-third provided copies for all jurors during deliberations.

State rules governing the timing and form of instructions were a significant factor in when and how instructions were delivered in both criminal and civil trials.\footnote{Instructions before Closing Cox & Snell R Square = .282; Rules on Timing of Instructions (Civil) $Wald = 11.389$, $p = .001$; Rules on Timing of Instructions (Criminal) $Wald = 113.983$, $p < .001$. Written Instructions Cox & Snell R Square = .283, Rules on Written Instructions (Criminal) $Wald = 1339.244$, $p < .001$.} Evidentiary complexity was a factor in the use of both techniques, but surprisingly in different directions. Controlling for other factors, judges were less likely to instruct before closing arguments in complex trials,\footnote{Id. Evidentiary Complexity $Wald = 6.296$, $p = .012$; Legal Complexity $Wald = .238$, $ns$.} but more likely to provide written instructions.\footnote{Id. Evidentiary Complexity $Wald = 17.476$, $p < .001$; Legal Complexity $Wald = .205$, $ns$.} Federal judges were less likely than state judges to instruct before closing arguments,\footnote{Id. Jurisdiction $Wald = 22.744$, $p < .001$.} but were more likely to provide written instructions to jurors.\footnote{Id. Jurisdiction $Wald = 66.056$, $p < .001$.} Like pre-instructions, much of the discretion exercised by judges appears to be affected by their awareness and support for other jury trial innovations. Judges who instructed before closing arguments were significantly more likely to pre-instruct juries, to permit juror notetaking and juror discussions, and to provide written instructions, but not to permit juror questions.\footnote{Juror Notetaking $Wald = 132.911$, $p < .001$; Juror Questions $Wald = .176$, $ns$; Juror Discussions $Wald = 10.711$, $p = .001$; Pre-Instructions $Wald = 18.805$, $p < .001$; Written Instructions $Wald = 410.537$, $p < .001$.} Judges who provided the jury with at least one copy of written instructions were marginally more likely to pre-instruct on the law, to permit jurors to take notes, and to deliver final instructions before closing arguments, but not to permit juror questions or discussions.\footnote{Juror Notetaking $Wald = 345.551$, $p < .001$; Juror Questions $Wald = .306$, $ns$; Juror Discussions $Wald = .921$, $ns$; Pre-Instructions $Wald = 2.726$, $p < .099$; Instructions before Closing $Wald = 404.073$, $p < .001$.}
Local practices and trial exigencies affected some procedural aspects of the trials in this study. Juries deliberating in state courts were significantly more likely to be sequestered (25% of all trials) than juries in federal court (15% of all trials). Moreover, criminal juries in state courts were more likely to be sequestered than civil juries (27% and 23%, respectively), but that pattern was reversed in federal courts with civil juries more likely to be sequestered (11% and 17%, respectively). Alternates were most likely to deliberate in federal civil trials (23%). Alternates deliberated in state civil trials 10% of the time, but in just 1% of criminal trials in both state and federal trials.

What effect do these techniques have on the length of jury deliberations? In Table 27 we see that the length of deliberations across all case categories is slightly shorter in state courts compared to federal courts, although some state court deliberations exceeded those in federal court. For example, Connecticut had the longest average deliberation time (7.75 hours) in felony trials. Wisconsin had the shortest (1 hour).

Like voir dire, the length of deliberations was affected by a number of factors, some related to trial characteristics and some related to the types of jury techniques employed by the judge. Table 28 was constructed using the same methods as Table 23 and indicates the effect of these factors on the length of jury deliberations. The reference trial is again a civil trial in state court in which the evidence and law are not at all complex, twelve jurors were required to deliberate to a unanimous verdict, and no decision-making aids were provided to jurors during trial or deliberations. The average deliberation time for such a trial is 166 minutes (2.77 hours).

92 \( F = 48.617, p < .001 \). Although statistically significant, this finding should be viewed with caution insofar that respondents may have defined the term “sequestered” to encompass deliberations in which the jury was kept together during routine breaks during deliberations (e.g., lunch), but not sequestered overnight.

93 State Court \( F = 19.355, p < .001 \); Federal Court \( F = 5.371, p = .021 \).

94 The Federal Rules of Civil Procedure specifies that civil juries consist of “not fewer than six and not more than twelve members” and requires that all jurors impaneled participate in deliberations. FED. R. CIV. PROC. Rule 48.

95 Like the voir dire regression model, the deliberation model failed to include the vast majority of factors that explain deliberation length in jury trials. Adjusted R Square=0.146. It is thus subject to the same caveats discussed in the voir dire model.
### Table 28: Effect of Trial Characteristics and Trial Practices on Length of Deliberations

<table>
<thead>
<tr>
<th>Trial Characteristics</th>
<th># Minutes Added or Subtracted</th>
<th>Trial Practices</th>
<th># Minutes Added or Subtracted</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Court</td>
<td>Reference</td>
<td>None</td>
<td>Reference</td>
</tr>
<tr>
<td>Federal Courts</td>
<td>123</td>
<td>Jurors Permitted to Take Notes</td>
<td>26</td>
</tr>
<tr>
<td>Casetype</td>
<td></td>
<td>Jurors Provided a Notebook</td>
<td>31</td>
</tr>
<tr>
<td>Capital Felony</td>
<td>225</td>
<td>Jurors Permitted to Submit Questions to Witnesses</td>
<td>- 10</td>
</tr>
<tr>
<td>Felony</td>
<td>39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>- 7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil</td>
<td>Reference</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidentiary Complexity</td>
<td></td>
<td>Jurors Permitted to Discuss Evidence</td>
<td>- 15</td>
</tr>
<tr>
<td>Not at all Complex</td>
<td>Reference</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moderately Complex</td>
<td>112</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extremely Complex</td>
<td>223</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal Complexity</td>
<td></td>
<td>Jurors Instructed before Closing</td>
<td>- 23</td>
</tr>
<tr>
<td>Not at all Complex</td>
<td>Reference</td>
<td>Arguments</td>
<td></td>
</tr>
<tr>
<td>Moderately Complex</td>
<td>55</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extremely Complex</td>
<td>109</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Trial Jurors Impaneled</td>
<td></td>
<td>Written Instructions</td>
<td></td>
</tr>
<tr>
<td>6 Jurors</td>
<td>-18</td>
<td>1 Copy of Instructions for Jury</td>
<td>35</td>
</tr>
<tr>
<td>12 Jurors</td>
<td>Reference</td>
<td>All Jurors Provided Written Instructions</td>
<td>5</td>
</tr>
<tr>
<td>Alternates Deliberated</td>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jurors Sequestered</td>
<td>- 36</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unanimous Verdict Required</td>
<td>- 20</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* \( p < .01 \)

** \( p < .05 \)

*** \( p < .001 \)

As a general matter, trial characteristics tended to affect deliberation length more often than trial practices. On average, juries deliberate in state court less time than federal juries. Juries in both capital and non-capital felony trials deliberate significantly longer than civil trial juries, but there was no significant difference between civil and misdemeanor deliberations. Both evidentiary and legal complexity resulted in increased deliberations. Surprisingly, the number of impaneled jurors deliberating had no effect on deliberation length, but permitting alternates to

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96 Id. Jurisdiction \( t = -7.704, p < .001 \).

97 Id. Capital felony \( t = 9.650, p < .001 \); Non-capital felony \( t = 4.223, p < .001 \); Misdemeanor \( t = .013, ns \).

98 Id. Evidentiary Complexity \( t = 9.002, p < .001 \); Legal Complexity \( t = 7.160, p < .001 \).
deliberate did lengthen deliberations.\textsuperscript{99} Sequestering juries and requiring a unanimous verdict actually decreased deliberation time.\textsuperscript{100}

Some trial practices did affect deliberation length. For example, jurors who were instructed before closing arguments deliberated for shorter periods, suggesting that they may have less difficulty understanding and applying the instructions.\textsuperscript{101} On the other hand, jurors who were permitted to take notes, jurors who were given trial notebooks, and juries that were given at least one written copy of the instructions tended to deliberate longer, perhaps because jurors who were equipped with those tools engaged in more thorough deliberations.\textsuperscript{102} Other techniques such as juror questions, pre-instruction on the evidence and law, and juror discussions had no effect on deliberation length.

As we noted earlier, many judges often use innovative jury trial techniques in various combinations. We wanted to gauge the extent to which statewide initiatives had an effect on judges’ willingness to do so. To examine this issue, we constructed an index of key jury techniques consisting of juror notetaking, juror questions, juror discussions, pre-instructions, instructions before closing arguments, and written instructions. The index ranged from 0 (no innovative techniques employed at trial) to 6 (all key techniques employed). The median index value was 2 – that is, an average of two techniques employed per trial. Then, using regression analyses to control for the trial venue (state or federal court), evidentiary and legal complexity, and case type (criminal or civil), we measured the impact of various statewide initiatives to determine which, if any, resulted in increased use of these techniques.\textsuperscript{103} We found that educational efforts directed at all potential audiences (judges, attorneys, and the public) resulted in increased use of innovative techniques.\textsuperscript{104} More intensive efforts to test and evaluate these techniques (e.g., evaluations, court observations) were also associated with increased use of key innovations.\textsuperscript{105} Surprisingly, some approaches to jury improvement correlate with lower use of these techniques, most notably, the existence of a statewide task force or commission.\textsuperscript{106} But this may be simply a matter of timing. That is, the substantive work of these task forces may not yet have translated into measurable increases in the use of jury innovations.

\textsuperscript{99} Id. Number of Jurors $t = .695$, $ns$; Alternates deliberated $t = 2.879$, $p = .004$.

\textsuperscript{100} Id. Jurors sequestered $t = -4.395$, $p < .001$; Unanimous verdict $t = -2.889$, $p = .004$.

\textsuperscript{101} Id. Instructions before Closing $t = -3.539$, $p < .001$.

\textsuperscript{102} Id. Juror Notetaking $t = 3.180$, $p = .001$; Juror Notebooks $t = 4.780$, $p < .001$; Written Instructions $t = 4.471$, $p < .001$.

\textsuperscript{103} Adjusted R Square=.138; $F (14, 11,006)=127.22$, $p < .001$. Of the trial characteristic factors incorporated into the model, only Evidentiary complexity ($t = 5.919$, $p < .001$) and Type of case ($t = 4.754$, $p < .001$) were statistically significant.

\textsuperscript{104} Judge education $t = 13.841$, Attorney education $t = 7.259$, and Public education $t = 21.920$, all $ps < .001$.

\textsuperscript{105} Evaluate ($t = 12.735$), Court observation ($t = 11.181$), all $ps < .001$.


40
VI. CONCLUSIONS

The State-of-the-States Survey of Jury Improvement Efforts is, to the best of our knowledge, the most comprehensive snapshot of jury operations and practices ever yet undertaken. From it, we confirmed a great deal of information about how state and local courts operate and manage their jury systems. Some of these findings were suspected, but we lacked reliable empirical documentation on which to confirm these suspicions. The statistics on jury yield, for example, fall roughly in the ranges we expected, but we anticipate that more precise statistics will provide courts with a better baseline on which to assess their own performance.

On the other hand, the State-of-the-States Survey also resulted in many surprises, not the least of which was the actual number of jury trials conducted annually in state courts. The NCSC had previously estimated the number of jury trials conducted in general jurisdiction courts, but the State-of-the-States Survey indicates that a considerable proportion of jury trials – perhaps as much as 40 percent – are actually conducted by limited jurisdiction courts, which had been excluded from previous estimates. The volume of jury trial activity in these courts is certainly a surprise and suggests that recent trends to eliminate the right to trial by jury for low-level offenses and low-value civil cases in many jurisdictions has not been as widespread and successful as previously imagined. It also helps to explain the relatively high summoning rates – 15% of the adult American population each year – and the increasing proportion of Americans that report having served as trial jurors.

Certainly one finding from the State-of-the-States Survey is that, in spite of statewide efforts to regulate jury operations and trial practices in some jurisdictions, most jury operations and practices are still governed on a local, and even individual, basis. The use of general terminology to describe jury practices (e.g., term of service, statutory exemptions, one-step versus two-step summoning procedures) tends to mask a great deal of local variation. As we discovered during the long, slow process of collecting data for the State-of-the-States Survey, the extent of continued local autonomy not only makes it difficult to collect data, but also makes it difficult to define terms and to compare data across jurisdictions. It also indicates the inherent challenge – and the likelihood of substantial local resistance – that states face in attempting to implement statewide changes in jury procedures.

Another curious finding from the Judge & Lawyer Survey is the extent to which judges and lawyers reported the use (or non-use) of various trial techniques (e.g., juror notetaking, juror questions to witnesses, written copies of instructions) that apparently conflicts with existing court rules or policies. As a general matter, judges and lawyers are more likely to use these techniques in jurisdictions that prohibit them than to not use them in jurisdictions that mandate them. Some instances of these inconsistencies may be the result of mistakes or misunderstandings on the part of the individuals who completed the Judge & Lawyer Survey or the Statewide Survey. However, the strong correlations among the different trial techniques suggests that at least in some cases, judges and lawyers have concluded that the benefits of these techniques in terms of improved juror performance and satisfaction outweighs any potential

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disadvantages. This decidedly Ghandi-esque approach to jury improvement at a grassroots level is very intriguing, to say the least.

We also found it heartening to see how prominent jury operations and practices are in statewide and local court improvement efforts. To some extent, we saw that local court efforts are affected by statewide initiatives, especially those involving mandated changes in jury procedures. But the level of local court activity, even in jurisdictions that had not undertaken a statewide jury improvement initiative, was considerable. A number of factors may be driving local court efforts, including the need to reduce the cost of jury operations, to improve the efficiency and effectiveness jury operations, and to be more responsive to local community demands on juror time and resources.

So how should state and local courts use this Compendium Report and the state-by-state tables (available on the Center for Jury Studies website at http://www.ncsconline.org/D_Research/cjs/)? Certainly we hope that the comparative information and analysis will encourage courts that do not routinely collect and review data on their jury operations and practices to begin doing so. This type of information is invaluable for identifying areas of relative strength and weakness, setting improvement priorities, and formulating effective strategies for addressing weaknesses. With data from the State-of-the-States Survey, judges and court administrators can now evaluate their own practices in light of those of their peers within their respective states and across the country.

As we had hoped, the State-of-the-States Survey also provides direction to the NCSC Center for Jury Studies concerning the types of activities that we should pursue to better assist state and local court policymakers. In some respects, surprises among the State-of-the-States Survey indicate the need for additional research. For example, how effective are various techniques to improve the accuracy of addresses on the master jury list, thus improving the overall jury yield? To what extent do various voir dire methods elicit candid and complete information from jurors? What implications do these methods have on juror privacy expectations? To what extent do jurors make use of decision-making aids when they are offered to them during trial?

Other areas for future research include topics that the State-of-the-States Survey did not address, either because we believed that too few courts could easily report on these topics or because we simply overlooked the issue while designing the surveys. The former category includes the extent to which courts collect and analyze information about the demographic characteristics of their jury pools and how well those jury pools reflect a fair cross section of their respective communities. Questions concerning juror utilization was also omitted from the Local Court Survey, but is critically important to the issues not only of court efficiency, but also citizen satisfaction with jury service. Finally, the Judge & Lawyer Survey failed to include questions on trial outcomes and trial length as well as respondents’ opinions about voir dire and trial techniques (regardless of whether these were used at trial). All of these issues we hope to address in the future, perhaps in a subsequent iteration of the State-of-the-States Survey.

In the meantime, we continue to pursue other components of the National Jury Program, many of which are related to issues explored in the State-of-the-States Survey. The NCSC Center for Jury Studies is currently planning a National Conference on Pattern Jury Instructions, tentatively
scheduled for April 17-18, 2008. We are also seeking funding to develop a series of performance measures and tools for courts to use in assessing their jury operations; to host an Urban Courts Workshop to provide urban and statewide jury systems an opportunity to share information about innovative approaches they have developed to address the unique issues associated with heavy volume jury systems; to document the various funding streams that support the American jury system; and to undertake a series of demonstration projects to implement the ideals of the ABA Principles for Juries and Jury Trials into actual jury practices in up to six jurisdictions. Of course, the NCSC Center for Jury Studies will continue to assist courts through education, technical assistance, and research.
APPENDICES

APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

APPENDIX C: STATE-BY-STATE RESPONSE RATES

APPENDIX D: NOTES ON METHODOLOGY USED TO CALCULATE NATIONAL STATISTICS

APPENDIX E: STATE TABLES ON KEY JURY OPERATION AND PRACTICE MEASUREMENTS
APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

Robins, Kaplan, Miller & Ciresi L.L.P.  
($100,000 Legacy Donor)  
The U.S. Chamber of Commerce  
State Justice Institute  
Shook, Hardy & Bacon L.L.P.  
The Product Liability Advisory Council Foundation  
The Kirkland & Ellis Foundation  
The American Association for Justice  
(formerly ATLA)  
Susman Godfrey LLP  
Reed Smith LLP  
Simmons Cooper LLC  
Wilmer Hale LLP  
Cohen, Milstein, Hausfeld & Toll, LLP  
Debevoise & Plimpton LLP  
Hunton & Williams LLP  
Sonnenschein Nath & Rosenthal, LLP  
Vinson & Elkins, LLP  
The Lanier Law Firm, PC  
Gibbs & Bruns, LLP  
Locke Liddell & Sapp, LLP  
Fulbright & Jaworski, LLP  
Carrington Coleman Sloman & Blumenthal, LLP  
Baker Botts, LLP  
Williams Bailey Law Firm, LLP  
Jamail & Kolius  
Bracewell & Giuliani, LLP  
Richard Warren Mithoff, PC  
E.I. DuPont de Nemours & Co.  
Chimicles & Tikellis, LLP  
Boies Schiller & Flexner, LLP  
The Defense Research Institute  
Frederick M. Baron, Esquire  
Zelle Hofmann Voelbel Mason & Gette LLP  
Bolognese & Associates, LLC  
Finnegan Henderson Farabow Garrett & Dunner, LLP  
Abraham Watkins Nichols Sorrels Matthews & Friend, LLP  
Sayles Werbner, APC  
Stanley Mandel & Iola, LLP  
Paul Hastings Janofsky & Walker, LLP  
Sullivan & Cromwell, LLP  
The Olender Foundation  
The State Bar of Texas  
Donna D. Melby, Esquire  
American Board of Trial Advocates [ABOTA] – Minnesota State Chapter  
Epstein Becker Green Wickliff & Hall, LLP  
McGuireWoods, LLP  
Simpson Thacher & Bartlett LLP  
Levin Papantonio Thomas Mitchell Echsner & Proctor, PA  
Shearman & Sterling LLP  
Weil, Gotshal & Manges LLP  
Stein Mitchell & Meizes LLP  
Mark A. Modlin, TC  
Ashcraft & Gerel, LLP  
Kirkpatrick & Lockhart Nicholson Graham LLP  
Smyser Kaplan & Veselka, LLP  
Levin Fishbein Sedran & Berman  
Gregory P. Joseph Law Offices LLC  
Chadbourne & Park, LLP  
Hill Williams, PLLC  
The Fullenweider Firm  
Stanley M. Chesley, Esquire  
Hurwitz & Fine, P.C.  
William H. Graham, Esquire  
Vincent J. Esades, Esquire  
Ellen Relkin, Esquire  
JMW Settlements, Inc.  
Same Day Process Services, Inc.  
Bruce Braley, Esquire  
DecisionQuest, A Bowne Company
APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS
1. Current Status of Jury Improvement/Jury Reform Efforts

A. Is there an office or a formal organization or entity in your state concerned with managing or overseeing jury management? Yes / No

If yes, how was that office or organization created?
- Administrative Order (e.g., by Chief Judge/Justice, by court of last resort, by statewide judicial council)
- Court rule (please cite: ____________________________)
- Other authority (please specify: ____________________________)

B. Is there or has there existed in the past 10 years a task force or commission on jury improvement/jury reform? Y / N

If yes, what is the name(s) of Statewide Task Force(s)/Commission(s):

__________________________________________________________________
__________________________________________________________________

Contact Information for Task Force/Commission Chairperson:

__________________________________________________________________
__________________________________________________________________

Is the Task Force/ Commission currently active? Y / N

If no, dates of operation? _____________________________________________

What person or agency created the Task Force/Commission?
- Chief Judge/Justice
- State Court of Last Resort
- State Judicial Council
- Other person or agency
National Program to Increase Citizen Participation in Jury Service

How large was the Task Force/Commission? _____________ members

What constituencies were represented on the Task Force/Commission?

- Trial judges
- Appellate judges
- Court administrators
- Jury managers
- Clerks of court
- Prosecutors
- Criminal defense lawyers
- Civil litigation lawyers
- State legislators
- Private citizens/former jurors
- Other constituencies

Has the Task Force/Commission submitted a written report of its activities? Y / N

If yes, please provide the report title and release date: _________________________
_____________________________________________________________________

If the report is available online, please provide the URL: _______________________

D. Please indicate any current or ongoing projects concerning jury improvement/jury reform efforts in which your state is involved.

- Judicial education
- Court staff education
- Attorney education
- Changes to legislation or court rules
- Pilot or demonstration programs
- Evaluations
- Public education/outreach
- Survey research
- Court observation
- Other: ___________________________
2. Jury Management and Administration

A. What source lists are required or permitted to be used to compile to the master jury list?

<table>
<thead>
<tr>
<th>Source List</th>
<th>Required</th>
<th>Permitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registered Voter</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Licensed Driver</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>State Tax Rolls</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Unemployment</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Public Assistance</td>
<td>□</td>
<td>□</td>
</tr>
<tr>
<td>Other: _______________</td>
<td>□</td>
<td>□</td>
</tr>
</tbody>
</table>

Is the master jury list compiled at the state level or at the local level? State / Local

B. What are the juror fees in this state?

- [ ] Flat daily rate of $ ___________
- [ ] Graduated rate of $ _______ for first day; $ ______ for ______ days; $ ______ to the completion of service
- [ ] Reimbursement for mileage/travel at $ ___________
- [ ] Other juror compensation (e.g., reimbursement for child care) $ ___________

Are employers required to compensate employees while on jury service? Y / N

Employer size: _____________ Number of days: __________________________

C. Is the term of jury service determined at the state level or the local level? State / Local

If at the state level, what is the term of service? ________________ days / weeks

If at the local level, what (if any) is the maximum permissible term of service?

___________________ days / weeks

D. Does this state employ a standardized Qualification Questionnaire/Summons? Y / N

If yes, where can we obtain a copy? __________________________

E. Is summoning and qualification conducted as a one-step or two-step process?

- [ ] Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this state.
- [ ] Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this state.
- [ ] Individual counties within the state use both one-step and two-step procedures for qualification and summoning.
F. Please indicate any criteria for jury service.
   - U.S. Citizenship
   - Residency (established after _____ days / months)
   - Age: _____ years or older
   - No felony conviction*
   - No misdemeanor conviction*
   - English fluency/proficiency
   - Other qualification: _________________________________________________

   * Is this prior criminal conviction a temporary or permanent disqualification from jury service?
   - Permanent
   - Temporary

   Does the state promulgate criteria or guidelines for determining the English fluency of prospective jurors?  Y / N
   If yes, where can these criteria or guidelines be obtained?

   Does the state promulgate criteria or guidelines for deciding requests to be excused for any of the reasons above?  Y / N
   If yes, where can these criteria or guidelines be obtained?

G. Please indicate any statutorily recognized exemptions from jury service.
   - Previous jury service (within __________ months / years)
   - Over _______ years of age
   - Political office holders
   - Judicial officers
   - Licensed attorneys
   - Law enforcement personnel
   - Health care providers
   - Other exemptions: _____________________________________________________

H. Please indicate any statutory basis for excusal from jury service.
   - Public necessity
   - Medical hardship
   - Financial hardship
   - Extreme inconvenience
   - Other basis: ___________________________________________________________
3. Voir Dire Procedures and Practices

A. Has the state developed a standardized questionnaire for use in voir dire?  Y / N
   If yes, where can we obtain a copy? __________________________________________
   Has this questionnaire been implemented on a statewide basis, on a local basis, or by
   individual judge?
   ☐ Statewide implementation
   ☐ Local implementation
   ☐ Individual judge implementation

B. Under state law, are juror responses to the Qualification Questionnaire a public record
   that may be made available to parties for voir dire purposes?  Y / N
   If yes, please indicate the source of legal authority: ______________________________

C. Under state law, who is permitted to question prospective jurors?
   ☐ Judge only, no attorney participation
   ☐ Judge only, attorneys provide suggested written questions
   ☐ Judge primarily with limited oral questioning by attorneys
   ☐ Judge and attorney equally
   ☐ Attorney primarily with limited judge participation
   ☐ Attorney only
   If attorney only, is the judge present for voir dire?  Y / N

D. What grounds are recognized in positive law (e.g., statute, court rule, case law,
   administrative order) for removing prospective jurors from the venire for cause?  Please
   cite relevant authority.
   ☐ Personal relationship to parties, attorneys, or witnesses __________________________
   ☐ Personal knowledge of case _________________________________________________
   ☐ Personal or family experience with crime or civil claim __________________________
   ☐ Exposure to media reports ___________________________________________________
   ☐ Attitudes/bias regarding parties ______________________________________________
   ☐ Attitudes/bias regarding police ______________________________________________
   ☐ Attitudes/bias regarding case characteristics _________________________________
   ☐ Hardship __________________________________________________________________
   ☐ Other: ____________________________________________________________________

E. How many peremptory challenges are allotted to each side?
<table>
<thead>
<tr>
<th>State/Plaintiff</th>
<th>Defendant</th>
<th>Alternates</th>
<th>Multiple parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital Felony</td>
<td>_________</td>
<td>_______</td>
<td>__________</td>
</tr>
<tr>
<td>Felony:_________</td>
<td>_________</td>
<td>_______</td>
<td>__________</td>
</tr>
<tr>
<td>Misdemeanor:_____</td>
<td>_________</td>
<td>_______</td>
<td>__________</td>
</tr>
<tr>
<td>Civil:__________</td>
<td>_________</td>
<td>_______</td>
<td>__________</td>
</tr>
</tbody>
</table>
4. Trial Procedures and Practices

Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

A. Juror note taking

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

B. Juror submission of questions to witnesses

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

C. Juror discussion before deliberations

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

D. Preliminary instructions on law

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

E. Final instructions before closing argument

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

F. Final instructions after closing argument

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal

G. Interim commentary by counsel

- Required □ civil □ criminal
- Permitted □ civil □ criminal
- Prohibited □ civil □ criminal
5. Jury Deliberations
Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

A. Guidance on conducting deliberations
☐ Required ◯ civil ◯ criminal
☐ Permitted ◯ civil ◯ criminal
☐ Prohibited ◯ civil ◯ criminal

B. Pattern instructions mandated by state
☐ Required ◯ civil ◯ criminal
☐ Permitted ◯ civil ◯ criminal
☐ Prohibited ◯ civil ◯ criminal

C. Written instructions provided
☐ Required ◯ civil ◯ criminal
☐ Permitted ◯ civil ◯ criminal
☐ Prohibited ◯ civil ◯ criminal

D. Alternates participate in deliberations
☐ Required ◯ civil ◯ criminal
☐ Permitted ◯ civil ◯ criminal
☐ Prohibited ◯ civil ◯ criminal

E. Sequestration
☐ Required ◯ civil ◯ criminal
☐ Permitted ◯ civil ◯ criminal
☐ Prohibited ◯ civil ◯ criminal

6. Special Topics
A. Please provide any state statutes, court rules, policies, or summaries developed or implemented to assist local courts in managing notorious trials.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

B. Please provide any statewide statutes, court rules, policies or procedures exist to protect juror privacy during jury selection, during trial, and after trial.

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
C. Please describe any resources or programs that the state makes available to local courts to address instances of juror stress.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

D. Do juries sentence defendants convicted of non-capital crimes? Y / N
   If yes, describe the trial process (e.g., bifurcated, not bifurcated), evidence that is admissible for the jury’s consideration including sentencing guidelines, and the standards for judicial review or modification of the sentence.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

E. Is capital punishment authorized in your state? Y / N
   If yes, please provide specific statutes, court rules, procedures, policies, or summaries concerning the conduct of capital jury trials.

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

Please send completed responses to:

Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us
Court: _______________________________    Date: ____________
County in which court is located: 
State: 

1. Current Status of Local Jury Improvement/Jury Reform Efforts

   A. Is there currently or has there been a jury improvement/reform effort in this court in the past five years?  Yes / No

      If yes, please describe how this effort has been implemented and the contact information for the person organizing this effort.

      ____________________________________________________________________________
      ____________________________________________________________________________
      ____________________________________________________________________________

   B. Is there a local court committee or office concerned with managing or overseeing jury management? Yes / No

      If yes, please describe the committee composition (e.g., trial judges, court staff, lawyers, citizens) and contact information for the committee chairperson.

      ____________________________________________________________________________
      ____________________________________________________________________________
      ____________________________________________________________________________

1. Please indicate any current or ongoing jury improvement efforts in this court.
      □ Improve the representation in jury pool
      □ Improve jury yields
      □ Decrease incidence of non-respondents
      □ Improve jury facilities
      □ Upgrade jury system technology
      □ Improve juror utilization
      □ Improve juror comprehension (in-court reforms)
      □ Improve jury instructions
      □ Improve public outreach
      □ Other ______________________________
2. Jury Management and Administration

A. Is the master jury list for this court compiled locally or at the state level?
   - Local
   - State

B. What source lists are used to compile the master jury list?
   - Registered Voter
   - Licensed Driver
   - State Tax Rolls
   - Unemployment
   - Public Assistance
   - Other: ___________________

C. What are jurors paid in this court?
   - Flat daily rate of $ _______________
   - Graduated rate of $ ______ for the first day; $ ______ for _______ days; $ ______ to the completion of service
   - Reimbursement for mileage/travel at $ _______________
   - Other juror compensation (e.g., reimbursement for child case) $ _________________

D. What is the term of jury service? _____________________________________________
   ___________________________________________________________________________

E. Are jurors summoned and qualified simultaneously or in two separate steps?
   - Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this jurisdiction.
   - Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this jurisdiction.

F. Who decides juror requests to be excused from jury service and what criteria are used for deciding these requests?
   - Judge ____________________________________________________________
   ___________________________________________________________________________
   - Jury Administrator _______________________________________________________
   ___________________________________________________________________________
   - Other _________________________________________________________________
   ___________________________________________________________________________
G. How does the court follow-up on persons who fail to respond to summonses or fail to appear for service?

- Follow-up or Second notice
- Order to Show Cause
- Fines (Range $_____________________________)
- Other
- None

H. Approximately how many jury summonses are mailed each year? ______________

I. Please describe the percentage of prospective jurors who are:

- Summons returned as undeliverable ________%
- Disqualified ________%
- Exempted ________%
- Excused for hardship ________%
- Deferred to another term ________%
- Non-response / FTA ________%
- Qualified and available to serve ________%

**SHOULD TOTAL TO 100%**

J. Approximately how many juries are impaneled each year?

- Felony: _______________
- Misdemeanor _______________
- Civil _______________
- Other _______________

K. Does your court routinely screen prospective jurors for English language proficiency?

- Yes / No

If yes, please describe the procedures used?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

L. What accommodations does your court provide for prospective jurors with disabilities?

- Assisted language devices
- Sign language interpreters
- Wheelchair ramps
- Other (please describe) _______________

M. Please indicate the technologies that support your jury system.

Base System:
National Program to Increase Citizen Participation in Jury Service

☐ Jury Systems, Inc. (Jury + / Jury + Next Generation)
☐ ACS Government Systems
☐ Other commercial software (please specify): _____________________________
☐ Software developed in-house

Verification of qualification information
☐ First-class mail
☐ Interactive Voice Response (IVR) interface
☐ Internet interface
☐ Other (please specify): ________________________________________________

Reporting technology
☐ Jurors receive summons only
☐ Jurors receive postcard informing them when to report
☐ Jurors receive automated telephone call informing them when to report
☐ Jurors call in, listen to telephone message informing them when to report
☐ Jurors log on to court webpage with information about when to report
☐ Other (please specify): ________________________________________________

Orientation
☐ Jurors receive live orientation at courthouse
☐ Jurors receive informational brochure/booklet with summons
☐ Jurors can read orientation materials at court website
☐ Jurors can view orientation videotape online at court website
☐ Jurors can view orientation videotape on local cable television
☐ Jurors can view orientation videotape at local public library
☐ Other (please specify): ________________________________________________
3. Voir Dire Procedures and Practices

A. What kinds of juror information are routinely available to attorneys prior to trial?
- Name
- Street Address
- Zip code or Neighborhood designation only
- Qualification information
- Marital status
- Occupation / Employer
- Number and ages of minor children
- Other: ______________________________________

B. Are attorneys routinely given access to jurors’ qualification questionnaires? Y / N

C. Do prospective jurors complete a standardized questionnaire for voir dire purposes?
  Y / N
  If yes, where can we obtain a copy? __________________________________________

D. What is the typical length of voir dire in hours?
  Capital Felony: ______________________________
  Non-capital felony: ___________________________
  Misdemeanor: _______________________________
  Civil: ______________________________________

E. What local court rules, policies, or procedures exist to protect juror privacy during jury selection, during trial, or after completing jury service?
   ___________________________________________________________________________
   ___________________________________________________________________________

Name and Title of Survey Respondent: ____________________________________________
Telephone: ______________________ Facsimile: _________________________________
E-Mail: _______________________________________________________________________

Please send completed responses to:
Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us
1. Identification Information
   A. I am a:
      ☐ State trial judge
      ☐ Federal trial judge
      ☐ Attorney
         ☐ primarily criminal prosecution
         ☐ primarily criminal defense
         ☐ primarily civil plaintiff
         ☐ primarily civil defense
      ☐ Other legal practitioner

   B. Please indicate the location of the court (county, state) in which you preside (judge) or most often practice (attorney):
      ________________________________________________________________

   C. Please indicate the type of case in your most recent jury trial.
      ☐ Capital felony
      ☐ Felony
      ☐ Misdemeanor
      ☐ Civil
      ☐ Other jury trial

      What was the date(s) of trial? ________________________________________

      Where was the trial held (county, state)? ______________________________
      ☐ State court
      ☐ Federal court

      On a scale of 1 to 7, how complex was the evidence in that trial?
      Not at all complex  1  2  3  4  5  6  7  Very complex

      On a scale of 1 to 7, how complex was the law in that trial?
      Not at all complex  1  2  3  4  5  6  7  Very complex
2. Voir Dire

A. How were questions posed to prospective jurors in the venire? (check all that apply)
   - Oral questions posed to full panel
   - Oral questions posed to individual jurors in jury box
   - Oral questions posed to individual jurors at sidebar, in chambers, or otherwise outside the hearing of other jurors
   - Written responses to standardized questionnaire
   - Written responses to a case specific questionnaire
   - When was the questionnaire given to prospective jurors?
     - Prior to reporting for service
     - Jury assembly room before jury selection
     - In courtroom before questioning

B. What method was used to conduct the voir dire?
   - Strike & Replace Method: Twelve or more prospective jurors are seated in the jury box and examined by judge and/or attorneys. Judge rules on challenges for cause. Attorneys exercise peremptory challenges. Seats that are vacated by struck jurors are refilled by random selection.
   - Six/Four Pack Method: Similar to Strike & Replace Method except prospective jurors are questioned in groups of six or four until the full number of jurors is reached.
   - Struck: The entire panel is examined by the judge and/or attorneys and the judge rules on challenges for cause and hardship. Prospective jurors equal to the number of impaneled jurors, alternates and peremptory challenges is seated. The attorneys exercise peremptory challenges alternately until the final panel is selected and sworn.
   - Individual: Prospective jurors are examined individually outside the hearing of other jurors (e.g., at sidebar or in chambers). The judge rules on challenges for cause after each juror is questioned. After questioning outside the presence of other jurors, attorneys may be required to exercise peremptory challenges at the completion of each examination.
   - Other method (please describe):
C. Who questioned the jurors during the voir dire?
- Judge only
- Judge primarily with limited attorney follow-up
- Judge and attorney equally
- Attorney primarily with limited judge
- Attorney only
  - If attorney only, was the judge present for the voir dire? Y / N

- How long was the voir dire? __________________________ (hours)

- Please indicate which of the following trial procedures or practices were employed in your most recent jury trial
  - Jurors were permitted to take notes
  - Jurors were provided with writing utensils and notepaper for taking notes
  - Jurors were provided with a notebook containing one or more of the following: a glossary of unfamiliar terms, names and short biographies of witnesses, copies of documentary evidence or exhibits, preliminary or final instructions, and notepaper for taking notes
  - Jurors were permitted to submit questions in writing to witnesses
  - Jurors were permitted to discuss the evidence among themselves prior to deliberations
  - Jurors were given substantive instructions on the law prior to the evidentiary portion of the trial
  - Jurors were instructed on the law before closing argument
  - Jurors were instructed on the law after closing argument
  - Attorneys were permitted to provide interim summation to the jury during the evidentiary portion of the trial

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury service during trial.
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
Jury Deliberations

4. Please indicate which of the following trial procedures or practices were employed in your most recent jury trial.
   - Jurors were given guidance on how to conduct deliberations
   - At least one written copy of the final jury instructions was provided to the jury
   - All jurors were provided with a written copy of the final jury instructions
   - Alternates were permitted to participate in deliberations
   - Jurors were sequestered for deliberations

How long were the jury deliberations? __________________________ (hours)

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury deliberations.

___________________________________________________________________________

___________________________________________________________________________

Special Issues

5. Please indicate if any of the following issues arose in your most recent jury trial and what procedures, if any, the court employed to address those issues.
   - Notorious trial / High profile trial: ____________________________________________
     ____________________________________________

   - Capital jury trial: _________________________________________________________
     ____________________________________________

   - Juror stress: _____________________________________________________________
     ____________________________________________

   - Jury sentencing in non-capital trial: ___________________________________________
     ____________________________________________

Please send to Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us
National Program to Increase Citizen Participation in Jury Service
### National Program to Increase Citizen Participation in Jury Service

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APPENDIX D: NOTES ON METHODOLOGY USED TO CALCULATE NATIONAL STATISTICS

National and statewide statistics were generated from Local Court Survey data and Judge and Attorney Survey data in order to glimpse a snapshot of the nation as a whole and to compare the results from an individual state to those of the nation at large. Depending on the format of the data, national and statewide statistics were calculated in several ways.

The easiest statewide or national statistic to compute is a frequency or an average. For example, if you wanted to know the median voir dire time for Virginia State Courts you would select the subset of Judge and Attorney Surveys submitted by Virginia State Courts and compute the median. For the national percentage of state courts using a one-step qualification and summoning process, you would run a frequency on the qualification and summoning variable for all Local Court Surveys.

Some of the national and statewide statistics from the Local Court Survey used a more complicated method to aggregate individual surveys. The examples below will demonstrate how the Local Court Survey was aggregated at the state level to create statewide statistics which were then aggregated to provide national statistics. Fifty-one counties in Virginia submitted Local Court Surveys, and these will be used for the example calculations. The populations of these 51 counties were obtained from the 2000 U.S. Census American Factfinder website (http://factfinder.census.gov/home/saff/main.html?lang=en), added together, and considered the “represented population”. The percent of the state represented in the survey is the represented population divided by the total population of the state.

Example 1:
Given from Local Court Surveys:
Sum of 51 VA Local Court Surveys county populations: 2,994,313
Year 2000 Population of VA (from US Census): 7,078,515

Calculated:
Percent Represented: 2,994,313 / 7,078,515 *100 = 42.3%

The Local Court Survey asked each locality to approximate the number of jury summonses mailed each year and the number of felony, misdemeanor, civil, and “other” juries impaneled each year. The numbers provided by the local courts were summed for the represented population of the state (or nation) and then extrapolated to provide an estimate of the entire state’s (or nation’s) annual summonses and jury trials. See the example below.

Example 2:
Given from Local Court Surveys
Sum of 51 VA Local Court Surveys No. of Summonses Mailed: 127,990
Sum of 51 VA Local Court Surveys No. of Felony Juries Impaneled: 779
Sum of 51 VA Local Court Surveys No. of Misdemeanor Juries Impaneled: 304
Sum of 51 VA Local Court Surveys No. of Civil Juries Impaneled: 624
Sum of 51 VA Local Court Surveys No. of Other Juries Impaneled: 19  
Sum of 51 VA Local Court Surveys Total No. of Juries Impaneled: 1,726

**Calculated:**
Estimated No. of Summons mailed in VA: 127,990 / 0.423 = 302,577  
Estimated No. of Felony Juries Impaneled in VA: 779 / 0.423 = 1,842  
Estimated No. of Misdemeanor Juries Impaneled in VA: 304 / 0.423 = 719  
Estimated No. of Civil Juries Impaneled in VA: 624 / 0.423 = 1,475  
Estimated No. of Other Juries Impaneled in VA: 19 / 0.423 = 45  
Estimated Total No. of Juries Impaneled in VA: 1,726 / 0.423 = 4,080  
Estimated Trial Rate per 100,000 Population: 4,080 / (7,078,515 / 100,000) = 57.6

The estimated number of *jurors* impaneled on a statewide or national basis was calculated from the estimated number of *juries* impaneled. Based on the minimum number of jurors required for each state by statute and depending on the trial type, the number of jurors was computed. Note that for the “other” trial category, 12 jurors were assumed across all states. Due to the large variation in number of jurors required by trial type (eminent domain, family law, juvenile, etc.) and across states, it was simplest to assume 12 jurors in all cases even though this number may be over-inclusive.

**Example 3:**
*Given by state statute:*
No. of Jurors Required by VA for a Felony Trial: 12  
No. of Jurors Required by VA for a Misdemeanor Trial: 7  
No. of Jurors Required by VA for a Civil Trial: 7  
No. of Jurors for an Other Trial: 12  
Year 2000 VA Population Age 18 and greater (from US Census): 5,340,253

**Calculated:**
Estimated Felony Jurors Impaneled in VA: 1,842 * 12 = 22,104  
Estimated Misdemeanor Jurors Impaneled in VA: 719 * 7 = 5,033  
Estimated Civil Jurors Impaneled in VA: 1,475 * 7 = 10,325  
Estimated Other Jurors Impaneled in VA: 45 * 12 = 540  
Estimated Total Jurors Impaneled in VA: Sum of above = 38,002  
Percent of Adult Population Impaneled: 38,002 / 5,340,253 * 100 = 0.7 %
APPENDIX E: STATE TABLES ON KEY JURY OPERATION AND PRACTICE MEASUREMENTS

TABLE 1: Voir Dire Length in Non-Capital Felony Trials

TABLE 2: Voir Dire Length in Civil Trials

TABLE 3: Who Conducts Voir Dire

TABLE 4: Attorney Access to Juror Information Before Voir Dire

TABLE 5: Attorney Access to Juror Qualification Information Before Voir Dire

TABLE 6: Jurors Examined Individually at Sidebar or In Chambers during Voir Dire

TABLE 7: Jurors Permitted to Take Notes

TABLE 8: Jurors Provided with Writing Materials

TABLE 9: Jurors Permitted to Submit Questions to Witnesses

TABLE 10: Jurors Instructed Before Closing Arguments

TABLE 11: Jury Provided with at Least One Copy of Written Instructions

TABLE 12: All Jurors Provided with Written Instructions
Median length of voir dire in hours for felony trials.

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<th>State</th>
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n/a = Not Applicable  
National Center for State Courts, 2007
### State Rankings of Judge & Attorney Survey Results

**Length of Voir Dire for Civil Trials**

Median length of voir dire in hours for civil trials.

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n/a = Not Applicable

National Center for State Courts, 2007
## State Rankings of Judge & Attorney Survey Results

### Mean score from most judge-dominated voir dire (scoring a 1) to most attorney-dominated voir dire (scoring a 5) for all jury trials.

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n/a = Not Applicable

National Center for State Courts, 2007
### State Rankings of Local Court Survey Results

#### Access to Juror Information

Mean score for 4 possible categories of "other juror information" that attorneys are given access to prior to trial: marital status, occupation, children, and other. These are less typical than other types of juror information such as name, address, and

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n/a = Not Applicable National Center for State Courts, 2007
### Access to Jurors' Qualification Questionnaires

Percent of local court respondents that routinely give attorneys access to jurors' qualification questionnaires.

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## State Rankings of Judge & Attorney Survey Results

### Jurors Questioned at Sidebar or in Chambers

Percent of respondents who reported that jurors were questioned individually at sidebar or in chambers, outside the range of hearing of other jurors, during voir dire.

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## Jurors Permitted to Take Notes

Percent of respondents who reported that jurors were permitted to take notes.

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National Center for State Courts, 2007
State Rankings of Judge & Attorney Survey Results

Jurors Provided with Notetaking Materials

Percent of respondents who reported that jurors were provided with writing utensils and notepaper for taking notes.

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National Center for State Courts, 2007
### Juror Questions to Witnesses

Percent of respondents who reported that jurors were permitted to submit questions in writing to witnesses.

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n/a = Not Applicable

National Center for State Courts, 2007
### Jurors Instructed Before Closing Arguments

Percent of respondents who reported that jurors were instructed on the law before closing arguments.

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n/a = Not Applicable

National Center for State Courts, 2007
### State Rankings of Judge & Attorney Survey Results

#### At Least One Copy of Jury Instructions

Percent of respondents who reported that at least one written copy of the final jury instructions was provided to jurors.

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n/a = Not Applicable  
National Center for State Courts, 2007
## State Rankings of Judge & Attorney Survey Results

### All Jurors Received a Copy of Jury Instructions

Percent of respondents who reported that all jurors received a written copy of the final jury instructions.

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n/a = Not Applicable  
National Center for State Courts, 2007
Jury Management in Indiana

October 22, 2010
Indiana Jury Reforms

Jury Rules initially adopted in
2003

Several Amendments since

Jury pool master list implemented
2007
Jury Pool: Rule 2

- Jury Pool is compiled annually by selecting names from lists approved by the Supreme Court.

- Lists currently approved:
  - Master list created by Jury Pool Project
  - OR
  - Voter Registration plus at least one of
    - Property tax records
    - Telephone directories
    - Utility customers

- Master list used in 91 of 92 counties
  - Exception population 39,500
Jury Pool Project

- Supreme Court asked Dept of Revenue and Bureau of Motor Vehicles cooperation
- Merger of DOR income tax returns with BMV driver licenses and id cards
  - Matches based on SSN
  - Name & address matches made when SSN number was not available
- Resulting list cleansed
  - Removed deceased, moved, etc.
  - Post office address validation process
Distribution by CD to counties

- No cost to counties
- Standard format
  - Excel file for counties with list sizes less than 65,500
- List includes:
  - Name
  - Current address with effective date
  - Previous address with effective date
  - Date of birth
  - Gender
Benefits

- More comprehensive lists
  - Total statewide master list size = 4,503,032
  - 2000 census of 18 and older = 4,506,089
- More current--updated annually
- Duplicates mostly eliminated
  - Reduces returned mail
- Address validation
  - standard address format per post office
  - county assignment validated
<table>
<thead>
<tr>
<th>County</th>
<th>18+ Pop*</th>
<th>VR List</th>
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<th>New List</th>
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Summons for Service: Rule 4

- Juror qualification form and notice of the period of potential service mailed no later than 7 days after drawing names from the jury pool.
- If summons accompanies the qualification form, they must be six weeks in advance of dates of actual.
- If summons follows, must be seven days in advance.
Juror Response

- Judge may authorize automated telephone services or web-based programs for responses.
- Juror must be able to complete the forms and receive the required information if unable or unwilling to use these programs.
Exemption from Service: Rule 6

- Completion of a term of jury service in the preceding 24 months Rule 6
- Repealed all statutory exemptions repealed in 2006
- Restored exemption for active military service and persons 75 or older
Preservation of records re juror exceptions and striking

- The facts supporting juror disqualification, exemptions and deferrals are recorded under penalty of perjury and retained for 2 years.
Jury Orientation

- Must include a standard presentation recommended by the Judicial Conference Rule 11.
- Introduction to the case by judge Rule 14(a)
- Court may permit mini opening statements before jury selection Rule 14(b)
Preliminary Instructions

- Written copies given to jurors before judge reads aloud
- Jurors may make written request that questions be asked of witnesses
- Jurors may take notes
- Jurors may discuss the case during recess if all are present but are to keep open minds
Jury Trial Books

- Not required
- Specifically permitted items listed
- All given instructions.
- Information regarding the trial schedule.
- Witness lists.
- Copies of exhibits admitted.
Final Instructions

- Jurors receive written copies before they are read.
- Jurors retain during deliberations.
Assisting Jurors at Impasse

- Counsel must be present
- Parties must be present in criminal case
- Inquire of jurors how court and counsel can assist
- Court consults with counsel
- Court may direct further proceedings “as appropriate”
**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Rule Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RULE 1</td>
<td>SCOPE</td>
<td>1</td>
</tr>
<tr>
<td>RULE 2</td>
<td>JURY POOL</td>
<td>1</td>
</tr>
<tr>
<td>RULE 3</td>
<td>RANDOM DRAW</td>
<td>1</td>
</tr>
<tr>
<td>RULE 4</td>
<td>NOTICE OF SELECTION FOR JURY POOL AND SUMMONS FOR JURY SERVICE</td>
<td>1</td>
</tr>
<tr>
<td>RULE 5</td>
<td>DISQUALIFICATION</td>
<td>2</td>
</tr>
<tr>
<td>RULE 6</td>
<td>EXEMPTION</td>
<td>2</td>
</tr>
<tr>
<td>RULE 7</td>
<td>DEFERRAL</td>
<td>2</td>
</tr>
<tr>
<td>RULE 8</td>
<td>DOCUMENTATION</td>
<td>2</td>
</tr>
<tr>
<td>RULE 9</td>
<td>TERM OF JURY SERVICE</td>
<td>2</td>
</tr>
<tr>
<td>RULE 10</td>
<td>JUROR SAFETY AND PRIVACY</td>
<td>3</td>
</tr>
<tr>
<td>RULE 11</td>
<td>JURY ORIENTATION</td>
<td>3</td>
</tr>
<tr>
<td>RULE 12</td>
<td>RECORD SHALL BE MADE</td>
<td>3</td>
</tr>
<tr>
<td>RULE 13</td>
<td>JURY PANEL: OATH OR AFFIRMATION BY PROSPECTIVE JURORS</td>
<td>3</td>
</tr>
<tr>
<td>RULE 14</td>
<td>INTRODUCTION TO CASE</td>
<td>3</td>
</tr>
<tr>
<td>RULE 15</td>
<td>EXAMINATION OF THE JURY PANEL</td>
<td>3</td>
</tr>
<tr>
<td>RULE 16</td>
<td>NUMBER OF JURORS</td>
<td>3</td>
</tr>
<tr>
<td>RULE 17</td>
<td>CHALLENGE FOR CAUSE</td>
<td>4</td>
</tr>
<tr>
<td>RULE 18</td>
<td>NUMBER OF PEREMPTORY CHALLENGES</td>
<td>4</td>
</tr>
<tr>
<td>RULE 19</td>
<td>OATH OR AFFIRMATION OF THE JURY</td>
<td>5</td>
</tr>
<tr>
<td>RULE 20</td>
<td>PRELIMINARY INSTRUCTIONS</td>
<td>5</td>
</tr>
<tr>
<td>RULE 21</td>
<td>OPENING STATEMENT</td>
<td>5</td>
</tr>
<tr>
<td>RULE 22</td>
<td>PRESENTATION OF EVIDENCE</td>
<td>6</td>
</tr>
<tr>
<td>RULE 23</td>
<td>JUROR TRIAL BOOKS</td>
<td>6</td>
</tr>
<tr>
<td>RULE 24</td>
<td>PROCEDURE FOR JUROR WITH PERSONAL KNOWLEDGE IN CRIMINAL CASE</td>
<td>6</td>
</tr>
<tr>
<td>RULE 25</td>
<td>JURY VIEW</td>
<td>6</td>
</tr>
<tr>
<td>RULE 26</td>
<td>FINAL INSTRUCTIONS</td>
<td>6</td>
</tr>
<tr>
<td>RULE 27</td>
<td>FINAL ARGUMENTS</td>
<td>6</td>
</tr>
<tr>
<td>RULE 28</td>
<td>ASSISTING JURORS AT AN IMPASSE</td>
<td>7</td>
</tr>
<tr>
<td>RULE 29</td>
<td>SEPARATION DURING DELIBERATION</td>
<td>7</td>
</tr>
<tr>
<td>RULE 30</td>
<td>JUDGE TO READ THE VERDICT</td>
<td>7</td>
</tr>
</tbody>
</table>

**RULE 1. SCOPE**

These rules shall govern petit jury assembly, selection, and management in all courts of the State of Indiana. Rules 2 through 10 shall govern grand jury assembly and selection.

**RULE 2. JURY POOL**

The judges of the trial courts shall administer the jury assembly process. The judges may appoint clerical personnel to aid in the administration of the jury system. Any person appointed to administer the jury assembly process is a jury administrator. The jury administrator shall compile the jury pool annually by selecting names from lists approved by the Supreme Court. In compiling the jury pool, the jury administrator shall avoid duplication of names.

**RULE 3. RANDOM DRAW**

The jury administrator shall randomly draw names from the jury pool as needed to establish jury panels for jury selection. Prospective jurors shall not be drawn from bystanders or any source except the jury pool.

**RULE 4. NOTICE OF SELECTION FOR JURY POOL AND SUMMONS FOR JURY SERVICE**

Not later than seven (7) days after the date of the drawing of names from the jury pool, the jury administrator shall mail to each person whose name is drawn a juror qualification form, and notice of the period during which any service may be performed. The judges of the courts of record in the county shall select, by local rule, one of the following procedures for summoning jurors:
(a) **Single tier notice and summons.** The jury administrator may send a summons at the same time the jury qualification form and notice is mailed. If so, the jury administrator shall send the jury qualification form and summons to prospective jurors at least six (6) weeks before jury service.

(b) **Two tier notice and summons.** The jury administrator may send summons at a later time. If the jury administrator sends the jury qualification form and notice first, the jury administrator shall summon prospective jurors at least one (1) week before service.

The summons shall include the following information: directions to court, parking, public transportation, compensation, attire, meals, and how to obtain auxiliary aids and services required by the Americans with Disabilities Act. The judge may direct the jury administrator to include a questionnaire to be completed by each prospective juror.

A judge may order prospective jurors to appear upon less notice when, in the course of jury selection, it becomes apparent that additional prospective jurors are required in order to complete jury selection.

A judge may authorize the jury administrator to use technological programs for receiving responses to juror qualification forms or to supplement information provided to jurors in the notice of selection and summons. The judge may authorize automated telephone services or web-based programs which include appropriate verification, such as juror identification numbers, PIN numbers, and passwords. The judge must ensure that jurors who are unable or unwilling to use these technological programs are able to complete the proper forms and receive the above-required information by contacting the jury administrator.

**RULE 5. DISQUALIFICATION**

The court shall determine if the prospective jurors are qualified to serve, or, if disabled but otherwise qualified, could serve with reasonable accommodation. In order to serve as a juror, a person shall state under oath or affirmation that he or she is:

- (a) a citizen of the United States;
- (b) at least eighteen (18) years of age;
- (c) a resident of the summoning county;
- (d) able to read, speak, and understand, the English language;
- (e) not suffering from a physical or mental disability that prevents him or her from rendering satisfactory jury service;
- (f) not under a guardianship appointment because of mental incapacity;
- (g) not a person who has had rights to vote revoked by reason of a felony conviction and whose rights to vote have not been restored; and
- (h) not a law enforcement officer, if the trial is for a criminal case.

Persons who are not eligible for jury service shall not serve. Upon timely advance request from the prospective juror, the court may excuse from reporting for jury service any person whose bona fide religious conviction and affiliation with a religion prevents the prospective juror from performing jury service.

**RULE 6. EXEMPTION**

A person who has completed a term of jury service in the twenty-four (24) months preceding the date of the person's summons may claim exemption from jury service.

**RULE 7. DEFERRAL**

The judge or judge's designee may authorize deferral of jury service for up to one (1) year upon a showing of hardship, extreme inconvenience, or necessity.

**RULE 8. DOCUMENTATION**

The facts supporting juror disqualifications, exemptions, and deferrals shall be recorded under oath or affirmation. No disqualification, exemption, or deferral shall be authorized unless the facts support it. These records shall be kept for a minimum of two (2) years.

**RULE 9. TERM OF JURY SERVICE**

- (a) A person who appears for service as a petit juror serves until the conclusion of the first trial in which the juror is sworn, regardless of the length of the trial or the manner in which the trial is disposed. A person who appears for service by reporting to the courthouse and being recorded as present for jury service and not deferred but is not selected and sworn as a juror completes the person's service when jury selection is completed; provided,
however, jurors who are called for jury service are eligible to serve in any court in that county on the day summoned.

(b) A person who:
   (1) serves as a juror; or
   (2) serves until jury selection is completed, but is not chosen to serve as a juror;
may not be selected for another jury panel until all nonexempt persons in the jury pool for that year have been called for jury duty.

(c) A person who serves until jury selection is completed, but is not chosen to serve as a juror may be placed back in the jury pool and eligible for additional terms of service upon making a written request to the court.

RULE 10. JUROR SAFETY AND PRIVACY
Personal information relating to a juror or prospective juror not disclosed in open court is confidential, other than for the use of the parties and counsel. The court shall maintain that confidentiality to an extent consistent with the constitutional and statutory rights of the parties.

RULE 11. JURY ORIENTATION
Trial courts shall provide prospective jurors with orientation prior to the selection process so they may understand their role in our legal system. Jury orientation shall include a standard presentation recommended by the Indiana Judicial Conference.

RULE 12. RECORD SHALL BE MADE
Unless otherwise agreed by the parties, jury selection shall be recorded including all sidebar conferences.

RULE 13. JURY PANEL: OATH OR AFFIRMATION BY PROSPECTIVE JURORS
The jury panel consists of those prospective jurors who answered their summons by reporting for jury service. The judge shall administer the following to the prospective jurors of the jury panel: “Do you swear or affirm that you will honestly answer any question asked of you during jury selection?”

RULE 14. INTRODUCTION TO CASE
   (a) After welcoming the jury panel, the judge shall introduce the panel to the case. Unless sufficiently covered by the jury orientation, the judge’s introduction to the case shall include at least the following:
      (1) Introduction of the participants;
      (2) The nature of the case;
      (3) The applicable standard of proof;
      (4) The applicable burden(s) of proof;
      (5) The presumption of innocence in a criminal case;
      (6) The appropriate means by which jurors may address their private concerns to the judge;
      (7) The appropriate standard of juror conduct;
      (8) The anticipated course of proceedings during trial; and
      (9) The rules regarding challenges.
   (b) To facilitate the jury panel’s understanding of the case, with the court’s consent the parties may present brief statements of the facts and issues (mini opening statements) to be determined by the jury.

RULE 15. EXAMINATION OF THE JURY PANEL
Examination of jurors shall be governed by Trial Rule 47(D).

RULE 16. NUMBER OF JURORS
   (a) In all criminal cases, if the defendant is charged with: murder, a Class A, B, or C felony, including any enhancement(s), the jury shall consist of twelve (12) persons, unless the parties and the court agree to a lesser number of jurors. If the defendant is charged with any other crime, the jury shall consist of six (6) persons. The court shall determine the number of alternate jurors to be seated. The verdict shall be unanimous.
(b) In all civil cases, the jury shall consist of six (6) persons, unless the parties agree to a lesser number of jurors before the jury is selected. The verdict shall be unanimous, unless the parties stipulate before the verdict is announced that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. The number of alternate jurors shall be governed by Trial Rule 47(B).

**RULE 17. CHALLENGE FOR CAUSE**

(a) In both civil and criminal cases the parties shall make all challenges for cause before the jury is sworn to try the case, or upon a showing of good cause for the delay, before the jury retires to deliberate. The court shall sustain a challenge for cause if the prospective juror:

1. is disqualified under rule 5;
2. served as a juror in that same county within the previous three hundred sixty-five (365) days in a case that resulted in a verdict;
3. will be unable to comprehend the evidence and the instructions of the court due to any reason including defective sight or hearing, or inadequate English language communication skills;
4. has formed or expressed an opinion about the outcome of the case, and is unable to set that opinion aside and render an impartial verdict based upon the law and the evidence;
5. was a member of a jury that previously considered the same dispute involving one or more of the same parties;
6. is related within the fifth degree to the parties, their attorneys, or any witness subpoenaed in the case;
7. has a personal interest in the result of the trial;
8. is biased or prejudiced for or against a party to the case; or
9. is a person who has been subpoenaed in good faith as a witness in the case.

(b) In criminal cases the court shall sustain a challenge for cause if the prospective juror:

1. was a member of the grand jury that issued the indictment;
2. is a defendant in a pending criminal case;
3. in a case in which the death penalty is sought, is not qualified to serve in a death penalty case under law; or
4. has formed or expressed an opinion about the outcome of the case which appears to be founded upon
   a. a conversation with a witness to the transaction;
   b. reading or hearing witness testimony or a report of witness testimony.

(c) In civil cases the court shall sustain a challenge for cause if the prospective juror is interested in another suit, begun or contemplated, involving the same or a similar matter.

**RULE 18. NUMBER OF PEREMPTORY CHALLENGES**

(a) In criminal cases the defendant and prosecution each may challenge peremptorily:

1. twenty (20) jurors in prosecutions where the death penalty or life without parole is sought;
2. ten (10) jurors when neither the death penalty nor life without parole is sought in prosecutions for murder, and Class A, B, or C felonies, including enhancements; and
3. five (5) jurors in prosecutions for all other crimes.

When several defendants are tried together, they must join their challenges.

(b) In civil cases each side may challenge peremptorily three (3) jurors.

(c) In selection of alternate jurors in both civil and criminal cases:

1. one (1) peremptory challenge shall be allowed to each side in both criminal and civil cases for every two (2) alternate jurors to be seated;
2. the additional peremptory challenges under this subsection may be used only in selecting alternate jurors; and
3. peremptory challenges authorized for selection of jurors may not be used in selecting alternate jurors.
(d) If it appears to the court that a particular peremptory challenge may have been used in a constitutionally impermissible manner, the court upon its own initiative may (a) inform the parties of the reasons for its concern, (b) require the party exercising the challenge to explain its reasons for the challenge, and (c) deny the challenge if the proffered basis is constitutionally impermissible.

**RULE 19. OATH OR AFFIRMATION OF THE JURY**

After the jury has been selected, but before commencement of the trial, the judge shall administer the following to the jury, including alternate jurors:

“Do each of you swear or affirm that you will well and truly try the matter in issue between the parties, and give a true verdict according to the law and evidence?”

**RULE 20. PRELIMINARY INSTRUCTIONS**

(a) The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

(1) the issues for trial;

(2) the applicable burdens of proof;

(3) the credibility of witnesses and the manner of weighing the testimony to be received;

(4) that each juror may take notes during the trial and paper shall be provided, but note taking shall not interfere with the attention to the testimony;

(5) the personal knowledge procedure under Rule 24;

(6) the order in which the case will proceed;

(7) that jurors, including alternates, may seek to ask questions of the witnesses by submission of questions in writing.

(8) 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.

(b) The court shall instruct the jurors before opening statements that until their jury service is complete, they shall not use computers, laptops, cellular telephones, or other electronic communication devices while in attendance at trial, during discussions, or during deliberations, unless specifically authorized by the court. In addition, jurors shall be instructed that when they are not in court they shall not use computers, laptops, cellular telephones, other electronic communication devices, or any other method to:

(1) conduct research on their own or as a group regarding the case;

(2) gather information about the issues in the case;

(3) investigate the case, conduct experiments, or attempt to gain any specialized knowledge about the case;

(4) receive assistance in deciding the case from any outside source;

(5) read, watch, or listen to anything about the case from any source;

(6) listen to discussions among, or received information from, other people about the case; or

(7) talk to any of the parties, their lawyers, any of the witnesses, or members of the media, or anyone else about the case, including posting information, text messaging, email, Internet chat rooms, blogs, or social websites.

(c) It is assumed that the court will cover other matters in the preliminary instructions.

(d) The court shall provide each juror with the written instructions while the court reads them.

**RULE 21. OPENING STATEMENT**

(a) In criminal cases, the prosecution shall state briefly the evidence that supports its case. The defense may then state briefly the evidence in support of the defense, but has the right to decline to make an opening statement.

(b) In civil cases, the party with the burden of going forward may briefly state the evidence that supports its case. The adverse party may then briefly state the evidence in support of its case.
**RULE 22. PRESENTATION OF EVIDENCE**

Unless the court otherwise directs, the party with the burden of going forward shall produce evidence first, followed by presentation of evidence by the adverse party.

The parties may then respectively offer rebuttal evidence only, unless the court, for good cause shown, permits them to offer evidence upon their original case.

**RULE 23. JUROR TRIAL BOOKS**

In both criminal and civil cases, the court may authorize the use of juror trial books to aid jurors in performing their duties.

Juror trial books may contain:

- (a) all given instructions;
- (b) information regarding the anticipated trial schedule;
- (c) witness lists; and
- (d) copies of exhibits admitted for trial.

**RULE 24. PROCEDURE FOR JUROR WITH PERSONAL KNOWLEDGE IN CRIMINAL CASES**

If the court receives information that a juror has personal knowledge about the case, the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning that knowledge.

If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused, and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

**RULE 25. JURY VIEW**

When the court determines it is proper, the court may order the jury to view:

- (a) the real or personal property which is the subject of the case; or
- (b) the place in which a material fact occurred.

The place shall be shown to the jury by a person appointed by the court for that purpose. While the jury is absent for the view, no person, other than the person appointed to show the place to the jury, shall speak to the jury on any subject connected with the trial. Counsel for the parties shall have the right to accompany the jury but shall not speak to the jury.

**RULE 26. FINAL INSTRUCTIONS**

(a) The court shall read appropriate final instructions, providing each juror with written instructions before the court reads them. Jurors shall retain the written instructions during deliberations. The court may, in its discretion, give some or all final instructions before final arguments, and some or all final instructions after final arguments.

(b) The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations.

**RULE 27. FINAL ARGUMENTS**

When the evidence is concluded, the parties may, by agreement in open court, submit the case without argument to the jury.

If the parties argue the case to the jury, the party with the burden of going forward shall open and close the argument. The party which opens the argument must disclose in the opening all the points relied on in the case. If, in the closing, the party which closes refers to any new point or fact not disclosed in the opening, the adverse party has the right to reply to the new point or fact. The adverse party's reply then closes the argument in the case.

If the party with the burden of going forward declines to open the argument, the adverse party may then argue its case. In criminal cases, if the defense declines to argue its case after the prosecution has made opening argument, then that shall be the only argument allowed in the case.
In criminal cases, the party with the burden of going forward is the prosecution. In civil cases, the party with the burden of going forward is the plaintiff.

**RULE 28. ASSISTING JURORS AT AN IMPASSE**

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors’ response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

**RULE 29. SEPARATION DURING DELIBERATION**

(a) The court, in its discretion may permit the jury in civil cases to separate during deliberations. However, before the jurors are permitted to separate, the court shall instruct them that while they are separated, they shall:

1. not discuss the case among themselves or with anyone else;
2. not talk to the attorneys, parties, or witnesses;
3. not express any opinion about the case; and
4. not listen to or read any outside or media accounts of the trial.

(b) The court shall not permit the jury to separate during deliberation in criminal cases unless all parties consent to the separation and the instructions found in section “a” of this rule are given.

**RULE 30. JUDGE TO READ THE VERDICT**

When the jury has agreed upon its verdict, the foreperson shall sign the appropriate verdict form. When returned into court, the judge shall read the verdict. The court or either party may poll the jury. If a juror dissents from the verdict, the jury shall again be sent out to deliberate.
New Jersey Statutes Annotated

New Jersey Rules of Court

Part I. Rules of General Application

Chapter I. Procedure

Rule 1:8. Jury

R. 1:8-8

1:8-8. Materials to be Submitted to the Jury; Note-taking; Juror Questions

Currentness

(a) Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. The court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room. The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure.

(b) Juror Note-taking. Prior to opening statements, the attorneys or any party may request that the jury be permitted to take notes during the trial or portion thereof, including opening and closing statements. If the court determines to permit note-taking after all parties have had an opportunity to be heard, it shall provide the jurors with note-taking materials and shall take such steps as will ensure the security and confidentiality of each juror's notes.

(c) Juror Questions. Prior to the commencement of the voir dire of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers. A witness who has been excused shall not be recalled to respond to juror questions unless all counsel and the court agree or unless the court otherwise orders for good cause shown.

Credits
Note: Source -- R.R. 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended and paragraphs (a) and (b) designated July 10, 1998 to be effective September 1, 1998; new paragraph (c) added July 12, 2002 to be effective September 3, 2002; caption amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended July 27, 2006 to be effective September 1, 2006.
Editors' Notes

COURT COMMENT TO PARAGRAPH (C), ADOPTED TO BE EFFECTIVE SEPTEMBER 3, 2002
The Civil Practice Committee's recommendation for adoption of paragraph (c) regarding jurors' questions included a recommendation for use of standard instructions to the jury both at the beginning of the trial ("Preliminary Instructions Regarding Jurors' Questions") and at the close of trial ("Final Instructions Regarding Jurors' Questions") when the trial judge determines to use this procedure in any particular trial. The Practice Committee asked the Committee on Model Civil Jury Charges to review and make any necessary refinements to those two charges, which had been used in the pilot test of this procedure. The Court agrees with the recommendation that these two jury charges, once finalized by the Committee on Model Civil Jury Charges, should be given in all trials in which the jury-question procedure is used.

Current with amendments received through 8/31/2010.
Jury Subcommittee  
(of the N.J. Supreme Courts Civil Practice Committee)

Juror Questions -- Pilot Program Report (2001)

- Background
- Pilot Project Features
- Rationale
- Summary of Results
- Key Pilot Project Procedures
- Quantitative Responses To The Pilot Project
  1. Judges' Responses
  2. Attorneys' Responses
  3. Jurors' Responses

Background

In 1998, the New Jersey Supreme Court authorized the development of a pilot project that allowed jurors to submit written questions during civil trials. The pilot was conducted from January 20th to March 31st, allowing eleven judges to allow jurors in civil trials to propose questions. The results of the pilot were largely positive and the New Jersey Supreme Court decided to expand the pilot by authorizing QA procedures more deeply by surveying civil judges' opinions on questions, from September 2nd.

What follows below is the final report on the outcome of the project. Questions on the pilot should be directed to michael.garrahan@judiciary.state.nj.us

Pilot Project Features

The Supreme Court authorized the juror question-asking pilot project for civil trials during the period January through June 2000. Eleven trial judges in eleven different vicinages participated in the pilot project:

Hon. Charles J. Walsh  Bergen  
Hon. Jan M. Schlesinger  Burlington  
Hon. John T. McNeill, III  Camden  
Hon. Donald A. Smith  Gloucester  
Hon. Thomas P. Olivieri  Hudson  
Hon. Paulette M. Sapp-Peterson  Mercer  
Hon. Yolanda Ciccone  Middlesex  
Hon. Catherine M. Langlois  Morris  
Hon. Marlene Lynch Ford  Ocean  
Hon. Helen Hoens  Somerset  
Hon. Rudy B. Coleman  Union
Rationale:

The theory behind this innovation in trial procedure is that jurors who are permitted to ask the questions that are on their minds will have a greater appreciation for the importance of their role, take their responsibility more seriously, and be more attentive, thus ensuring a more reasoned deliberative process and a more just outcome. It is also theorized that jury service will be a more satisfying experience, with resulting benefits to public confidence in the judicial system.

No study of actual trials can measure the results against the theory in any scientifically reliable way. However, the questionnaires completed by the jurors, judges, and attorneys gave us significant information - including the fact that out of 127 trials conducted by 11 judges in as many counties, no one suggested that the process had an unfair effect on the outcome of the trial.

It is our perception that there need be no tension between the goal of a trial as a search for truth and justice, and the method of the adversarial process. Based on the experience gained in the pilot project, we recommend to the Civil Practice Committee, for its recommendation to the Supreme Court, the adoption of a rule permitting each judge presiding over a civil trial, in his or her discretion, to employ the jury question procedures essentially as set forth in the pilot. It has been reported that in approximately half the states, either by rule or informal practice, juror questions are permitted, and in many of those states the practice is not limited to civil trials. See Commonwealth v. Britto, 2001 WL 303736 at *9 n.6, 433 Mass. 596 (Sup. Jud. Ct. 2001) (affirming a felony murder conviction and rejecting the defendant's argument that by allowing jurors to submit questions for the witnesses, the judge deprived defendant of a fair trial.) That Court held that allowing juror questioning "rests in the sound discretion of the trial judge." Id. at *9-*11.

Summary of Results

Even before the end of the six-month pilot, it was apparent that jurors and judges were reacting very favorably, whereas attorney reaction was mixed. After the conclusion of the pilot and a review of the written responses to our questionnaires, those early reactions were confirmed. The jurors virtually all loved it. The judges, some of whom initially were skeptical, were very pleased with how well the process worked. Many wanted to continue the procedure after the end of the pilot period. The attorneys' responses were measured, although a majority favored the procedure. More defense attorneys expressed negative views than plaintiffs' attorneys, the primary concerns being interference with trial strategy and control of witnesses. Most of those who expressed such concerns appeared to refer not to the trials just concluded, but to potential problems in future cases.

Key Pilot Project Procedures

The Sub-committee designed the pilot with attention to State v. Jumpp, 261 N.J. Super. 514, certif. denied, 134 N.J. 474 (1993) (noting that other jurisdictions "...generally approved this practice and found that the trial court has discretion to authorize it." Id. at 529.) In Jumpp, the Appellate Division directed trial courts to refrain from allowing jurors to ask questions until the Supreme Court thoroughly considered the issue and established "precise guidelines and procedures." Id. at 534.
In developing the pilot project, the committee examined the procedures used in other jurisdictions, particularly Arizona and Massachusetts, spoke with judges in those jurisdictions, and drew heavily upon the recommendations set forth in two publications: that of the ABA Section on Litigation, Civil Trial Practice Standards (February 1998), and Jury Trial Innovations - a joint effort of the ABA, State Justice Institute, and the National Center for State Courts (compiled by G. Thomas Munsterman, et al.).

The key features of the pilot were: (1) the trial judge would determine at the start of each trial whether jurors would be permitted to ask questions in that trial; (2) in making that decision, the judge would consider counsel's views but consent of counsel was not a condition for permitting questions; (3) the judge would explain to the jurors at the outset that they would be permitted to ask questions to clarify a witness's testimony, not to argue with a witness, and that rules of evidence might make it improper to ask some of their questions; (4) jurors would write out their questions with materials provided by the court and submit those questions to the judge at the conclusion of the testimony of each witness; (5) all juror questions would be reviewed by the judge and counsel on the record but out of the jurors' hearing; (6) the trial judge would consider whether to allow the proposed questions under the same rules of evidence applicable to the attorneys' questions and subject to the same objections; (7) the judge would ask the witness those questions that were deemed admissible; (8) if juror questions were asked of the witness, the attorneys would have an opportunity for follow-up questions of that witness.

Quantitative Responses to the Pilot Project

Separate questionnaires were developed for completion by the trial judge, the attorneys, and the jurors at the end of each trial. Copies of those questionnaires are attached to this Report.

Each questionnaire provided for entry of the type of case, the name of the judge, the length of the trial, an assessment of various aspects of the procedure, an overall opinion as to whether juror questions should be permitted in every civil trial, and a space for open-ended comments. We did not perceive any pattern in the responses related to the type of case, perhaps due to the size of the sample.

We received completed questionnaires from the participants in 127 civil trials over the six-month duration of the pilot project. Jurors proposed questions in 121 or 95% of those 127 trials; no juror questions were proposed in 6 trials. A total of 2,540 questions were posed by jurors in 121 trials, or a mean of 21 questions per trial. However, there were 7 trials that produced more than 50 questions from jurors, and those extremes significantly affected the mean. However, the median number of questions proposed per trial was nine. Those seven trials that produced an unusually large number of questions were only 6% of the 127 pilot project trials. A similar number (six, or 5% of the total pilot trials) produced no juror questions.

More than three-quarters of the questions that were proposed (77%) were allowed by the trial judge and asked of a witness. The judges allowed 1,957 questions to be asked of witnesses, or a mean of 15 questions per trial, with the median being 7 per trial. In 2 trials, none of the few questions submitted were allowed. Thus in a total of 8 trials, no juror questions were submitted to witnesses.
The questionnaires asked the judges and attorneys to estimate how much time was added to the trial because of the procedure. The judges responded to that question for 107 of the 127 trials, and the estimated median time added to the trial was 30 minutes. However, several trials yielded more extreme responses, which would skew the mean.

The questionnaires reveal that the median number of attorney follow-up questions per trial was two, and there was at least one follow-up question in 78% of the trials in which juror questions were asked.

From the figures cited, it appears that if juror questions were permitted in all civil trials, a composite picture of a typical civil trial (based on median responses to the questionnaires) would look like this:

| % of trials in which questions are asked: | 95% |
| median # of questions proposed by jurors: | 9 |
| median # of questions approved by the judge: | 7 |
| median # of follow-up questions: | 2 |
| median amount of time added to trial: | 30 |

Interestingly, these results were very similar to those reported in the Massachusetts pilot.

### Qualitative Responses to the Pilot Project

The key question posed to the trial judges and attorneys was whether question-asking should be permitted in all civil trials.

#### Judges

Several judges withheld a response after the first few trials, and one judge answered in the negative early on. However, by the end of the pilot, all eleven judges recommended that judges have discretion to allow juror questions in any civil trial.

These are representative comments from six different judges at the conclusion of the pilot:

1. I would urge that the practice of permitting juror questions as per the pilot program be made permanent by rule change. I found it to be basically non-disruptive, added little trial time and the positives far outweighed the negatives in terms of juror empowerment, clarification of testimony, etc.
2. After being involved with the program for 3 months or so, I started telling the jury panels about the program as part of my preliminary remarks . . . and I noticed in every instance a positive reaction. I think there are a number of people who have a negative feeling about jury service even though the system has improved dramatically over the years, and I feel that this pilot
program definitely makes the jurors feel more involved. I think that anything
which raises the average interest level in our justice system is a good thing.

3. The jury loved asking questions. The trial held their attention because of their
ability to ask questions. The jury asked some very informed and revealing
questions. However, many of the questions were directed to the wrong
witness (e.g., asking a fact witness an expert opinion question).

4. I think jury questioning is a terrific idea. In my experience, jury questioning
keeps the jury more alert and interested in the case. The questions in many
instances are insightful and give attorneys a glimpse of the jury's thinking on
the case. I saw no difficulties develop with the program.

5. I think we have to carefully assess who is posing the questions. The more
articulate, intelligent juror seems to be the one asking the questions and
although the less articulate jurors decide not to ask questions, it seemed to
me on occasion they were "backing off" and permitting the question askers to
"take over." This may be the natural progression during jury deliberation and
may just be the personality of the jurors, who seem to be the ones who are
not afraid to speak out, be more outgoing and less concerned with criticism.

One judge gave a particularly comprehensive response:

6. When initially asked to consider participating in the project, I was anticipating
that the process would be precisely the sort of disaster that many members of
the bar believed it would be. The very idea of letting jurors participate in
questioning of the witnesses was one which I was quite confident would be
fraught with danger. I thought that the trials would inevitably become bogged
down in review of questions which were irrelevant at best and which in the
end could not be asked . . . . I thought that permitting the jury to dream up
questions would improperly alter their focus and lead to chaos. I was not only
incorrect about all of those matters, but now that the project has concluded, I
find myself yearning for it to be approved for use in the near future. Far from
creating the sort of crisis that I anticipated, . . . the jurors were uniformly
more focused on the evidence. [T]he questions that they wanted to be asked
were by and large relevant and in many cases significant. Indeed, one of the
experts who testified told me on the record after the jury had left for the day
that he welcomed the questions from the jurors and considered them to be a
helpful guide to whether or not they had understood his testimony. No change
of course, is completely without controversy, and I suspect that many
attorneys will have the same fears and misgivings that I had. But I also
suspect that if the program becomes an option, those of us who have
experienced it first hand will find that our views of its benefits are soon
enough shared by many others. I have been thoroughly convinced of the
value of the program and hope that it is approved for future trials.

Attorneys

The final question to both judges and attorneys was:

Do you recommend that jurors be allowed to submit questions to witnesses in all civil
trials?  Yes / No

Of the 272 attorneys who were involved in the pilot, 161 or 59% answered "Yes," 99
or 36% answered "No," and 12 or 4% did not answer the question. Fifty percent of
the 139 attorneys who identified themselves as defense counsel (69 attorneys) and 69% of the 133 attorneys who identified themselves as plaintiff's counsel (92 attorneys) answered "Yes," recommending the option in all civil trials.

The most common concerns expressed by attorneys were interference with trial strategy and loss of control over witnesses. Another expressed concern was that the judge's control of the process was critical, and that perhaps not all judges would handle the procedure as well as the pilot judge. Virtually all of the attorneys recognized increased juror attention and satisfaction as a result of the procedure. One concern recognized by both judges and attorneys is whether to allow questions of an expert witness who testifies "live" if the opposing expert's testimony is presented by videotape.

These are representative positive comments from attorneys:

1. I believe that jurors should be permitted to take notes and ask questions in all trials. It promotes their attentiveness and makes them feel a part of the process. I have always feared jurors' speculation on what they feel they do not know affecting their decision-making. Interviews of jurors by the court or counsel in other cases in federal or other states' courts have shown this fear to be reasonable.
2. This was an extremely positive event. I was happy to be part of the experience. Judge________ has an extremely good disposition to work with the jurors and attorneys to warrant admiration. Under his control, the focus of the jury was greater than any other I've seen.
3. The positives of the program are obvious: juror participation and a strong indication as to how jurors feel about a witness's testimony.
4. Jurors submitting questions is a good idea as long as the safeguards remain in place to scrutinize and review the proposed questions before the question is posed to the witness. The questions gave me an indication as to what the jury considered significant.
5. The questioning did give some insight into what the juror's perceptions were which was beneficial in structuring of the argument.
6. I think that throughout a trial, settlement may be more forthcoming based on attorneys' hearing juror questions.

These are representative negative comments from attorneys:

1. The jury should remain neutral throughout the trial, rather than making the witness feel they are being questioned by the fact finder.
2. The follow-up permits re-covering testimony already covered and opens the door to introducing testimony on new subjects not previously covered, which can give an advantage to the attorney fortunate enough to have been served up with a question on an issue on which he needs to add testimony.
3. The adversary process presumes the ability of counsel to pose appropriate questions to witnesses at the appropriate time. The process has worked to produce fair and impartial results over the course of time. Injecting another layer of questioning has the potential negative effects of: 1) overemphasizing certain aspects of a witness's testimony; 2) injecting information that one or both counsel have avoided for tactical reasons; 3) risking testimony from a witness which goes beyond the specific question posed; and 4) extending the trial time with no measurable benefit in terms of just resolution of matters.
4. Part of the lawyering process is to know what questions to ask or not. When a juror asks a question that was specifically not asked by a lawyer it doesn’t seem right to allow the lawyering strategy to dissolve.

5. The jury may have a question for one witness which may be much better answered by a later witness, and which the attorneys may have chosen not to pose to this particular witness. The manner in which the case unfolds is best left to the attorneys who know much more about the case.

**Jurors**

Juror responses to that same question showed overwhelming approval. Jurors welcomed the opportunity to question witnesses, irrespective of whether the individual juror actually submitted a question. Several jurors who wrote out comments stated that knowing they could ask questions made them more attentive, especially when the judge allowed them to take notes. Several reported that they were assisted by the witnesses’ answers to a juror’s question, and several indicated that having had the opportunity to get answers to their questions actually shortened the deliberation time. That was a potential benefit we did not foresee, and did not ask about on the questionnaires. Finally, most jurors who had served on a jury before found this experience more satisfying.

Respectfully submitted,

The Jury Sub-committee of the Civil Practice Committee

Hon. Barbara Byrd Wecker,
Chair
Hon. Steven L. Lefelt
Hon. Catherine M. Langlois
Jeffrey Greenbaum, Esq.
Alan Y. Medvin, Esq.
Joseph Connor, Jr., Esq.
Michael Garrahan, Esq., AOC
4/25/01
REPORT OF THE
CONFERENCE OF CIVIL PRESIDING JUDGES
ON ITS
EVALUATION OF JUROR QUESTION-ASKING
PROCEDURES

January 2006
The N.J. Supreme Court authorized juror questions in civil trials, as may be determined by the judge prior to the commencement of *voir dire*, approving a recommendation for such action from the Civil Practice Committee following completion of a pilot program conducted by its Jury Subcommittee. The Court-approved revision of R. 1:8-8(c), effective September 3, 2002, as follows:

(c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court’s discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors’ questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors’ questions and the witness’s answers.

In response to procedural questions raised by trial judges in the first year after authorization of juror questions, the Conference of Civil Presiding Judges initiated this evaluation, with the assistance of Michael Garrahan, chief of the AOC’s Jury Management Unit. Survey instruments were developed for use by the Conference and provided to trial judges and attorneys to complete for trials taking place during September 2003 through February 2004 and involving juror questions for witnesses. Those survey instruments focused on three specific issues identified by judges and about which there were differing opinions on what would constitute the most appropriate procedures. These issues are listed below:
1. Where one party’s witness testifies by videotape or deposition, should juror questions be asked of the other party’s witness(es)?

2. If a witness remains available after completing his or her testimony, including responding to any juror questions, should that witness be subject to recall in order to respond to later juror questions?

3. Should the jurors be identified by seat number on questions that they submit for witnesses?

In addition to those issues, the surveys additionally sought background information (such as the number of questions asked by jurors) and information about how trial judges conducted the review of juror questions with counsel. The surveys also asked judges and attorneys their opinions on whether authorizing jurors to submit questions significantly affected the following areas:

- jurors’ attentiveness
- jurors’ understanding of testimony
- jurors’ satisfaction with the process
- the fairness of the trial

Another question sought judges’ and attorneys’ reactions to jurors being permitted to submit questions in the particular trial in which they were involved. Those participating were also asked to provide additional comment on questions so that they had a full opportunity to provide their input. Over the six-month period in which the surveys were conducted, 232 completed surveys were submitted by 65 trial judges and 479 completed surveys were submitted by attorneys – 219 by plaintiffs’ counsel and 260 by defense counsel. With regard to trial type, a combined 72% of the survey cases involved automobile negligence (45%), non-auto personal injury (18%), or medical malpractice (9%).
This evaluation first addresses the responses to the three primary questions identified above, including possible next steps for the Conference based on those results, and also reviews the responses of judges and attorneys to the other areas covered by the survey.

1. When A Witness Testifies On Videotape Or By Deposition

Question 9 on the Trial Judge Questionnaire sought a Yes / No response to whether any witness had testified on videotape or by deposition, and if answered “Yes” asked for the number of such witnesses, and then asked the following:

9a. If any witness testified by way of videotape or by deposition, and was therefore unavailable to respond to jurors’ questions, did you permit questions to be asked of the other party’s (parties’) expert witness(es)?

Where a witness testified by videotape or deposition, 56% of the responding judges did not permit juror questions to be asked of the other party’s corresponding witness. Questions were permitted by 44% of the judges who responded to that question.
Responses from participating judges disclosed that a witness testified by videotape or deposition in 34% of the cases that involved juror questions. Judges’ responses also noted that there was only one such witness in 61% of those cases and two witnesses in another 28%. Therefore, in only 11% of these trials were there more than two witnesses testifying in this way.

A question on the Attorney Questionnaire asked the attorneys if the trial judge allowed the questions in the trial in which they participated. The question did not ask the attorneys’ opinions of whether questions should have been permitted. Its inclusion was as a back-up to the question asked of judges and it’s unnecessary to report on the responses since there were sufficient judges’ responses and no related issues that require additional review.

Written comments from judges show support both for allowing juror questions to the other party’s witnesses and for not allowing such questions – reinforcing the 56% to 44% response in favor of not allowing questions.

The primary reason expressed for not allowing questions of one party’s witness when the other party’s witness did not testify in person was the need to ensure an equal playing field. A compromise position was taken by a judge who indicated that the lawyers had consented before trial to have both expert
witnesses respond to juror questions by way of the speakerphone since one was unavailable to testify in person. The apparent intent was to treat each witness in the same way with respect to his or her responses to juror questions.

A number of attorneys provided responses to the general question, and their comments were similar to these of the judges.

Possible Next Steps – Re: Videotaped or Deposition Witness

Since the judges’ responses were only 56% to 44% in favor of not permitting juror questions where the other side’s witness testified by videotape or deposition, it is recommended that no action be taken at this time. Rather, trial judges should continue to make these determinations on a case-by-case basis. The court rule allows the trial judge to determine whether to authorize juror questions at trial, so allowing the trial judge to exercise his or her discretion with regard to this trial situation is consistent. This situation was reported to have occurred in 34% of the trials for which judges submitted completed surveys, so it is a significant issue that will be monitored and perhaps revisited at a later time.

2. Should a Witness be Recalled to Respond to Juror Questions?

Question 10 on the Trial Judge Questionnaire asked judges the following:

10. If witnesses remained available in court after completing their testimony, did you allow them to be recalled, if requested, in order to respond to later juror questions?

In those surveys on which judges responded Yes or No to whether a witness was requested to be recalled, 67% stated that they did not recall the witness in order to respond to a later juror question. Judges stated that they did recall a witness in 33% of those instances. Judges’ responses indicated that this issue was encountered in 25%
of the trials in the evaluation. Therefore, when this situation occurred, judges decided not to recall those witnesses in two-thirds (67%) of those trials.

Did Judges Recall Witnesses for Later Juror Questions?

33%

67%

Attorneys were asked to provide their opinion about this issue in Question 5 on the Attorney Questionnaire, as follows:

5. If a witness remains available in court after completing his or her testimony (including responding to any juror questions) and being dismissed, do you believe that such a witness should be subject to recall in order to respond to later juror questions?

Overall, 72% of the responding attorneys answered “No” – that witnesses should not be subject to recall in order to respond to later questions from jurors. Another 25% stated that witnesses should be subject to recall and 3% did not respond to that question. Within that overall response from attorneys, the percentage of “No” responses was 67% among attorneys representing plaintiffs and 77% among attorneys representing defendants. The 25% overall “Yes” response included 30% among plaintiffs’ attorneys and 20% among defense counsel.
Possible Next Steps – Re: Whether to Recall Witnesses

By a significant majority, responding judges and attorneys favored not recalling witnesses (who were otherwise available) in order to respond to juror questions that were submitted after the witness was excused. Those majorities were 67% of judges and 72% of attorneys, including 67% from plaintiffs counsel and 77% from defense counsel. In light of that level of response, the Conference has recommended a proposed revision to R. 1:8-8(c) to the Civil Practice Committee. The proposed revision would add the following language to the end of the current rule section:

Once a witness is excused by the court after completion of his or her testimony, including responding to any questions from jurors and follow-up questions from counsel, the witness shall not be recalled to respond to juror questions that are proposed at a later time unless all counsel and the court agree.

Judges’ responses revealed that this circumstance occurred in 25% of the 232 trials involved in this study, which indicates that addressing this issue will assist a large number of judges, attorneys, litigants, and witnesses. Any change to the rules would also need to be reflected in the instructions to jurors.

3. Should each juror be required to identify himself or herself on the written questions that they propose to ask of witnesses?

Question 11 on the Trial Judge Questionnaire asked judges the following:

11. Did you require each juror to place his or her juror number (seat position) on each question that they submitted for a witness?

Of the 226 responses to this question, 87% of the judges responded that they did not require jurors to write their juror number (seat position) on their questions. The remaining 13% stated that they did require jurors to include their seat number on any written questions.
Question 6 on the Attorney Questionnaire asked attorneys the following question:

6. In your opinion, should each juror be required to write his or her number (seat position) on each question that they submit for a witness?

Overall, 58% of attorneys stated “No” – believing that jurors should not be required to place their juror number (seat position) on the questions they submit for witnesses. The “Yes” response was 42% overall (one survey did not contain a response to this question). Within the overall response, the “No” response was 52% from plaintiffs’ attorneys and 63% among defendants’ attorneys.
It should be noted that the question to judges was whether they actually required juror identification when confronting this issue at trial, whereas the question to attorneys asked their opinion of whether identification should be required. One difference between judges and attorneys on this issue that is demonstrated in their respective comments is that some attorneys are interested in identifying jurors as individuals in order to direct argument, including summation, to those particular jurors, whereas judges tend to consider jurors as part of the whole, i.e. the jury, rather than as individuals.

Possible Next Steps – Re: Whether to Identify Jurors on Questions

Although these responses show a significant difference in the rate of “No” responses from judges (87%) and attorneys (58% = No, including 52% of plaintiffs' attorneys and 63% of defense attorneys), each group favored jurors not being identified with their questions for witnesses. Additionally, it must be pointed out that the judges’ rate of “No” responses — at 87% — was substantial. The Conference considered whether to recommend that the current court rule be revised to state that jurors, where authorized to submit questions in civil trials, not identify themselves, by name or identifying number, on their questions, but determined not to recommend such a rule change.

Several judges indicated that they disguise, or mask, a juror’s connection with particular questions by requiring that each juror submit a piece of paper, even if blank, or write something like “I have no question”. This procedure was considered and rejected during the development of both the pilot project and the procedures that are in place today, and the Conference does not recommend its statewide implementation.
General Questions

Courtroom procedures – judge question #8

With regard to the issue of the positioning of counsel and jurors when the judge reviews jurors’ questions with counsel, question 8 asked: “What procedure did you use when reviewing jurors’ questions with counsel?” Judges indicated that in 57% of the trials they conduct the review “At sidebar, with jurors in the courtroom”. The next greatest response was at 12% (“In courtroom, with jurors removed or at recess”) and there were two responses at 11% (“In chambers, with jurors in the courtroom” and “Combination of above”. Judges’ clear preference is to review the questions at sidebar with the jurors in the courtroom. The breakdown of the responses is the following:

a. At sidebar, with jurors in the courtroom -- 57%
b. In courtroom, with jurors removed or at recess -- 12%
c. In chambers, with jurors in the courtroom -- 11%
d. In chambers, with jurors removed or at recess -- 5%
e. Combination of above -- 11%
f. Other -- 3%

Where Judges Review Juror Questions

![Pie chart showing distribution of responses]

- At sidebar
- Jurors at recess
- Chambers jurors in
- Chambers jurors recess
- Combinations
- Other

C:\Documents and Settings\heller\Local Settings\Temporary Internet Files\OLKD\DD -- Follow Up Rpt -- Juror Ques to Witnesses - MAY 2006.doc
The judges clearly prefer the courtroom over chambers for conducting the review of jurors' questions -- 69% favoring the courtroom versus 16% favoring chambers (even without considering the 14% who offered combined or other responses). There are no further steps recommended in this area.

Attorney follow-up questions – judge questions 7 and 7a

Question 7 on the Trial Judge Questionnaire inquired about follow-up questions, asking how often attorneys asked follow-up questions after witnesses responded to juror questions. Judges' responses were that attorneys asked follow-up questions in 71% of such instances and no follow-up questions in the remaining 29%. Judges' revealed, in their replies to question 7a, that the median number of follow-up questions was just one. Sixteen responses (12%) stated that there were five or more follow-up questions. The responses, particularly given that the median number of follow-up questions is just one, indicates that there is no need to recommend any next steps in this area.

Opinion on the impact of juror questions — judge question 13 and attorney question 7

Both judges and attorneys, in responses to question 13 and question 7, respectively, were asked to provide a "Yes" or "No" response to whether allowing juror questions affected the following items.

- Juror attentiveness during the trial
- Juror understanding of the testimony
- Juror satisfaction with the process
- The fairness of the trial

The percentage of "Yes" responses from judges and attorneys are shown in the table below, which shows the tabulated responses of plaintiff and defense counsel, as well as of attorneys as an undifferentiated group. There was a majority response of "Yes" in each category for each group, with judges responding "Yes" in a greater percentage than attorneys. The impact on juror satisfaction obtained the highest percentage of
“Yes” responses and the impact on the fairness of the trial received the lowest percentage of “Yes” responses.

<table>
<thead>
<tr>
<th>Issue Inquired About</th>
<th>% of Yes Responses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Judges</td>
<td>Plaintiff</td>
<td>Defense</td>
</tr>
<tr>
<td>Jurors’ attentiveness</td>
<td>83%</td>
<td>64%</td>
<td>57%</td>
</tr>
<tr>
<td>Understanding of testimony</td>
<td>84%</td>
<td>68%</td>
<td>61%</td>
</tr>
<tr>
<td>Juror Satisfaction</td>
<td>95%</td>
<td>81%</td>
<td>77%</td>
</tr>
<tr>
<td>The fairness of the trial</td>
<td>76%</td>
<td>66%</td>
<td>51%</td>
</tr>
</tbody>
</table>

Time Required by Juror Questions -- Judge Question #12

Question 12 asked for the amount of time that resulted from “...allowing the opportunity for juror questions (including time for attorney objections, follow-up questions, and any other extra time required...).” Judges provided that time estimate in 154 completed surveys - a 66% response rate. It can be difficult to track that kind of information during a trial and that number of responses provides a meaningful measure.

The responses indicated that the median amount of time required for the juror questioning process was 30 minutes. The average amount of time was 59 minutes. The reason why the average time is nearly twice the median can be traced to 16 trials in which the estimated time to conduct the procedures was 3 hours or more. Those 16 trials were 10% of the total number of trials but their combined times were represented more than 48% of the total time for the 154 trials. Those trials reported that the procedures averaged 276 minutes, or more than 4.5 hours each. The average time without those trials included would be 34 minutes, meaning that those 16 trials added 25 minutes to each of the other 138 trials. For these reasons, it appears that the median is a more reliable predictor of the time that will be required for a typical trial.

It is worth noting that the 30-minute median is the same as that reported in the original pilot study of juror questions (see Report on Pilot Project Allowing Juror Questions, report of Civil Practice Subcommittee, 2001). In addition, although two of
the questions being evaluated in this report (i.e., allowing questions when the other side testifies by way of videotape or deposition and recalling witnesses for later juror questions) may have been said to add time to these procedures, neither procedure was supported by the responses of judges and attorneys. Accordingly, although the information on time added by the procedure does not result in any recommendations for additional procedures or rule revisions, this information is, nonetheless, helpful to the evaluation.

Information was obtained from court clerks on, inter alia, the numbers of questions submitted and the number actually asked. The average number of questions submitted, the number of questions asked, and the corresponding “approval” rate, are shown below — categorized by the type of witness to whom the questions were directed.

**Plaintiff Witnesses**

<table>
<thead>
<tr>
<th>Witness Type</th>
<th>Total Questions Submitted</th>
<th>Total Questions Allowed</th>
<th>Percentage Allowed of Total Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert</td>
<td>457</td>
<td>222</td>
<td>49%</td>
</tr>
<tr>
<td>Fact</td>
<td>900</td>
<td>368</td>
<td>41%</td>
</tr>
<tr>
<td>Totals</td>
<td>1357</td>
<td>590</td>
<td>43%</td>
</tr>
</tbody>
</table>

**Defense Witnesses**

<table>
<thead>
<tr>
<th>Witness Type</th>
<th>Total Questions Submitted</th>
<th>Total Questions Allowed</th>
<th>Percentage Allowed of Total Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert</td>
<td>308</td>
<td>232</td>
<td>75%</td>
</tr>
<tr>
<td>Fact</td>
<td>343</td>
<td>288</td>
<td>84%</td>
</tr>
<tr>
<td>Totals</td>
<td>651</td>
<td>520</td>
<td>80%</td>
</tr>
</tbody>
</table>

As can be seen, the approval rate for questions to defense witnesses is much greater than that for plaintiffs' witnesses. Based on the numbers shown above, there were an average of 1.4 juror questions actually asked of each plaintiffs' witness — 1.6 for expert witnesses and 1.4 for fact witnesses. There were an average of 2.1
questions asked of each defense witness — that is, an average of 2.1 questions overall as well as for expert and fact witnesses individually.

**Ranking of Reaction to Juror Questions – Judge question 14, attorney question 8**

Judges and attorneys were asked, in the questions noted above, to rank their reactions to jurors being permitted to propose questions to witnesses -- on a scale of 1 (very negative) to 5 (very positive). Of the judges’ responses, 88% were in the 4 or 5 range. The responses of plaintiffs’ attorneys were in the 4 or 5 category for 73% of their responses and defendants’ attorneys’ responses were in the 4 or 5 category for 54% of responses. Overall, attorney responses were in the 4 or 5 range for 63% of responses. The percentage responses for each category are shown in the table and the graph below.

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Judges</th>
<th>Plaintiffs</th>
<th>Defendants</th>
<th>All Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0.6%</td>
<td>3%</td>
<td>7%</td>
<td>5%</td>
</tr>
<tr>
<td>2</td>
<td>0.6%</td>
<td>6%</td>
<td>10%</td>
<td>8%</td>
</tr>
<tr>
<td>3</td>
<td>12%</td>
<td>17%</td>
<td>30%</td>
<td>24%</td>
</tr>
<tr>
<td>4</td>
<td>22%</td>
<td>33%</td>
<td>27%</td>
<td>30%</td>
</tr>
<tr>
<td>5</td>
<td>66%</td>
<td>40%</td>
<td>27%</td>
<td>33%</td>
</tr>
</tbody>
</table>

**Judges’ and Attorneys’ Rankings of Reaction to Juror Questions -- by %**

![Graph showing judges and attorneys' rankings](C:\Documents and Settings\bsheller\Local Settings\Temporary Internet Files\OLKD\DD -- Follow Up Rpt -- Juror Ques to Witnesses - MAY 2006.doc)

**Note:** 5 is "very positive" / 1 is "very negative"
The responses from both judges and attorneys indicate overall satisfaction with the impact of the procedures on jurors’ attentiveness, jurors’ understanding of testimony, jurors’ satisfaction with the process, and the fairness of the trial, and their assessments in that area should encourage increased use of the question-asking process at trial.
This Directive supplements Directive #21-06 (issued December 11, 2006). That earlier Directive promulgated the Jury Selection Standards (Standards), including model jury voir dire questions, as approved by the Supreme Court. This Directive provides additional explanation or further direction from the Court with regard to juror questioning at voir dire. Where this Directive modifies voir dire procedures set forth in Directive #21-06, it supersedes the relevant portions of that Directive.

The standard voir dire questions approved by the Court and promulgated by the earlier Directive – as stated in the underlying Report by the Supreme Court Special Committee on Peremptory Challenges and Jury Voir Dire (Special Committee) and in the promulgated Standards – are intended to provide for a full and complete voir dire of prospective jurors so that reasons for any appropriate challenges for cause can be discovered and so that counsel is provided with information that may be relevant to their lawful exercise of peremptory challenges. The use of the standard voir dire questions required certain new procedures, as provided for in the Standards and the earlier Directive. The explanations discussed and modifications set forth in this Directive are reflections of the complexity of the jury selection process and of those procedures.

Following implementation of the procedures required by Directive #21-06, trial judges reported regarding their experience with the application of the Standards, incorporating comments from attorneys and jurors in some instances. Those were offered in a cooperative spirit that demonstrated a common interest
in serving justice and a shared concern for efficient court operations. Such efforts are appreciated and encouraged and provide benefits not just for judges, but for others involved at trial, including jurors.

A key focus of comments involved judges being required to repeat the same question to each juror, with general agreement that such action is not necessary to ensure that jurors have heard, understood, and can fully respond to the voir dire questions being asked. Although they understood that to be the intent of the questioning using the standard voir dire questions, many judges throughout the state indicated their belief that the procedures set forth in the Standards, particularly the questioning method, could be adjusted so as to assure thorough and complete questioning of prospective jurors without requiring excessive repeated readings of questions to jurors.

The matter was considered by the newly established Supreme Court Committee on Jury Selection in Criminal and Civil Trials (Committee), which is chaired by Appellate Division Judge Joseph F. Lisa and includes experienced judges and attorneys. After thorough consideration the Committee reached a broad consensus and issued a report to the Supreme Court dated March 30, 2007, recommending adjustments to the jury selection procedures and setting forth its proposed changes in this Supplemental Directive. The Committee agreed that the requirement that each prospective juror be verbally asked each question is unnecessary and, to some extent, counterproductive to the goals of the jury selection standards. The Committee was of the view that the modified procedure, if implemented, will provide a format that ensures that each prospective juror will furnish the information requested by each question, in a more expeditious and streamlined fashion, but nevertheless in a manner designed for reliability in eliciting the information and not dependent upon the juror's recollection of questions asked of other jurors. The modified procedure recommended by the Committee also would require that a judge ask a limited number of open-ended questions at voir dire, in order to require verbal responses from, and interaction with, prospective jurors, which will provide valuable information and insight during the selection process. The Committee also recommends that the waiver of the full use of the standard questions be approved for use at criminal trials. The Committee is of the view that the modified procedures will continue to adhere to the goals and purposes of the Jury Selection Standards that the Court previously approved.

After careful review, the Supreme Court has accepted the recommendations of the Committee, with the exception of that regarding waiver in criminal trials. Accordingly, the Court hereby modifies the procedures set forth in the Jury Selection Standards promulgated by Directive #21-06, as set forth below.

A. The first modification authorizes judges, as an alternative procedure, to conduct jury voir dire without being required to verbally ask each question to
each juror. Under this alternate procedure the questions must be provided to
jurors in print and, at a minimum, the voir dire elements described below must be
part of the process.

1. At the beginning of the voir dire process, each prospective juror in the
panel shall be furnished with a printed copy of the voir dire questions,
which shall consist of all the standard questions for the case type, as
supplemented and determined by the judge at the Rule 1:8-3 conference.
The form of these questions calls for a yes or no answer. The names of
witnesses shall be included in print, either on the form after question #4, or
on a separate paper. All prospective jurors shall also be furnished with a
pencil or pen.

2. Questions 1 though 6 may be addressed to the entire array in any trial, not
just lengthy trials, and excusals may be made of those disqualified by their
responses at the outset of the proceeding. Question 2a, pertaining to the
length of the trial, may be included in this questioning regardless of the
expected length of the trial.

3. The judge must read and review each question en banc with the first
jurors seated in the box. The judge should instruct all jurors in the array to
pay close attention and may tell them to mark their printed copy of the
questions with their yes or no responses. The judge should instruct that,
unless requested by a particular juror, the questions will not be read again,
thus making this the appropriate opportunity for jurors to note their
answers. The judge should also instruct that if a juror is unsure of his or
her answer or is uncertain as to the meaning of the question, the juror
should bring that to the judge's attention when called upon. Jurors will not
place their names on the printed copies, and when a juror has completed
the process, the printed copy will be returned to court staff and destroyed
if written upon or damaged.

4. When reading the questions to the jurors in the box and the array, judges
are encouraged to provide some explanatory commentary, in their own
words, about the intent and meaning of some or all of the questions.

5. In addition to the printed questions, the judge shall also inform the jurors in
the box and the array that jurors will also be individually asked several
questions that they will be required to answer in narrative form. One such
question will be the biographical question contained in the standard
questionnaire. In addition to the biographical question, several other
open-ended questions will be posed to prospective jurors, as will be
discussed below. The judge may, but is not required to, distribute copies
of these questions to the jurors in the box and in the array.
6. The judge may read all of the questions one time before addressing each juror in the box individually. The judge shall verify that the juror understood all of the printed questions and inquire whether the juror answered yes or uncertain to any of them. If so, appropriate follow up questions shall be asked. The judge will then ask that juror each of the open-ended questions, to which a verbal response shall be given and for which appropriate follow up questions will be asked. Each juror must then be verbally asked the two omnibus qualifying questions that follow the biographical question in the lists of standard questions for civil voir dire and criminal voir dire. Questioning shall be in open court or at sidebar, in the discretion of the court, with input from counsel.

7. As jurors are challenged for cause or peremptorily and excused from the box, the judge will seat the replacement juror(s). The judge will preliminarily ask each replacement juror if he or she understood the questions when they were read earlier. If the juror requests clarification or rereading of any one or more of the questions, the judge shall do so. The judge will then ask whether the juror answered yes or uncertain to any question and, if so, ask appropriate follow up questions. When questioning the jurors about the written form, the judge must refer to questions by number or description, sufficient to establish for the record the question to which the juror is responding. An unmarked copy of the printed form should be made part of the record as a court exhibit.

8. Some open-ended questions must be posed verbally to each juror to elicit a verbal response. The purpose of this requirement is to ensure that jurors verbalize their answers, so the court, attorneys and litigants can better assess the jurors' attitudes and ascertain any possible bias or prejudice, not evident from a yes or no response, that might interfere with the ability of that juror to be fair and impartial. Open-ended questions also will provide an opportunity to assess a juror's reasoning ability and capacity to remember information, demeanor, forthrightness or hesitancy, body language, facial expressions, etc. It is recognized that specific questions to be posed verbally might appropriately differ from one case to another, depending upon the type of case, the anticipated evidence, the particular circumstances, etc. Therefore, rather than designating specific questions to be posed verbally to each juror, the determination is left to the court, with input from counsel, in each case.

The verbal questions should be selected based upon what is deemed particularly important in the jury selection process in that case. They could be derived from the standard list of questions or be developed without regard to the standard questions by the judge, with input from counsel, to address case-specific issues. The verbal questions should elicit open-ended answers. The judge must ask at least three such questions, in addition to the biographical question and the two omnibus qualifying questions. This is a minimum number
and judges are encouraged to ask more where such action would be appropriate. If questions are derived from the standard list of questions, they must be reformulated to elicit open-ended answers.

Appended to this Supplemental Directive is a list of sample open-ended questions, provided here only for the purpose of assisting judges and counsel by illustrating the type of questions contemplated. These are examples; they are not model, or standard, open-ended questions. Some of the examples are reformulations of standard questions, and others are not. There is no requirement that any of these examples be used in any case, although they may be used. The open-ended questions shall be asked either at sidebar or in open court, in the discretion of the court, with input from counsel.

B. The following is clarification regarding Directive #21-06.

With regard to the ability of jurors to read voir dire questions that are displayed or provided in print, trial judges should keep in mind that jurors are asked on their qualification questionnaire (which they return in advance of service) whether they can read and understand the English language. Although some jurors nonetheless may raise language issues for the first time during voir dire, the Jury Management Office will have addressed any language questions that the juror indicated on his or her qualification questionnaire. Consistent with the Americans with Disabilities Act (ADA), the Judiciary will, upon request, provide reasonable accommodations regarding the printed questions, such as providing a larger print size.

While use of the standard voir dire questions is mandatory, judges in their discretion may alter the sequence of the questions as they determine is appropriate – including whether to ask key challenge for cause questions early on, to incorporate questions suggested by counsel, or to integrate case type specific questions. The earlier Report of the Special Committee suggested that judges should not be required to follow a "rigid script" in conducting voir dire. The voir dire questions to be asked, including the sequence in which to ask them, modifications of wording on a case-appropriate basis, the inclusion of supplemental questions requested by counsel, and the proposed open-ended questions, should be part of the Rule 1:8-3 conference. The promulgated standard voir dire questions are posted on the Judiciary’s Internet site in Word format.

With regard to asking the "biographical" question as separate parts rather than as a whole, that question is intended to be asked as a single question so that jurors must select the topic that they want to answer first. As noted in the earlier Special Committee Report (Report at page 35): "The jurors, in responding in narrative fashion to the variety of subjects presented in the question, will also provide important information by self-selecting what they choose to talk about."
Criminal Standard Question #25 (renumbered on the attached revision as #27) was the subject of a number of specific comments. A criminal defendant may waive the inclusion of this question, which deals with that defendant's decision not to testify. Where that question is waived by defendant, the trial judge must not only ensure that the question is not asked, but also that neither the question nor any reference to the question is included in the list of questions that is distributed. The note that is included with that question in the standard criminal questions includes the following: "The defendant's decision in that regard should be discussed during the voir dire conference."

As part of its charge, the Committee on Jury Selection in Criminal and Civil Trials will be responsible for considering and making recommendations regarding any changes to the standard voir dire questions, the introduction of possible additional case type questions, the drafting of a voir dire manual, development of training programs for judges and attorneys, and other related efforts. While the membership of that committee is necessarily limited in number, the Court trusts that every judge and every attorney, not just those appointed to the Committee, will continue to be involved in our ongoing efforts to improve the trial process.

C. Also attached to this supplemental directive are revised standard voir dire questions, which supersede those earlier promulgated by Directive #21-06.

Any questions or comments regarding this Supplemental Directive (Directive #4-07), the underlying Directive (Directive #21-06), or any related materials, including standard voir dire questions and open-ended voir dire questions, may be directed to Michael F. Garrahan, Esq., of the AOC's Office of Trial Court Services (and staff to the Committee on Jury Selection) by e-mail (Michael.Garrahan@judiciary.state.nj.us) or by phone (609-292-2634).

P.S.C.

attachments
cc: Chief Justice James R. Zazzali  
    Associate Justices  
    Hon. Joseph F. Lisa  
    Assignment Judges  
    Assignment Judge Designate Travis L. Francis  
    Civil and Criminal Presiding Judges  
    Theodore J. Fetter, Deputy Admin. Director  
    AOC Directors and Assistant Directors  
    Trial Court Administrators  
    Operations Managers/ATCAs  
    Vicinage Jury Managers  
    Michael F. Garrahan, Jury Programs  
    Steven D. Bonville, Special Assistant  
    Francis W. Hoeber, Special Assistant
EXAMPLES OF OPEN-ENDED QUESTIONS - CRIMINAL

1. How do you feel about testimony of law enforcement officers as opposed to testimony by other witnesses who are not law enforcement officers? For example, do you think a law enforcement officer is more likely, less likely, or as likely to tell the truth as a witness who is not in law enforcement? What makes you feel the way you do about this?

2. What do you think about the principle that the defendant on trial is presumed to be innocent and must not be found guilty unless each and every essential element of an offense is proved by the State beyond a reasonable doubt? Would you have any difficulty follow that principle? What makes you feel the way you do about this?

3. What was your reaction when you first heard me explain the nature of the charges against the defendant in this case? Is there anything about the nature of the charges that will make it difficult for you to consider the evidence, the arguments of the attorneys, and my instructions on the law, with an open mind? What makes you feel the way you do about this?

4. Do you have any feelings about the fact that the defendant was arrested and charged with a criminal offense in an indictment? Do these circumstances cause you to have any preconceived notions about the defendant's guilt? What makes you feel the way you do about this?

5. Do you understand that a defendant in a criminal trial does not have to prove his or her innocence, does not have to present any evidence, does not have to testify, and does not even have to be present during the trial if he or she chooses not to be? How do you feel about these principles of our legal system? Will you be able to abide by them in deciding this case?

6. Do you believe the criminal justice system is fair and effective? Please explain.

7. How do you feel about the so-called war on drugs? For example, do you think the amount of resources the government devotes to enforcing the criminal drug laws and prosecuting suspected offenders is too much, not enough, or about right? Do you think resources could be more effectively used in other ways to address the drug problem? Why do you feel this way?

8. How do you feel about gun control laws?

9. Do you believe that you will make a good juror for this case? Please explain.
EXAMPLES OF OPEN-ENDED QUESTIONS - CIVIL

1. What do you think about large corporations that are named as defendants in law suits? Would you consider the legal rights and responsibilities of a corporation differently than those of an actual person? Why do you feel this way?

2. Do you have any feelings about whether or not our society is too litigious, that is, that people sue over things too often that they should not sue over; or do you think, on the other hand, there are too many restrictions on the right of people to sue for legitimate reasons; or do you think our system has struck the right balance in this regard? Have you heard of the concept of "tort reform" (laws that restrict the right to sue or limit the amount that may be recovered)? How do you feel about such laws?

3. There may be expert witnesses in this case. If there are, I will instruct you in more detail, but let me say for now that you do not have to accept their opinions, but you should consider their opinions with an open mind. The expected field of expertise of these witnesses is ________________. How do you feel about experts in that field? Will you be able to evaluate their opinions fairly and with an open mind? Why do you feel the way you do about this?

4. Do you have any particular feelings about whether people should be allowed to sue doctors, hospitals, and other health care providers if they are dissatisfied with the results of medical treatment? Tell me how you feel about this and about what kind of circumstances you think should have to be proven before a dissatisfied patient should be allowed to recover damages?

5. How do you feel about the jury system? Do you think law suits would be better decided by some sort of professional hearing officers, arbitration panels, or judges? In our country, under our constitution, in cases such as this one, people have the right to a jury trial. If it were up to you, should that right continue to exist or be eliminated?

6. Do you believe that you will make a good juror for this case? Please explain.
MODEL JURY SELECTION QUESTIONS

Standard Jury Voir Dire

Civil

[Revised as Promulgated by Directive #4-07]

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:
   - Age 18 or older
   - A citizen of the United States
   - Able to read and understand the English language.
   - A resident of _____________ county (the summoning county)

   Also, a juror must not:
   - Have been convicted of any indictable offense in any state or federal court
   - And must not have any physical or mental disability which would prevent the person from properly serving as a juror.

   Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act.

   Is there any one of you who does not meet these requirements?

2. a. This trial is expected to last for ______________________. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?
b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

c. Do any of you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror? The court will provide reasonable accommodations to your special needs but I will only be aware of any such needs if you let me know about them. My only purpose in asking you these circumstances relates to your ability to serve as a juror. If you have any such request, please raise your hand and I will speak to you at sidebar.

[Note: If a juror makes a request, contact the ADA Coordinator to see if the TCA can meet the request right away (e.g., a portable speaker system available immediately) or if the juror’s service should be deferred so that the TCA can arrange the accommodation timely (e.g., an ASL interpreter that may require three or four months’ reservation in advance).]

3. 

*Introduce the lawyers and the parties.* Do any of you know either/any of the lawyers? Has either / any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr./Ms ____________________?

Names of Parties

4. 

*Read names of potential witnesses.* Do you know any of the potential witnesses?

[Note: List witnesses’ names here or attached a separate sheet.]

5. I have already briefly described the case. Do you know anything about this case from any source other than what I’ve just told you?
6. Are any of you familiar with the area or address of the incident?

7. Have you or any family member or close personal friend ever filed a claim or a lawsuit of any kind?

8. Has anyone ever filed a claim or a lawsuit against you or a member of your family or a close friend?

9. Have you or a family member or close personal friend either currently or in the past been involved as a party ...as either a plaintiff or a defendant... in a lawsuit involving damages for personal injury?

10. A plaintiff is a person or corporation [or other entity] who has initiated a lawsuit.
Do you have a bias for or against a plaintiff simply because he or she has brought a lawsuit?

11. (a) A defendant is a person or corporation [or other entity] against whom a lawsuit has been brought.
Do you have a bias for or against a defendant simply because a lawsuit has been brought against him or her?

[Ask if applicable]
(b) The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual. Would any of you have any difficulty in accepting that principle?

12. The court is aware that there has been a great deal of public discussion about something called Tort Reform (laws that restrict the right to sue or
limit the amount recovered). Do you have an opinion, one way or the other, on this subject?

13. If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or defendant regardless of any sympathy you may have for either party?

14. Based on what I have told you, is there anything about this case or the nature of the claim itself, that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?

15. Can you accept the law as explained by the court and apply it to the facts regardless of your personal beliefs about what the law is or should be?

16. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?

17. Do you know anyone else in the jury box other than as a result of reporting here today?

18. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom such as friendships or family relationships or the type of work you do?

19. Have you ever been a witness in a civil matter, regardless of whether it went to trial?

20. Have you ever testified in any court proceeding?

21. New Jersey law requires that a plaintiff has to prove fault of a defendant before he or she is entitled to recover money damages from that defendant. Do you have any difficulty accepting that concept?


Biographical Question

The following questions should be asked of each potential juror, one by one, in the jury box:

You have answered a series of questions about civil trials and civil cases. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you’ve served in the military; what is your educational history; who else lives in your household and the type of work they do, if any; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e. the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say? What you do in your spare time and anything else you feel is important.

[Note: This question is intended to be an open-ended question which will allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: “I notice you didn’t mention [specify]. Can you please tell us about that?”]
Omnibus Qualification Questions (Two)

1. Is there anything, whether or not covered in the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?

2. Is there anything else that you feel is important for the parties in this case to know about you?
STANDARD JURY VOIR DIRE
(AUTO, SLIP & FALL, MEDICAL MALPRACTICE)

Auto

1. How many of you are licensed drivers?

2. Have you or any family member or close personal friend ever been involved in a motor vehicle accident in which an injury resulted?

3. (a) Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

   (b) Has anyone ever filed a claim or lawsuit against you or a family member or close personal friend?

4. Have you or a family member or close personal friend sustained an injury to the ______ or have chronic problems with _________?

5. [Ask if applicable] Have you or a family member or close personal friend utilized the services of a chiropractor?

6. The court is aware that there has been a great deal of public discussion in print and in the media about automobile accident lawsuits and automobile accident claims. Do you have an opinion, one way or the other on this subject?
**Slip and Fall**

1. Is anyone a tenant?

2. Is anyone a landlord?

3. Is anyone a homeowner?

4. Have you or a family member or close personal friend ever been involved ...as either a plaintiff or a defendant...in a slip and fall accident in which an injury resulted?

5. Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

6. Have you or a family member or close personal friend sustained an injury to the _______ or have chronic problems with _________?
Medical Malpractice

Note: This information is not to be included on printed copies provided to jurors.

It is expected that the parties will submit a few specific questions seeking juror attitudes towards particular injury claims, such as pecuniary loss for wrongful death or a claim for emotional distress, if applicable, or juror attitudes about other particular types of claims, such as wrongful birth or informed consent issues. In particular, wrongful birth claims might require a questionnaire or separate voir dire to address attitudes about termination of pregnancy.

Before asking the questions below, explain that the trial involves a claim of medical negligence, which people sometimes refer to as medical malpractice and that the terms both mean the same thing.

1. Have you, or family member, or a close personal friend, ever had any experience, either so good or so bad, with a doctor or any other health care provider, that would make it difficult for you to sit as an impartial juror in this matter?

2. If the law and the evidence warranted, could you award damages for the plaintiff even if you felt sympathy for the doctor?

3. Regardless of plaintiff's present condition, if the law and evidence warranted, could you render a verdict in favor of the defendant despite being sympathetic to the plaintiff?

4. Have you, any family member, or close personal friend ever worked for:
   - Attorneys
   - Doctors, Hospitals or Physical Therapists
   - Any type of health care provider
   - Any ambulance / EMT / Rescue
5. Have you, or any members of your family, been employed in processing, investigating or handling any type of medical or personal injury claims?

6. Is there anything that you may have read in the print media or seen on television or heard on the radio about medical negligence cases or caps or limits on jury verdicts or awards that would prevent you from deciding this case fairly and impartially on the facts presented?

7. This case involves a claim against the defendant for injuries suffered by the plaintiff as a result of alleged medical negligence. Do you have any existing opinions or strong feelings one way or another about such cases?

8. Have any of you or members of your immediate family ever suffered any complications from [specify the medical field involved]?

9. Do you have any familiarity with [specify the type of medical condition involved] or any familiarity with the types of treatment available?

10. Are you, or have you ever been, related (by blood or marriage) to anyone affiliated with the health care field?

11. Have you or any relative or close personal friend ever had a dispute with respect to a health care issue of any kind with a doctor, chiropractor, dentist, nurse, hospital employee, technician or other person employed in the health care field?

12. Have you or any relative or close personal friend ever brought a claim against a doctor, chiropractor, dentist, nurse or hospital for an injury allegedly caused by a doctor, dentist, nurse or hospital?
13. Have you or any relative or close personal friend ever considered bringing a medical or dental negligence action but did not do so?

14. Have you or any relative or close personal friend ever been involved with treatment which did not produce the desired outcome?
MODEL JURY SELECTION QUESTIONS

Standard Jury Voir Dire

Criminal

[Revised as Promulgated by Directive #4-07]

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:
   - Age 18 or older
   - A citizen of the United States
   - Able to read and understand the English language.
   - A resident of ______________ county (the summoning county)

Also, a juror must not:
   - Have been convicted of any indictable offense in any state or federal court
   - And must not have any physical or mental disability which would prevent the person from properly serving as a juror.

Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act.

Is there any one of you who does not meet these requirements?

2. a. This trial is expected to last for __________________________. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?

b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

Model Criminal Jury Voir Dire Questions
Revised as Promulgated by Directive #4-07
Page 1 of 7
c. Do any of you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror? The court will provide reasonable accommodations to your special needs but I will only be aware of any such needs if you let me know about them. My only purpose in asking you these circumstances relates to your ability to serve as a juror. If you have any such request, please raise your hand and I will speak to you at sidebar.

[Note: If a juror makes a request, contact the ADA Coordinator to see if the TCA can meet the request right away (e.g., a portable speaker system available immediately) or if the juror’s service should be deferred so that the TCA can arrange the accommodation timely (e.g., an ASL interpreter that may require three or four months’ reservation in advance).]

3. *Introduce the lawyers and the defendant.* Do any of you know either/any of the lawyers? Has either / any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr./Ms. __________________________?

   Name of defendant

4. *Read names of potential witnesses.* Do you know any of the potential witnesses?

   [Note: List witnesses’ names here or attach a separate sheet.]

5. I have already briefly described the case. Do you know anything about this case from any source other than what I’ve just told you?

6. Are any of you familiar with the area or address of the incident?
7. Have you ever served on a jury before today, here in New Jersey or in any state court or federal court?

8. Have you ever sat as a grand juror?

9. Do you know anyone else in the jury box other than as a result of reporting here today?

10. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom, such as friendships or family relationships or the type of work you do?

11. Is there anything about the nature of the charge itself that would interfere with your impartiality?

12. Have you ever been a witness in a criminal case, regardless of whether it went to trial?

13. Have you ever testified in any court proceeding?

14. Have you ever applied for a job as a state or local police officer or with a sheriff’s department or county jail or state prison?

15. Have you, or any family member or close friend, ever worked for any agency such as a police department, prosecutor’s office, the FBI, the DEA, or a sheriff’s department, jail or prison, either in New Jersey or elsewhere?

16. As a general proposition, do you think that a police officer is more likely or less likely to tell the truth than a witness who is not a police officer?
17. Would any of you give greater or lesser weight to the testimony of a police officer merely because of his or her status as a police officer?

18. Have you or any family member or close friend ever been accused of committing an offense other than a minor motor vehicle offense?

19. Have you or any family member or close friend ever been the victim of a crime, whether it was reported to law enforcement or not?

20. Would you have any difficulty following the principle that the defendant on trial is presumed to be innocent and must be found not guilty of that charge unless each and every essential element of an offense charged is proved beyond a reasonable doubt?

21. The indictment is not evidence of guilt. It is simply a charging document. Would the fact that the defendant has been arrested and indicted, and is here in court facing these charges, cause you to have preconceived opinions on the defendant's guilt or innocence?

22. I have already given you the definition of reasonable doubt, and will explain it again at the end of the trial. Would any of you have any difficulty in voting not guilty if the State fails to prove the charge beyond a reasonable doubt?

23. If the State proves each element of the alleged offense(s) beyond a reasonable doubt, would you have any difficulty in returning a verdict of guilty?

24. The burden of proving each element of a crime beyond a reasonable doubt rests upon the prosecution and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to
prove his/her innocence or offer any proof relating to his/her innocence. Would any of you have any difficulty in following these principles?

25. Would you have any difficulty or reluctance in accepting the law as explained by the court and applying it to the facts regardless of your personal beliefs about what the law should be or is?

26. Is there anything about this case, based on what I've told you, that would interfere with your ability to be fair and impartial?

27. A defendant in a criminal case has the absolute right to remain silent and has the absolute right not to testify. If a defendant chooses not to testify, the jury is prohibited from drawing any negative conclusions from that choice. The defendant is presumed innocent whether he testifies or not. Would any of you have any difficulty in following these principles?

[Note: The defendant has the right to waive this question. The defendant's decision in that regard should be discussed during the voir dire conference.]
Biographical Question

The following questions should be asked of each potential juror, one by one, in the jury box:

You have answered a series of questions about criminal trials and criminal charges. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you’ve served in the military; what is your educational history; who else lives in your household and the type of work they do; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e., the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say; what you do in your spare time and anything else you feel is important.

[Note: This question is intended to be an open-ended question which will allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: “I notice you didn’t mention [specify]. Can you please tell us about that?”]
Omnibus Qualification Questions (Two)

1. Is there anything, whether or not covered by the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?

2. Is there anything else that you feel is important for the parties in this case to know about you?
Juror Basics

- Juror Source List
- Juror Qualifications
- Juror Summons/Questionnaire
- Rescheduling Jury Service
- Excuse
- Disqualifications
- Juror Compensation
- Term of Service
- Juror Call-Off System/Emergency Court Closings
- Directions to the Court
- Courthouse Security & Building Entrances
- Jury System Improvements
- Jury Service Exit Survey
- Glossary
- Volunteer Opportunities
- Additional Information

JUROR SOURCE LIST

The names of persons eligible for jury service are selected from a juror source list of county residents whose names and addresses are obtained from a merger of four lists:

1. Registered voters
2. Licensed drivers
3. Filers of state gross income tax returns
4. Filers of homestead rebate applications

Top of Page

QUALIFICATIONS OF JURORS

Every person summoned as a juror:

a. Shall be 18 years of age or older
b. Shall be able to read and understand the English language
c. Shall be a citizen of the United States
d. Shall be a resident of the county in which the person is summoned
e. Shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States
f. Shall not have any mental or physical disability, which will prevent the person from serving as a member of a jury

Top of Page
JUROR SUMMONS/QUESTIONNAIRE

When you are selected to serve as a juror, you will be mailed a one page document that contains two separate parts: a summons showing the date and time at which you are required to report; and a questionnaire that you must complete and return within 10 days. After reading all instructions, please complete and sign the questionnaire, which is the yellow portion of the document, and return it to the jury management office within 10 days. Please bring the "JUROR" portion of the form with you. This will serve as your juror identification badge while serving. If you have any questions, please contact the Jury management office at 973-693-5913.

RESCHEDULING JURY SERVICE

Jury service is one of the most important duties of a citizen, and we recognize the sacrifices you are making in terms of your time and energy.

If you have a scheduling conflict or problem that would prevent you from serving jury duty on the date you are summoned, you can request to have your service rescheduled to a new date. All rescheduling requests must be received at least ten (10) days prior to the reporting date.

EXCUSED

There are very few statutory reasons for being excused from jury duty. If you have an extreme hardship, or you feel that you should be excused from your service obligation, you can submit your request to the jury management office. Medical excuse requests must be accompanied by a doctor's note.

All requests must be submitted at least ten (10) days prior to the reporting date to:

Jury Management Office
Veterans Courthouse - 1st floor th, Room 150
50 West Market Street
Newark, NJ 07102

Note: Your request to be excused must be approved by the assignment judge. A reasonable effort will be made to notify you if your request has been approved or denied. If, however, you do not receive notification from this office, you must report on the assigned date.

DISQUALIFICATION

A person is disqualified from serving as a juror if he or she is:

1. A convicted felon
2. A non-resident of Essex County
3. A non-resident of the U.S
4. Under the age of 18
5. Unable to read and understand English, and
6. Unable to mentally or physically perform the functions of a juror. (Doctor's certification required.)

JUROR COMPENSATION

Petit Jurors
For the first three consecutive days of jury service, petit jurors will be compensated $5.00 (five) dollars per day. On the fourth day of jury service and beyond, petit jurors will receive $40.00 (forty) dollars per day. There is no reimbursement for mileage. Juror checks are mailed directly from the State Department of the Treasury every Friday for each week of petit jury service.

Grand Jurors

Grand jurors are compensated $5.00 (five) dollars per day for each day of service. There is no reimbursement for mileage. Grand jurors are paid upon completion of service. Juror checks are mailed directly from the State Department of the Treasury.

TERM OF SERVICE

Petit Jurors

The term of service for all petit jurors is an anticipated two days, or the duration of one trial. Sometimes, depending on the needs of the courts, you may not be required to return for a second day. If after serving a second day you are not involved in a jury selection process, you will be dismissed provided there are no unexpected trial demands for jurors.

Grand Jurors

Grand jury selection is held on the first day of service. If you are selected, your service will be on a specific day each week for approximately 19 weeks.

EMERGENCY COURT CLOSINGS

A recorded message regarding court closings can be accessed by dialing 693-5896 or 693-5700. Media announcements will be on radio station 101.5 FM and on FOX TV - Channel 5 between 6 a.m. and 9 a.m.

JUROR CALL-OFF SYSTEM

The Essex jury management office operates a recorded message system to inform jurors when they are not required to report as summoned. To determine if you are required to report, you must call (973) 693-5896 after 5 p.m. on the evening before your summons date. A recorded message will refer to the juror numbers located on the "JUROR" badge portion of your summons and will provide you with the reporting instructions. You may be called off indefinitely, or required to appear on a future date specified in the recording. If the recording is not operational, you must report as directed on your summons.

DIRECTIONS TO THE ESSEX COUNTY COURT COMPLEX

For directions to the Essex County Courthouse, 50 West Market Street Newark, NJ 07102, please call (973) 693-5701 or visit our web site at www.judiciary.state.nj.us/directions/esxdirect.htm
Sheriffs Department personnel screen all persons, including jurors, when entering the court complex. To expedite this process, please observe the following:

- Wear your JUROR badge at all times
- Be prepared to remove all metal objects that will activate the metal detector including keys, coins, cell phones, cigarette packs, foil wrappers and large buckles
- If the metal detector activates as you pass through, a hand-held metal detector will be used to screen you
- Purses and other carried items, such as brief cases and backpacks, will be x-rayed
- Leave pocketknives, scissors, pepper spray, glass bottles, etc. at home or in your vehicle; all potential weapons will be confiscated.
- Cameras and recording devices are prohibited

The fewer metal items you are carrying, the faster you will pass through this area.

Building Entrance:

The Juror entrance is located adjacent to the Juror Parking Lot on 13th Avenue. When entering the Court Complex, you must display your summons or Juror ID Badge. If you fail to display your badge, you may be required to use the public entrance located at the east end of the Veterans Courthouse (50 West Market Street) and the main entrance to the Hall of Records on Dr. Martin Luther King, Jr. Blvd.

Jury System Improvements

- Increased respect for citizens as jurors
- Renovated facilities
- Free secured juror parking
- Increased juror pay from $5 to $40 after the third day of service
- Repeal of all automatic exemptions which increased the jury pool
- Production of statewide Juror Education Handbook with capacity for local insert
- Improved orientation including personal greeting and orientation by staff and video orientation
- Complimentary morning beverage (coffee/tea)
- The encouragement of juror feedback upon completion of service
- Reduction in term of service from 1 week /1 trial to 1 trial or 2 days
- Detailed jury information on the Judiciary Web site
- Enforcement of Order to Show Cause Hearings for jurors that are summoned and fail to appear
- Bar-coded juror questionnaires that can be easily scanned into the jury automated system
- Annual updating of source lists
- The establishment of a local vicinage jury committee to seek ways to further improve the overall juror experience

Exit Survey

The court system encourages juror feedback as a means of measuring our progress and as a source of new ideas on how the system can be made better. For example, if you have completed service, the Superior Court of New Jersey - Essex Vionage would greatly appreciate feedback on your experience as a juror. To complete and submit the survey please click on the appropriate link below:

Grand Jury Service Exit Survey (Acrobat pdf format)
Petit Jury Service Exit Survey (Acrobat pdf format)

Please return completed questionnaires to:

Jury Management Office
Veterans Courthouse -1st floor th, Room 150

http://www.judiciary.state.nj.us/essex/jury/juror basics.htm
Glossary of Legal Terms

Visit the judiciary's website at www.judiciary.state.nj.us/resource.htm

Court Volunteers

Volunteer Opportunities are available with several court programs in Essex County. Currently over 5,200 volunteers serve the court system. The New Jersey Judiciary recognizes the critical role of volunteers in promoting the public’s trust and building a court/community partnership. They assist in handling cases, resolving disputes and working with juveniles.

For information about volunteer opportunities in Essex County, or visit the judiciary's website at www.judiciary.state.nj.us/volunteer/essex.htm

Additional Information

For information on how judicial process and the important role of jurors within the judicial system go to www.judiciary.state.nj.us/juror.htm
Frequently Asked Questions about Juror Service in New Jersey

WARNING: Please note that the New Jersey Judiciary Jury Management Office does not contact jurors to request personal or financial information by telephone or e-mail.

JURY SERVICE IN GENERAL

1. Why is it important that I serve as a juror?

Jurors are an essential part of our justice system. The right to trial by jury in the United States dates from Colonial times and is rooted in English history. It is guaranteed by the Sixth and Seventh Amendments to the Constitution of the United States of America and Article One of New Jersey’s State Constitution. People have a right to have matters determined by a jury of their peers. Participating in our judicial system is not only an honor, but is also one of our civic duties. Although juror service may be inconvenient, citizens must participate in the jury process in order for it to work. Cases that go to trial need to be resolved by citizens who hear the evidence, determine the facts and render a verdict. It is impossible to get a fair cross-section of the community to participate in the jury system if people do not report for jury service. If you ever found yourself or a loved one involved in a civil or criminal trial, it's likely that you would want a jury of fellow citizens who will be fair and impartial.

2. What lists are used as the source for jurors?

The Judiciary is required by statute to create a single list for juror selection that combines names of registered voters, licensed drivers, filers of N.J. personal income tax returns, and applicants for homestead rebates. The Judiciary vigorously reviews the names to ensure that each person has only one listing in the source file. Citizens can assist that process by using their legal name when filing relevant forms and checking to ensure that all information, including address and identifiers, is accurate.

3. How are prospective jurors selected to be summoned?

Juror selection is a random process. Prospective jurors are selected by computer in no particular order. Because each eligible record has the same chance of being selected at any time, some jurors are summoned more frequently. In accordance with the statutory excuse grounds and in order to broaden service among those on the list, a juror’s name is made ineligible for selection for three years after service.

4. Why do I seem to get summoned frequently but others don’t?

Because each eligible record in the source file has the same chance of being selected at any time, some jurors are summoned more frequently. If you believe that you have been summoned within the past three years in the same county and want to be excused on that basis, please note that information on your qualification questionnaire when you return it to the Jury Management Office. If possible, please provide the date you served and, if different, your name at the time you served. Your prior service will be reviewed.

5. What should I do if I have lost my juror questionnaire / summons?

If you misplace your juror questionnaire / summons, you should immediately telephone the Jury Manager in your county. A list of Jury Managers and their telephone numbers are
included on the Judiciary's internet site at [www.njcourts.com](http://www.njcourts.com). Click on the Juror Information link located in the box on the right side of the screen.

6. **How should I respond if I receive a questionnaire / summons addressed to a person who is deceased?**

It sometimes happens that a juror summons is issued in the name of a person who is now deceased. The Judiciary regrets any such instances but they can occur due to the nature of the records that are required to be included for juror service selection and to the timing of the receipt and processing of those records. The Judiciary works to limit the number of such incidents, including by obtaining records from local offices of vital statistics.

If you receive a juror questionnaire / summons addressed to a person who is deceased, we would appreciate it if you would return the questionnaire, noting (in the area intended for change of name or address) that the person to whom it is addressed is deceased. Also please provide (at that same location on the form) the date of death and your relationship to the deceased. Then please provide your name and sign the questionnaire on the signature line marked by the X in the white box on the bottom panel of the yellow questionnaire. That line provides for the signature of the "prospective juror or the person completing form".

That action will allow the Judiciary to make the record ineligible for selection and to retain the response for record-keeping purposes. The Judiciary appreciates your assistance in responding in this way.

**THE JURY SYSTEM**

7. **What are the different types of juror service for which I might be summoned by the New Jersey Judiciary?**

You may be summoned for one of three types of jury service. You may be summoned to serve as a Petit Juror, a Grand Juror, or a State Grand Juror.

- Petit Jury service includes criminal and civil trials. Petit jurors who sit on a criminal trial decide guilt or innocence in a criminal matter. Petit jurors who sit on a civil trial decide liability or damages.
- Grand jurors determine whether there is sufficient evidence to move forward with criminal charges against a defendant.
- State Grand Jury and county grand jury operate similarly but the State Grand Jury has statewide jurisdiction and representation and meets in Trenton rather than one of the county seats.

Please also be aware that you may be summoned to serve as a federal petit juror or grand juror in U.S. District Court. Such service is independent of N.J. Superior Court jury service. Federal courthouses are located in Newark, Trenton, and Camden.

8. **Does recent service as a federal juror affect my scheduled service in the NJ Superior Court?**

The three year excuse does not apply to federal jury service. Recent service as a federal juror does not automatically relieve you from your petit jury civic obligation but you should
include that information on your juror qualification questionnaire and provide verification of your federal jury service. It may lead to your service being rescheduled.

9. Does recent service in another state excuse me from serving in New Jersey?

Recent service in another state does not excuse you from serving in New Jersey. Please be aware that it will take some period of time for your name to be added to the four lists that provide names for random selection as jurors. You may also request a postponement [for up to a year] of your scheduled service.

**JUROR QUALIFICATION / DISQUALIFICATION**

10. What are the qualifications to serve as a juror?

In order to serve as a juror in N.J. you must meet the following six qualifications set forth in N.J. statutes (N.J.S.A. 2B:20-1). The first six questions on the juror qualification questionnaire ask about these criteria. You must be truthful in responding to these important questions:

- **NJ RESIDENT** - You must reside in the summoning county at the time and during the period of your juror service. If you moved, you must list the new address on the form and enclose proof of your new residence.

- **US CITIZENSHIP** - You must be a citizen of the United States. Temporary or permanent legal residents of the United States are not eligible to serve.

- **PHYSICAL / MENTAL CONDITION** - You must be physically and mentally able to perform the functions of a juror, noting that the Judiciary will provide accommodations consistent with the Americans with Disabilities Act. If you suffer from a medical condition that is unlikely to change within a year, and this condition prevents you from serving jury duty, you must submit a doctor’s note indicating that you are unable to perform jury duty. Please fill out the questionnaire, sign it, attach the doctor’s note and return it to us as soon as possible. The doctor’s note must be written on your doctor’s letterhead and signed by your doctor. Requests written by jurors to be excused for medical conditions without verification from a doctor will be denied.

- **INDICTABLE OFFENSE** - You must not have been convicted of an indictable offense. Note that only individuals who have been convicted or pled guilty to an indictable offense are disqualified from jury duty. Please indicate any criminal record in response to question #4, noting the criminal charge, the year and the state involved. The Jury Management Office will verify that the information you provide is accurate.

  - Examples of persons who would be disqualified are anyone who was convicted of, or pled guilty to, a crime in Federal Court or Superior Court; or anyone currently on PTI (Pre-trial Intervention Program.)

  - Examples of persons who would qualify to serve jury duty are anyone whose only convictions are in Municipal Court (most traffic violations fall into this category, as do most shoplifting charges;) or anyone who has been accused of a crime but has not yet been convicted or has yet to enter a guilty plea.

  - Also, traffic offenses, juvenile and DWI related offenses that occurred in New Jersey are not grounds for disqualification.
— You are not disqualified with respect to criminal record if you successfully completed a Pre-Trial Intervention program (PTI) for an offense and have not been convicted or pled guilty to another disqualifying offense.

• AGE - You must be at least 18 years of age on the date that you are scheduled to serve jury duty. However, if you are 75 years of age or older, you may be excused from jury duty at your request, in accordance with statutory grounds for excuse from juror service without requiring documentation of a medical condition or other grounds for excuse.

• LANGUAGE - You are required to be able to read and understand English. Many people who do not speak English as their first language fear that they will not be able to understand what is going on in a courtroom. However, the English spoken during a trial is not much different than the English people speak at home, at work and among friends. If you speak English at work, you will most likely qualify to be a juror. However, if you feel that your knowledge of the English language is not sufficient to perform the duties of a juror, you must provide that information on your qualification questionnaire and return it to the Jury Management Office. We will make a decision based on the information you provide to us.

PERMISSIBLE EXCUSES

11. What are the reasons for which I can request to be excused from service?

The N.J. statutes set forth, in N.J.S.A. 2B:20-10, grounds for which a person can request to be excused from juror service. Each of these grounds is listed on the uniform juror questionnaire/summons. In most instances, you will be required to submit supporting documentation for the Jury Management Office to determine whether to grant your excuse from jury service. Many jurors who request to be excused instead have their service rescheduled to a more convenient time which accommodates the juror’s circumstances. You may request to be excused from jury service if:

• You have a medical inability to serve as a juror.
  If you suffer from a medical condition that is unlikely to change within a year, and this condition prevents you from serving jury duty, you must submit a doctor’s note indicating that you are unable to perform jury service. The doctor’s note must be written on your doctor’s letterhead and signed by your doctor. Requests written by jurors to be excused for medical conditions without verification from a doctor will be denied.

• You are an active member of a volunteer fire department, fire patrol, first aid or rescue squad.
  If you are a volunteer firefighter or volunteer member of a first aid or rescue squad and want to be excused on that basis, you must provide verification that you are an active member. A letter from your supervisor or a photocopy of your identification card with that group may be sufficient documentation.

• You are 75 years of age or older.
  There is not an upper age limit to serve as a juror. You must be at least 18 years of age to serve. However, if you are 75 years of age or older, you may be excused from jury duty at your request. No medical excuse is required. In order to be excused, you must complete the Juror Qualification Form and check the box on the juror summons that
reads: PLEASE EXCUSE DUE TO AGE 75 OR OLDER. Please write your age in the space provided and return the form to the Jury Management Office.

- **You care for a minor child, or a sick, aged or infirm dependent and have no alternative care available without suffering severe financial hardship.**
  When requesting to be excused for any of these circumstances, keep in mind that the Jury Management Office will grant you time to arrange for alternative care. In order to be excused from jury service due to any of these circumstances, you must submit the proper documentation that indicates your role in the individual’s daily care.

- **You provide highly specialized technical health care services for which replacement cannot reasonably be obtained.**
  In order to be excused under this ground, you must provide verification of your expertise and the inability to obtain a replacement. Please note that physicians are not excused from jury service under this ground.

- **You are a health care worker directly involved in the care of a mentally or physically handicapped person, and your continued presence is essential to the regular and personal treatment of that person.**
  To be excused for this reason, you must provide documentation that verifies your occupation.

- **You have already served as a juror in the same county within the last three years.**
  If you have served in the county to which you are being summoned within the last three years and would like to be excused, you must provide a letter of attendance as proof of your previous service or write on the qualification form the approximate date you served and if different, your name at that time. Please note that if you served federal jury duty, jury duty in another state or in another New Jersey county within the last three years, you are not entitled to be excused. The statute requires that your prior service must have occurred in the summoning county, but you should still provide that information on your qualification questionnaire.

- **You are full-time teacher of a grammar/high school during the school year for which a replacement cannot be reasonably obtained.**
  Full-time teachers are not excused from jury duty on that basis alone. If you receive a summons directing you to report when you must teach class and a replacement cannot be obtained, please request a postponement by indicating on the qualification form a date in which you can serve. The Jury Management Office will grant you a new date of service and will make every effort to accommodate your specific request.

- **You believe that you will suffer severe financial hardship.**
  In order to be excused for financial reasons, you must show that serving as a juror will cause a severe financial hardship that will compromise your ability to support yourself or/and your dependents. In order to prove this, you must submit supporting documentation with your completed questionnaire. These documents will be reviewed by the Jury Management Office to verify that serving jury duty will cause a significant loss in income that will prevent you from supporting yourself and your family. In addition, jurors who are involved in the jury selection process may speak with the trial judge regarding their financial hardships at the time of voir dire based on the anticipated length of the trial. Depending on your individual circumstances, the trial judge may excuse you from serving on a particular trial.
NOTE: Police officers and prosecutors are disqualified from serving as grand jurors but they may serve as petit jurors.

REPORTING

12. What are the penalties for failing to return my qualification questionnaire or not reporting for service?

Jurors who fail to respond or appear for jury duty, without a reasonable excuse, may be punished for contempt of court pursuant to N.J.S.A. 2B: 20-14b and subject to a fine of up to $500.00 or imprisonment.

13. Can I get my summons date changed?

The Jury Management Offices mail summonses a minimum of five weeks in advance of the reporting date in order to provide sufficient notice for jurors to make all necessary arrangements. If you have a conflict with the days for which you have been summoned, you may request to be postponed. Requests must come directly from the juror. Employers or others may not call or write on your behalf to request a postponement. You should make your request on your qualification questionnaire that you return within ten days of receipt. If some later occurrence affects your ability to serve on the summons date you should notify the Jury Management Office as soon as possible in order to allow for timely processing.

Petit Jurors - Please indicate on your questionnaire dates to which you would like your service to be rescheduled. When deciding on your new reporting date, please keep in mind that jurors are not summoned on State holidays, the week of Thanksgiving, or generally on Fridays in most counties and during the last two weeks of the year.

Grand Jurors - The term of grand jury service is generally one day each week for a specified number of weeks. Depending on the nature of the request, service may be rescheduled to a future date.

State Grand Jury - You will receive written notification and instructions regarding reporting to Trenton for service as a State grand juror. The instructions will also indicate the procedures for requesting an excuse.

14. What is the juror call-off system?

NOTE: Juror Call-off is a notification process used only for Petit Jurors, not Grand or State Grand Jurors, and provides notification to jurors the night before their reporting date on whether they will need to report to the courthouse. It is done in order to provide greater convenience to jurors and also to reduce costs and relies on Jury Managers' daily assessment of juror needs for the following day -- based on the most current information available from trial judges and Judiciary division managers.

The juror call-off system is for Petit jurors only. To determine if you are required to report as summoned, you must call the Jury Management Office or go to www.njcourts.com/juryreporting/ after 5:00 the evening before you are summoned to report for service. The message will refer to your juror numbers (located on the JUROR badge portion of your summons) and will provide reporting instructions. If you are unable to access the message, you must report as indicated on your summons.
15. How are jurors compensated for their service?

Jurors' daily fee is set by statute at $5 per day for grand jurors and for petit jurors (N.J.S.A. 22A:1-1.1). In addition to that daily fee, the statute requires that petit jurors receive an additional $35 per day starting on their fourth consecutive day of service and each day thereafter. Where available, parking is provided. Other amenities for jurors are noted on each county's internet juror call-off site, which can be accessed at: www.njcourts.com/juryreporting/. Information on parking is printed on the juror questionnaire/summons and is also available online.

16. Can I get verification for my employer of the dates that I served?

The Jury Management Office can provide written verification for you and/or your employer that will show each date that you served as a juror. If you do not receive that document while at the courthouse during your juror service, you may request it later but please note that the request needs to come from you or from your employer on company letterhead. The verification document will be mailed to the juror's address. Please note that you will only get verification for the dates which you actually reported for service.

17. How quickly can I expect to receive payment for juror service?

Juror payrolls are processed each Friday, except holidays. Therefore, a juror may receive more than one check if that juror served in different weeks. Checks are processed centrally in Trenton in order to reduce costs and are generally mailed within a week of the Friday processing.

Please note that juror fees are considered to be reimbursement for expenses incurred while serving, rather than income. You will not receive a Form 1099 relating to your juror fees.

18. Is my employer required to pay me for days I served as a juror?

In New Jersey there is no statutory requirement that a private employer pay your salary during juror service. Whether or not your employer pays you for jury duty depends on your employment situation, including employers' policies, union contracts, and the like. The State of New Jersey will pay you the appropriate juror fee as set forth in the New Jersey statutes. The Jury Management Office is aware that many employers do not pay their employees during jury duty. If service as a juror will create a severe financial hardship, as set forth in N.J.S.A. 2B:20-10, you may request to be excused. But please be aware that non-payment by your employer, by itself, is not a valid reason to be excused from service. Each situation will be reviewed individually.

If you are employed full time by the State of New Jersey you will receive your usual compensation while you serve as a juror. However, in accordance with N.J.S.A. 2B:20-16 you will not receive juror fees. This law applies to persons employed full time by any agency, independent authority, instrumentality of the State of any political subdivision of the State (such as counties or municipalities). Jurors affected by this policy should notify the Jury Management Office when they report for service. If a check is issued to you in error, you will be required to return it to the Jury Management Office.
19. Is there protection for my employment while I serve as a juror?

*New Jersey Statute* 2B:20.17 prohibits an employer from penalizing you because you serve as a juror. Penalties for a violation of this statute include the possibility of a criminal charge, as a disorderly persons offense, and a possible civil action for monetary damages and for reinstatement of employment.

20. Do I remain eligible for unemployment benefits during my service as a petit juror, grand juror, or State grand juror?

Yes, you remain eligible for unemployment benefits. They are not affected by service as a juror because there is a statute, *N.J.S.A. 43:21-4(c)(5)*, that protects a person's benefits during juror service. That statute states the following:

(5) An unemployed individual, who is otherwise eligible, shall not be deemed unavailable for work or ineligible solely by reason of the individual's attendance before a court in response to a summons for service on a jury.

If an employment interview is scheduled on a day on which you need to report for juror service, notify the Jury Management Office, in advance if possible, and your service will be rescheduled to a later date. Please be aware that verification may be required.

**COMING TO THE COURTHOUSE TO SERVE**

21. Is there a dress code for jurors reporting?

Jurors reporting for service should wear clothing appropriate for an appearance in court. Shorts, t-shirts, uniforms or clothing containing statements or offensive symbols are not permitted. All hats must be removed when in a courtroom. Comfortable clothing is also advisable.

22. Where can I locate driving directions and public transportation information?

Driving directions to the courthouse are provided on the questionnaire/summons, are available on the Judiciary website or can be searched through internet sites.

www.njcourts.com
www.njtransit.com

23. Will I be screened for weapons when entering the courthouse?

In order to ensure the safety of those entering NJ courthouses, all persons, including jurors, are screened when entering a NJ Superior Court courthouse. Chemical agents, pepper sprays, or anything resembling a weapon, including scissors, will not be permitted into the Courthouse - for the safety of the public. Please pay attention to additional instructions, on the questionnaire/summons and the internet, about cell phones and other electronic devices. Also, be aware that all metal objects will activate the metal detector and will need to be placed in the trays before passing through the metal detector. If the metal detector is activated as you pass through, you will be screened by an officer using a handheld metal detector. Purses and other carried items, such as briefcases and backpacks will be x-rayed. Any illegal items will be confiscated. The fewer metal items you are carrying, the faster you will pass through the screening process.
TAKING A STAND ON TAKING THE STAND: THE
EFFECT OF A PRIOR CRIMINAL RECORD ON
THE DECISION TO TESTIFY AND ON
TRIAL OUTCOMES

Theodore Eisenberg & Valerie P. Hans†

This Article uses unique data from over 300 criminal trials in four
large counties to study the relations between the existence of a prior criminal
record and defendants testifying at trial, between defendants testifying at
trial and juries’ learning about criminal records, and between juries’ learn-
ing about criminal records and their decisions to convict or acquit. Sixty
percent of defendants without criminal records testified, compared to forty-
five percent with criminal records. For testifying defendants with criminal
records, juries learned of those records in about half the cases. Juries rarely
learned about criminal records unless defendants testified. After controlling
for evidentiary strength and other factors, statistically significant associa-
tions exist (1) between the existence of a criminal record and the decision to
testify at trial, (2) between the defendant’s testifying at trial and the jury’s
learning about the defendant’s prior record, and (3), in cases with weak
evidence, between the jury’s learning of a criminal record and conviction.
For cases with strong evidence against defendants, learning of criminal
records is not strongly associated with conviction rates. Juries appear to rely
on criminal records to convict when other evidence in the case normally
would not support conviction. Use of prior-record evidence may therefore
lead to erroneous convictions. We also find little evidence that prior-record
information influences credibility. This casts doubt on the historical justifi-
cation for prior-record evidence: its presumed effect on defendant-as-witness
credibility. Prosecutors and judges should consider the increased likelihood of
erroneous conviction based on the use of prior convictions in decisions to
prosecute and in evidentiary rulings.

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INTRODUCTION

The evidentiary treatment of a defendant’s prior criminal record is one of the most important issues for the criminal justice system and for the day-to-day conduct of criminal cases. Some pressure to testify and deny guilt likely exists in almost every case. Adjudicators naturally want to hear defendants provide their own accounts of involvement or lack of involvement in crimes. Not testifying in one’s own defense may influence a trial’s outcome notwithstanding the Fifth Amendment’s prohibition against self-incrimination. Prosecutors, until prohibited from doing so, argued that a defendant’s failure to testify was evidence of guilt.\(^1\) In a less direct violation of the Fifth Amendment, prosecutors may argue that the defendant failed to rebut particular evidence, even if the only reasonable way to do so was through the defendant’s testifying.\(^2\) Having a prior criminal record must be considered when a defendant is deciding whether to testify. Indeed, a

\(^1\) See, e.g., Griffin v. California, 380 U.S. 609, 610–11 (1965). Until at least 1961, the common law rule prohibiting defendants, as interested parties, from testifying on behalf of themselves remained in force in Georgia but had been abolished throughout the rest of the common law world. See Ferguson v. Georgia, 365 U.S. 570, 570, 574 (1961).

\(^2\) E.g., United States v. Cotnam, 88 F.3d 487, 497 (7th Cir. 1996).
principal reason defendants decline to testify is the existence of prior criminal records.3

All U.S. jurisdictions allow the use of some criminal convictions to impeach the credibility of a witness.4 Indeed, the impeachment of witnesses with their prior records was permitted at common law as early as the seventeenth century.5 The existence of felony (and some other) convictions led to the inference that the witness was highly likely to lie under oath. Early on, defendants who were convicted felons were completely prohibited from taking the stand because their testimony was seen as having no credibility. Over time, the prohibition was eventually eased to permit defendants with records to testify, yet simultaneously to allow the impeachment of defendants with their prior convictions.

When to allow the fact finder to learn of a prior criminal record is an important evidentiary topic because a prior record is understandably thought to promote convictions. Evidentiary rules try to balance a defendant’s interest in testifying and the prejudicial effect of impeaching a defendant’s testimony using prior convictions. For example, Federal Rule of Evidence 609(a)(1) allows impeachment by prior convictions “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”6

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3 See, e.g., Carter v. Kentucky, 450 U.S. 288, 292–93 (1981) (reciting a conference with the judge during which the defendant decided not to testify in his own defense; counsel advised the defendant during the conference that his experience indicated that impeachment with prior offenses is “‘a heavy thing; it is very serious, and I think juries take it very seriously’”); see also John H. Blume, The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted, 5 J. Empirical Legal Stud. 477, 486, 490–91 (2008) (finding that 91% of factually innocent defendants with prior records declined to testify and that counsel in these cases reported that the primary reason was to avoid jury bias stemming from the prior record).

4 See George Fisher, Evidence 265–95 (2d ed. 2008) (discussing generally impeachment with past convictions); 3A John Henry Wigmore, Evidence in Trials at Common Law § 980, at 828 (James H. Chadbourn rev. ed. 1970) (“It has therefore been universally acknowledged that proof of a crime by record of a judgment of conviction may be made . . . .” (emphasis omitted)).


6 Fed. R. Evid. 609(a)(1). Rule 609(a) reads:

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted
Although questions relating to the evidentiary treatment of prior criminal records have been the object of judicial, legislative, and scholarly attention for decades, they remain of vital importance. Every year, trial judges exercise substantial discretion about the admissibility of prior records in thousands of criminal cases, and prosecutors and police are undoubtedly influenced by the existence of prior records in charging and arrest decisions. Moreover, questions of prior-record admissibility remain on legislative and public policy agendas. Judges’ balancing of the probative value of evidence versus possible prejudice and Executive Branch decision makers’ behavior should be based on the best possible information about the impact of criminal records. More importantly, the prejudicial effect of a prior criminal record may contribute to the increasingly visible problem of erroneous convictions.

Limited empirical analysis exists of defendants’ decisions to testify or of the effect of prior criminal records on trial outcomes in real jury trials. This Article uses a unique data set gathered by the National Center for State Courts (NCSC) under a grant from the National Institute of Justice (NIJ) to explore when criminal defendants testify and the effect of that testimony on jury verdicts. To summarize

of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

Fed. R. Evid. 609(a).


our findings, 60% of defendants without criminal records testified, compared to 45% with criminal records. For testifying defendants with criminal records, juries learned of those records in about half the cases. Juries rarely learned about criminal records unless defendants testified. Statistically significant associations exist (1) between the existence of a criminal record and the decision to testify at trial, (2) between the defendant’s testifying at trial and the jury’s learning about the defendant’s prior record, and (3), in cases with weak evidence, between the jury’s learning of a criminal record and conviction. For cases with strong evidence against defendants, learning of criminal records is not associated with conviction rates. Juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction. The effect in otherwise weak cases is substantial and can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%. We find no evidence that prior-record evidence influences credibility. Given growing concern about the risk of erroneous convictions, judges, prosecutors, and police should consider this information in making decisions relating to prior criminal records.

Part I of this Article reviews prior related research, and Part II describes the data. Part III reports the results relating to defendants’ testifying and juries’ learning of criminal records. Part IV reports on the association between juries’ learning of criminal records and conviction rates. The Article concludes with a discussion of policy implications.

I

PRIOR RESEARCH ON DEFENDANT TESTIMONY AND THE EFFECT OF CRIMINAL RECORD

From a theoretical perspective, there are several ways in which knowledge of a criminal record might affect a decision maker.9 First, such knowledge could function as the legal rules governing its use suggest it usually should, by affecting the credibility of the defendant as a witness in the proceedings. The limiting instruction that typically accompanies the provision of criminal-record information notes that the record should be used in assessing the defendant’s credibility rather than inferring the defendant’s guilt in the present offense.10 Second, a decision maker might use a defendant’s criminal record to categorize the defendant as a bad person, a person of poor character. In other words, a negative halo effect might operate. Indeed, studies

10 See FED. R. EVID. 609.
of social perception and cognition show that observers who learn that an individual has one negative characteristic or trait are apt to generalize and assume that the person has other bad characteristics or traits.\textsuperscript{11} Third, the meaning of the evidence might change. Meaning is constructed taking context into account. Evidence that seems inconclusive against a defendant with no record of wrongdoing may appear to be more damning when jurors learn of the defendant’s criminal past.\textsuperscript{12} Thus, the weight and significance of the evidence in a case may change as a function of knowledge about a defendant’s criminal record. Finally, the threshold for conviction, or the subjective burden of proof, may differ for defendants with and without criminal records. Jurors may be willing to convict on less evidence if the defendant has a criminal past. Thus, what constitutes reasonable doubt may be interpreted more expansively by jurors if the defendant appears to have no record.

A. Experimental Research with Mock Jurors

Several experimental studies have examined the possible negative effects of a defendant’s criminal record on jury decision making. Using a mock jury paradigm in which research participants are given case evidence, the studies divide participants so that some learn about the defendant’s criminal record while others do not. Or, the type of criminal record is varied. Comparing responses of these groups of participants provides insight into the impact of knowledge of a criminal record.

Most of the experimental studies show that knowledge of a defendant’s criminal record has statistically significant biasing effects on jurors’ guilt perceptions and verdicts. British researchers A.P. Sealy and W.R. Cornish conducted one of the earliest experiments testing the impact of a defendant’s criminal record.\textsuperscript{13} At the time, a defendant’s criminal record was generally inadmissible in British courts.\textsuperscript{14} Community members listened to a tape recording of a case of either theft or rape, made individual judgments, and then deliberated to reach a group verdict.\textsuperscript{15} The case facts were designed to be ambiguous so that either verdict could be justified. There were four conditions in the experiment: a control condition with no information about the defendant’s criminal record; a condition in which a previous record for a similar offense was disclosed; a condition in which a dissimilar record

\textsuperscript{11} See Hans & Doob, supra note 9, at 237–38; see also Susan T. Fiske & Shelley E. Taylor, Social Cognition: From Brains to Culture 95–96 (2d ed. 2008).

\textsuperscript{12} See Hans & Doob, supra note 9, at 238.


\textsuperscript{14} Id. at 211.

\textsuperscript{15} Id.
was disclosed; and a similar-offense condition in which the judge gave instructions to disregard the record. The researchers found an increase in the proportion of individual mock jurors’ judgments of guilt when they learned of a defendant’s previous record for crimes similar to that charged, although the effect declined slightly when they were told to disregard the record. Introducing a dissimilar conviction did not bias mock jurors against the defendant; in fact, the proportion voting guilty declined somewhat compared to the control condition.16

The basic finding of greater convictions if jurors learn of defendants’ previous records for similar crimes has been replicated in subsequent studies.17 In addition, other experimental work has shed light on the likely mechanisms by which criminal-record information produces a greater likelihood of conviction. Valerie Hans and Anthony Doob transcribed mock jury deliberations and found that jurors who knew of a defendant’s record were more apt to begin the deliberation with pro-prosecution statements, a result that suggests that they were more confident in their negative assessment of the defendant’s case.18 These juries more often described the evidence as strong and more frequently brought up damaging evidence during deliberations. In contrast, juries that did not learn of the defendant’s record were more likely to discredit the prosecution evidence against the defendant—for example, by describing problems with eyewitness accounts, biased police lineups, or the limits of circumstantial evidence. Jurors more often mentioned how to interpret reasonable doubt in juries that knew about the defendant’s record. Hans and Doob argue that jurors interpreted the case evidence itself differently as a result of knowing

16 Id. at 222.
17 See A.N. Doob & H.M. Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused, 15 CRIM. L.Q. 88, 93–95 (1972) (finding that a similar record increased convictions and that a limiting instruction had no beneficial effect); Edith Greene & Mary Dodge, The Influence of Prior Record Evidence on Juror Decision Making, 19 LAW & HUM. BEHAV. 67, 76 (1995) (finding that mock jurors were more likely to convict if they learned of a prior conviction, compared to no conviction information or information about a prior acquittal); Hans & Doob, supra note 9, at 251 (finding that deliberating groups were more likely to convict if they learned of a defendant’s similar criminal record); Sally Lloyd-Bostock, The Effects on Juries of Hearing About the Defendant’s Previous Criminal Record: A Simulation Study, 2000 CRIM. L. REV. 734, 753–55 (finding that recent similar convictions increased the likelihood of conviction and dissimilar convictions showed a comparative decline); Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37, 47 (1985) (finding that similar records increased convictions compared to no prior convictions and that defendants with previous convictions for perjury and dissimilar crimes were convicted at intermediate rates); see also Eugene Borgida & Roger Park, The Entrapment Defense: Juror Comprehension and Decision Making, 12 LAW & HUM. BEHAV. 19, 32 (1988) (finding that prior records increased convictions if entrapment was defined narrowly); Sarah Tanford & Michele Cox, The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making, 12 LAW & HUM. BEHAV. 477, 488 (1988) (finding that impeachment evidence influences decision making in legally impermissible ways).
18 Hans & Doob, supra note 9, at 244.
the defendant’s record. In contrast, discussions of the defendant’s credibility during deliberations did not differ significantly between the two groups.

Other researchers have also concluded that determinations of the defendant’s credibility are not the prime method by which criminal record influences guilt judgments. For example, in Roselle Wissler and Michael Saks’s mock juror study, jurors’ ratings of the defendant’s credibility did not differ across their control and record conditions. In addition, the researchers conducted an analysis of covariance that controlled for the potential mediating effect of credibility judgments, yet the significant impact of criminal record on mock juror verdicts remained. In a study by Edith Greene and Mary Dodge, 17% of mock jurors convicted the accused based on just the facts, compared to 40% of mock jurors who additionally learned of the defendant’s prior record. Jurors who heard of the criminal record made more negative inferences about the defendant. Mock jurors’ knowledge of the prior record affected their ratings of both the perceived dangerousness and the credibility of the defendant, in contrast to some other studies. There was no statistically significant difference between record and no-record jurors’ reported threshold for conviction, that is, the minimum percentage of evidence that they would need to convict the defendant.

Finally, Sally Lloyd-Bostock’s British study varied the presence, similarity, and recency of prior convictions and found that mock jurors who learned of a recent similar conviction rated the probability that the defendant committed the crime as higher. These mock jurors estimated the probability of guilt as 66%, compared to 52% for those who did not hear of a record. Similar and dissimilar convictions had different effects. Jurors who heard about a five-year-old conviction for a similar offense rated the defendant’s tendency to commit this kind of crime as higher compared to the control condition. Credibility judgments did not differ between jurors who learned of similar records and jurors in the control condition; however, jurors who learned of a recent dissimilar record said that they were more likely to believe the defendant than jurors in any of the other conditions.

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19 Id. at 244–47.
20 Id. at 247.
21 Wissler & Saks, supra note 17, at 41–42 (finding that credibility ratings did not differ across conditions and that even after controlling for the impact of credibility judgments, prior records had strong effects on verdicts).
22 Id. at 42.
23 Greene & Dodge, supra note 17, at 72–74.
24 Id. at 75.
25 Lloyd-Bostock, supra note 17, at 743–44.
26 Id. at 746–47.
The different patterns for similar and dissimilar prior convictions led Lloyd-Bostock to conclude that jurors primarily used criminal-record evidence to infer propensity rather than to assess credibility. Further analyses showed that a previous conviction for indecent assault on a child created substantial prejudice above and beyond similarity to the currently charged offense, thus underscoring the point that the nature of a prior record may lead jurors to make inferences about the character of the defendant as well as the defendant’s likelihood of having committed the offense.27 Interestingly, 66% of the mock jurors in the control condition, who were given no information about the defendant’s record, said that they thought that he had at least one or more prior convictions.28

Thus, prior work indicates that jurors use similar criminal-record information to develop propensity judgments and other generally negative evaluations of a defendant. The evidence against a defendant with a prior record appears stronger to the jury. From the limited experimental study of the threshold hypothesis, the threshold for conviction does not seem to change. Although the defendant’s credibility can be harmed by knowledge of a record, credibility does not appear to be the main way that criminal record information affects the guilt judgments of jurors. The experimental research also suggests that limiting instructions are not a reliable method for eliminating the negative impact of criminal records.29

B. Research with Judges

How criminal-record information might affect judicial decision making is also of interest, and a handful of studies examine this topic. The studies show similar negative effects caused by knowledge of a defendant’s criminal record. For instance, one study presented American judges with a scenario of a products liability lawsuit in which the defendant company conceded liability but disputed the plaintiff’s damages; the judge’s task was to determine an appropriate damage award for the plaintiff’s pain and suffering.30 Some judges also had to rule on the company’s motion to introduce the plaintiff’s fourteen-year-old fraud conviction, while other judges never heard of the plaintiff’s record. The criminal record information led to marginal differ-
ences in award amounts. The authors point out that the precise mechanism by which the criminal record (even if it was suppressed, as most judges ruled) influenced judges is unknown. For instance, because the past crime was fraud, the judges might have drawn a negative inference about the credibility of testimony in the products liability case. Or, they may have judged the plaintiff to be an undesirable person and reduced his compensation.\footnote{Id. at 1308.}

Lloyd-Bostock replicated part of her jury study with British lay magistrates.\footnote{See Sally Lloyd-Bostock, The Effects on Lay Magistrates of Hearing That the Defendant Is of “Good Character”, Being Left to Speculate, or Hearing That He Has a Previous Conviction, 2006 CRIM. L. REV. 189.} The magistrates watched the video depiction of the trial, completed initial individual questionnaires, and deliberated (as they do normally) in groups of three to arrive at group verdicts.\footnote{Id. at 194.} Compared to a defendant with no record, when magistrates evaluated the same case of a defendant with a record, they rated the defendant’s guilt as significantly higher. Like the majority of the mock jurors, 69\% of the magistrates who learned nothing about a defendant’s criminal record nonetheless judged him likely to have one.\footnote{Id. at 194–95.}

Another study had 88 Ohio judges and 104 jurors participate in parallel experiments testing the effect of limiting instructions and inadmissible evidence.\footnote{Stephan Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113, 120 (1994).} Some of the judges and jurors were provided with facts that could not legally be considered in deciding the case, while others, in a control condition, did not hear the objectionable facts. Half of the judges and jurors who heard the inadmissible evidence received a limiting instruction directing that the evidence should be set aside, but the others did not receive this instruction. Both judges and jurors responded similarly. Those who heard the inadmissible evidence—even if told to disregard the information—responded more negatively, compared to judges and jurors in the control condition.\footnote{Id. at 122–25.}

One other study deserves mention. Peter Blanck videotaped judges’ final legal instructions in jury trials.\footnote{Peter David Blanck et al., The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Jury Trials, 38 STAN. L. REV. 89 (1985).} In a number of analyses of the videotapes, evaluators found that the extent of the defendants’ criminal records was correlated with distinctive nonverbal behavior by judges during the final jury instructions.\footnote{Id. at 122–23.}
decisions was not clear from this small study, but Blanck argues that judges’ views may influence juries through both verbal and nonverbal channels.\footnote{Id. at 133.}

Although there are few judge studies, they tend to converge with the jury experiments and show similar patterns of more negative assessments and the difficulty of following limiting instructions regarding the use of a criminal record.

C. Prior Research with Real Juries

Complementing the experimental research are a few previous studies of real juries and the role of criminal records. In Harry Kalven and Hans Zeisel’s 1950s classic national study of judicial agreement with jury verdicts in criminal trials, the presence of a criminal record appeared to be a prime determinant of a defendant’s decision to testify at trial.\footnote{HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 143–48 (1966).} When defendants had no prior record, they testified in 91% of cases; by comparison, defendants who had criminal records testified in 74% of cases.\footnote{Id. at 145 tbl.42 (basing percentages on 1143 cases in Sample II); id. at 145 n.12 (basing percentages on 2385 cases from Sample I).} In their sample of criminal trials, 53% of defendants had criminal records while 47% did not.\footnote{Id. at 147 tbl.44 (basing percentages on 1534 defendants from Samples I and II who had criminal records).} Interestingly, the link between taking the stand and the jury’s learning of a defendant’s record was not invariant. If a defendant with a record took the stand, 72% of the time the jury learned about the record; conversely, if a defendant with a record elected not to testify, 13% of the time the jury learned of the record anyway.\footnote{Id. at 179 tbl.56.} Kalven and Zeisel attributed some disagreement between judge and jury over the verdict to whether defendants had criminal records and whether they took the stand.\footnote{Id.} Kalven and Zeisel examined a set of cases in which the evidence was closely balanced. In this set of cases, for defendants with no records who took the stand, juries were more apt to acquit when judges would have convicted, compared to cases with defendants with records who did not take the stand.\footnote{Id.} But note that this analysis conflates having a criminal record and taking the stand.\footnote{Kalven and Zeisel did not conduct statistical analyses of these data; rather, they presented the data in tabular form. See generally id.} Recently, Joseph Gastwirth and Michael Sinclair used statistical techniques to analyze Kalven and Zeisel’s data on the impact of criminal record on judge–jury disagreement in criminal cases. Joseph L. Gastwirth & Michael D. Sinclair, A Re-Examination of the 1966 Kalven–Zeisel Study of Judge–Jury Agreements and Disagreements and Their Causes, 3 L. PROBABILITY & RISK 169 (2004). They found that in cases with closely balanced evidence, judge–jury disagreement was related to the
In a study using 201 actual Indiana jury trials, Martha Myers reported a statistically significant association between the number of a defendant’s prior convictions and the likelihood of conviction. Juries were more likely to convict defendants who had numerous prior convictions. But it appears that in just 36 of these jury trials, the defendant (or accomplices) provided statements or testimony about involvement or lack of involvement in the crime.47

Daniel Givelber published an interesting analysis of the NCSC data that are the subject of this Article. On the basis of his analysis, Givelber concluded that the jurors’ knowledge of a defendant’s criminal record made little difference in jury verdicts.48 That study did not account for the defendant’s decision whether to testify. Givelber’s analysis treated all cases in which the jury did not become aware of a defendant’s criminal history the same, whether or not the defendant testified. The effect of defendants’ testimony on their convictions should be assessed in conjunction with the decision to testify, as the decision to testify is not a random act. At a minimum, one should explore the effect of a criminal record in cases in which defendants testify because these are the cases in which the jury is most apt to learn about criminal records, if they exist.

Givelber and Amy Farrell, again using the NCSC data, explore the relation between the case the defense presented and the verdict. They include having a criminal record as an explanatory factor for verdict and report that juries are four times more likely to acquit if the defendant has no prior criminal record.49 Given their research question, their model includes cases in which the defendant had no criminal record, so they do not test the effect of the jury’s learning about a criminal record conditional on the defendant having a criminal record. The relation between verdict and learning about a criminal record may be confounded in such a model by cases in which the defendant did not have a criminal record. Acquittals in such cases may be attributable to the absence of a criminal record or to the jury not learning about the record, given that one exists, as Givelber and Farrell note.50
D. Some Caveats

Several factors might make it difficult to detect effects of criminal records on real juries, even if defendants’ records influence case outcomes. First is the issue of selection bias. Some of the impact of criminal record may occur at early stages of case processing. Undoubtedly criminal record plays a role in who is initially investigated by police, who is targeted for prosecution, and who receives a favorable plea agreement prior to trial. Thus, in comparing cases in which defendants do or do not have past criminal records, one may reasonably assume that these defendants and their cases may differ in a variety of ways in addition to their criminal pasts.

Similarly, a defendant’s criminal record may affect the decision to take the stand—a focus of this Article. The evidence and other factors in cases with and without defendant testimony are apt to differ in myriad ways because only cases with such testimony directly raise issues of credibility. Thus, it is challenging to separate the effects of the defendant’s criminal record and the effects of the defendant’s testimony.

Furthermore, the type of criminal record should influence the decision to testify and other behavior. For example, the prior crimes among defendants who testify are apt to be more minor, or at least less probative of guilt, than among defendants who do not take the stand. Judges may be especially concerned about the prejudicial effects of similar crime records. Yet prosecutors might try harder to get the prior conviction into evidence if the crime is especially probative. Because we lack information about the nature of defendants’ prior crimes, we cannot control for the influence that the nature of the crime has on the decision to testify or on the jurors’ decision to convict or acquit.

Setting aside selection effects, another factor limiting the ability to isolate the effect of a criminal record is conflating the criminal record with the perceived strength of evidence. As discussed above, jurors who learn that a defendant has a criminal record may

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51 Cf. Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 CORNELL L. REV. 1124 (1992) (exploring the potentially confounding impact of selection effects in comparing judge and jury trial outcomes). As Kevin Clermont and Theodore Eisenberg describe, because parties may choose a judge or a jury trial, cases heard by judges and juries may differ along multiple dimensions, making it difficult to attribute the cause of outcome differences to the fact finder alone. Likewise, because police and prosecutors may consider defendants’ criminal records in deciding whether to investigate, arrest, and prosecute, the cases of defendants who do and do not have criminal records may differ along multiple dimensions. See id. at 1128–33.
incorporate that information into their narrative account of the evidence in the case, seeing the case as having stronger evidence favoring conviction. The evidentiary-strength variables would contain most of the information embodied in the knowledge of criminal history variable. If one uses judgments of evidence strength to control for the closeness of the case, as we do here, a defendant’s criminal history might not emerge as a statistically significant independent factor, even if it had an effect.

Notwithstanding these caveats, the data analyzed here have a special strength worth noting. Prior studies try to assess the overall strength of the evidence by indirect measures. Thus, to assess evidentiary strength, researchers have relied on the presence of classes of evidence such as eyewitness identification testimony, expert testimony, or physical evidence. But the existence of a class of evidence does not necessarily affect case outcomes. For example, a jury can view expert testimony as strongly implicating a defendant or as having little probative value. Proxies for evidentiary strength cannot capture the jurors’ overall assessments of the quality of the case. As described below, this study contains a quantitative measure of the jurors’ overall estimates of the strength of the evidence against the defendants. We thus have a reasonable control for evidentiary strength that allows us to test the contribution of criminal record to case outcome.

II
DATA DESCRIPTION

The NCSC gathered the data used in this study as part of a NIJ-funded project to study hung juries. The NCSC’s report, *Are Hung Juries a Problem?*, thoroughly describes the data, so the description here, derived from the NCSC report, is more abbreviated. The data have also been used in several other studies.

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52 See, e.g., Myers, supra note 47, at 786 tbl.1.
Four sites participated in the data collection: The Central Division, Criminal, of the Los Angeles County Superior Court, California; the Maricopa County Superior Court (Phoenix), Arizona; the Bronx County Supreme Court, New York; and the Superior Court of the District of Columbia. Several criteria shaped site selection. First, each site needed a sufficiently high volume of felony jury trials to permit data collection within a reasonable time period. Second, court personnel had to be willing to cooperate in data collection, including agreeing to adhere to privacy and confidentiality protocols. Los Angeles and Washington, D.C., were included because of reported concerns about hung jury rates. Maricopa was chosen to study the effects of an innovative procedure allowing judges to admit further evidence and arguments in cases with deadlocked juries. The New York State Office of Court Administration provided suggestions about high-volume courts in New York City and helped secure the Bronx County Supreme Court’s cooperation.

After a pretest in Los Angeles, data were collected at the four sites. Data were collected in Los Angeles from June, 2000, through October, 2000. Maricopa County began data collection in November of 2000 and ended in October, 2001. Data from the Bronx were collected from February through August, 2001, and data for Washington, D.C. were collected from April through August, 2001.

Court personnel at the sites distributed and collected questionnaire packets covering noncapital felony cases in all site courtrooms. The sample excludes misdemeanor cases because hung juries in felony trials are typically of greater concern to policymakers. The sample excludes capital cases because of the sanction’s severity and because of the risk that confidential juror questionnaire data might be used in litigation. Further information about the data collection is available in NCSC’s report.

The Questionnaires. Each packet contained instructions and questionnaires for the judges, attorneys, and jurors. Each packet also had a case data form requesting information about case characteristics and outcomes. Many of the questions asked trial participants to give ratings on a seven-point Likert scale. The content of each questionnaire packet was reviewed by court personnel at each court site, and participants were asked to provide feedback on their questionnaires.

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56 This period overlapped with a significant local investigation of the Los Angeles police (the Ramparts investigation), producing some concern about the typicality of the conviction/acquittal ratio. Id.
57 A brief hiatus during this period was the result of some confusion on which cases were to be included in the study. For a short time, some judges believed that data were to be collected only if the jury hung. Thus, the number of hung juries in Maricopa County may be elevated. Id. The hung jury rates in Maricopa were 3.3% (hung on all counts), 5.1% (hung on count one), and 7.7% (hung on any count). Id. at 41 tbl.4.1.
58 See id. at 29–31.
most relevant to this study is listed below and is described more fully in the NCSC report.59

- Case Data Form—type of charge, sentence range, jury’s decision, and demographic information about the defendant(s) and the victim(s), voir dire, trial evidence and procedures, and jury deliberations. This form included a specific question about whether the defendant had a criminal record and whether the jury learned of that record.

- Judge Questionnaire—(Part I—before jury verdict) verdict judge would have reached in bench trial, evaluation of the evidence, case complexity, attorney skill, and likelihood that the jury would hang; (Part II—after jury verdict) reaction to the verdict and experience on the bench.

- Juror Questionnaire—case complexity, attorney skill, evaluation of the evidence, rating of the believability of the defendant as a witness, rating of sympathy for the defendant, formation of opinion, dynamics of the deliberations including the first and final votes, juror participation, conflict, reaction to verdict, opinion about applicable law, assessment of criminal justice in the community, and demographic information.

**Distribution of Study Packages.** Researchers briefed judges and key court personnel about the project and instructed them about how the packet distribution was to occur.60 Packets were sent from the jury assembly room to the courtrooms with the panel for voir dire. Once the jury was selected, court personnel distributed the packets to the judge and/or court clerk. If the case proceeded through to jury deliberations and did not end by a plea agreement, dismissal, or mistrial for some reason other than the jury’s inability to arrive at a unanimous verdict, the judge was asked to complete the judge survey. In addition, either the clerk or the judge was to complete a questionnaire about general case information on a case data form.

Once the jury retired to deliberate, court personnel distributed the questionnaire to the judges. The judges were asked to complete the questionnaires in two stages, answering some questions prior to the jury decision (Part I) and the remaining questions after the jury rendered its verdict or the case was declared a mistrial (Part II). The court personnel distributed the final set of questionnaires to the jurors after the verdict was announced or a mistrial declared. To protect confidentiality, respondents were provided blank envelopes for completed questionnaires. Court staff collected the completed ques-

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59 *Id.* at 30 app. A. The contents of the Attorney Questionnaire are not included here because the current analysis does not include items from attorneys.

60 For the time sequence of the packet distribution, see *id.* at 31 fig.3.1.
tionnaires and gave these to the designated court liaison for each site, who forwarded the cases to the NCSC for data entry and analysis.

Response Rates. The NCSC report summarizes response rates. Briefly, case data forms were returned in 358 of the 401 cases, an 89% response rate. Judges completed 366 questionnaires (91% response rate). Although confidentiality precludes us from linking the data in a particular case to an individual judge, we are confident that a substantial number of judges are represented in the sample. For example, in Maricopa County, twenty-nine judges sat in the criminal division in fiscal year 2000–2001.

Overall, 3626 jurors returned their questionnaires. The response rate for jurors across all sites, with consideration for jury size, was 80%. For the twelve-person juries in Los Angeles, Maricopa, the Bronx, and D.C., the average response rate was eleven, ten, eight, and ten jurors, respectively. For the eight-person juries in Maricopa, an average of seven jurors responded. The Case Data Form surveys asked factual information about the criminal charges filed and the jury’s decision and led to 382 usable cases, though particular analyses reported below have fewer observations due to data missing on variables under consideration. The number of questionnaires included in the final usable database varied slightly for each site and is summarized in the NCSC report.

III

DEFENDANT TESTIMONY AND JURIES’ LEARNING OF CRIMINAL RECORD

Preliminarily, the judges’ descriptions of the importance of defendant testimony confirm that defendant testimony plays a promi-

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61 See id. at 32–33.
62 E-mail from Judge G.T. Anagnost to Theodore Eisenberg (Jan. 26, 2004) (on file with author). For a race and gender breakdown of the judges, see Eisenberg, Hannaford-Agor, Hans, Waters, Munsterman, Schwab & Wells, supra note 54, at 205 n.61.
64 Arizona law provides for eight-person juries in felony trials unless the penalty for the defendant includes death or a potential sentence of thirty years or more, in which case there are twelve jurors. See ARIZ. CONST. art. II, § 23. In Maricopa County, there were thirty cases with twelve-member juries and sixty-nine juries with eight members. Six cases had too little information to determine jury size. Hannaford-Agor, Hans, Mott & Munsterman, supra note 53, at 30.
65 If this key information was missing from the questionnaires, NCSC made follow-up inquiries with the courts. NCSC salvaged thirty-one cases without Case Data Forms through direct communication with the courts to obtain the key information about the cases. The courts were unable to recover this missing information in twelve cases, which were not included in the final data analysis. Seven additional cases had so little information (three or fewer questionnaires received) that they were also eliminated from the analysis. Id.
66 Id. at 33 tbl.3.1.
nent role at trial. In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of co-defendants, and of expert witnesses. Only victim testimony received a higher mean score on the Likert one-to-seven scale, and even this difference was only marginally statistically significant (p = 0.075, Wilcoxon matched pairs signed-rank test). Judges viewed defendant testimony as significantly more important than police testimony (p < 0.001), informant testimony (p < 0.001), codefendant testimony (p = 0.003), and expert-witness testimony (p < 0.001). Defendant testimony was not significantly more important than eyewitness testimony (p = 0.597).

Defendants’ testifying presumably directly affects whether jurors learn of a defendant’s prior criminal record, if any. So we first determine whether defendants testified and then assess whether such testimony is associated with juries’ learning about past convictions. We explore in Parts III.A and III.B the relation between individual factors and the decision to testify and juries’ learning about criminal history. Part III.C assesses these factors in regression models.

A. Defendant Testimony: Case Characteristics Considered Separately

Because defendant testimony is important, it is reasonable to explore the factors that might be expected to influence a defendant’s decision to testify. Given the threat of impeachment with a prior conviction, the most obvious hypothesis is that defendants are more reluctant to testify if they have a prior criminal record than if they do not. One way or another, they may worry, the prosecution will be able to use the record in cross-examination, thereby disadvantaging the defendant.

However, in addition to whether the defendant has a prior criminal record, other factors such as evidentiary strength, race, sex, and type of crime should also be considered. In the fairly unusual case when defense counsel believes conviction is highly unlikely even without a defendant denial, the risk of testifying may not be worth the possible benefit. So the overall perceived strength of the evidence might be associated with the decision to testify.

Additionally, personal background variables, especially race and sex, might be associated with the decision to testify. At the aggregate level, minorities and whites have different perceptions about the criminal justice system, and these perceptions might lead to different rates of testifying. Men and women might react differently to the

67 See id. at 50, 51 tbl.4.7.
68 See, e.g., Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty, 30 J. LEGAL STuD. 277.
prospect of a public appearance on the witness stand or to other influences. Perception of the defendant’s general appeal as a witness will influence the decision to testify, as it would for any other witness.

The nature of the crime charged could also be relevant. The trial judge must weigh the potential prejudice to the defendant of a prior conviction coming into evidence. That balancing process may differ depending on the type of crime at trial.

Table 1 shows the relation between the first four factors and whether the defendant testified at trial.

**Table 1. Defendant Testimony and Selected Characteristics**

<table>
<thead>
<tr>
<th>Panel A. Defendant Characteristic, Dichotomous Variables</th>
<th>Number not testifying</th>
<th>Number testifying</th>
<th>% testifying</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant: had prior record</td>
<td>137</td>
<td>114</td>
<td>45.4</td>
</tr>
<tr>
<td>had no prior record</td>
<td>50</td>
<td>49</td>
<td>62.0*</td>
</tr>
<tr>
<td>Defendant: was minority</td>
<td>145</td>
<td>130</td>
<td>47.3</td>
</tr>
<tr>
<td>was white</td>
<td>12</td>
<td>21</td>
<td>63.6†</td>
</tr>
<tr>
<td>Defendant: was male</td>
<td>147</td>
<td>138</td>
<td>48.4</td>
</tr>
<tr>
<td>was female</td>
<td>9</td>
<td>20</td>
<td>69.0*</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel B. Case Characteristic, Continuous Variables</th>
<th>Mean of those not testifying</th>
<th>Mean of those testifying</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence strength—judges’ view</td>
<td>4.88</td>
<td>4.72</td>
<td>51.5 (N=346)</td>
</tr>
<tr>
<td>Evidence strength—jurors’ view</td>
<td>4.62</td>
<td>4.38</td>
<td>49.8 (N=3142)</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001; 163 of 330 defendants (49.4%) testified. The third numerical column reports the significance level of difference between those with and without a characteristic. For significance levels, † indicates p < 0.10, * indicates p < 0.05. Significance levels at the case level account for stratification of sample by site. Significance levels at the juror level (“Evidence strength—judges’ view”) account for both site stratification and the non-independence of observations at the case level. The minority-white comparison treats blacks and Hispanics as minorities and excludes two Asians and fifteen defendants classified as being of “other” races. Strength of evidence in Panel B is coded on a one-to-seven Likert scale, with higher values indicating evidence more favorable to the prosecution.

Panel A first shows the association between the existence of a prior criminal record and whether the defendant testified at trial. In 251 of 330 cases with information available about prior records and whether the defendant testified, the defendants had criminal records. Forty-five percent of defendants with prior records testified, compared to 62% of defendants without known prior records. The difference in the proportion of defendants with and without criminal records who testify is statistically significant (p = 0.011).

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284–85 nn.33, 35–36 (2001) (citing sources about racial differences in attitude toward the death penalty); id. at 298 n.80 (citing sources about juror race and decision making).
Panel A also shows that minorities, used here to include blacks and Hispanics, comprise the bulk of defendants in the studied sites. The four sites studied all have substantial minority populations. Only 33 cases involved white defendants, compared to 275 with minority defendants. Although over 60% of white defendants testified, less than half of minority defendants testified. This result is marginally statistically significant.

This result, however, could be the product of confounding due to races having different rates of prior criminal records. Minority defendants were more likely to have criminal histories than white defendants were. Of 275 minority defendants, 215 (71.2%) had prior records. Of 33 white defendants, 18 (54.6%) had criminal records. This difference is statistically significant at \( p = 0.005 \). Table 2, therefore, shows the percentage of defendants who testified, controlling for minority status and prior criminal record. Two-thirds of white defendants without prior criminal records testified, compared to a slightly lower 62% of minority defendants. The big difference in rate of testimony is between whites who had criminal records and minorities who had criminal records. About 6 in 10 whites with criminal records testified, compared to about 4 in 10 minorities with criminal records.

Panel A of Table 1 also shows gender differences in the relation between having a prior record and testifying. About 48% of males testified, compared to 69% of females. This difference is statistically significant \( (p = 0.036) \) despite the few women defendants. Panel B of Table 1 indicates that there are no significant differences in the strength of evidence between cases of defendants who did or did not testify. This is so whether one uses the judge’s or the jury’s view of evidentiary strength.

Table 3 reports the relation among the type of criminal case, the existence of a prior record, and the decision to testify. It shows substantial variation in the rate of testimony by type of case, both for defendants with and without criminal records. For defendants without criminal records, the rate of testifying ranged from over 93% in assault cases to just over 14% in second-degree murder cases. For defendants with criminal records, testifying rates ranged from 14% in attempted murder cases to about 57% in assault cases to over 70% in the residual category of “Other” case types. In addition, rates varied within case type depending on whether the defendant had a prior record. For the largest case type in which defendants did not have criminal records, assault, the 93% testimony rate for defendants without criminal records is accompanied by a 57% rate for defendants

The analysis excludes two cases with Asian defendants and fifteen cases with defendant race designated as “other.” Cases with insufficient information about race are likewise excluded.
TABLE 2. RACE, PRIOR RECORD, AND RATES OF TESTIFYING

<table>
<thead>
<tr>
<th>Race</th>
<th>Defendant had no prior record</th>
<th>Defendant had prior record</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WHITE DEFENDANT</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testimony rate (%)</td>
<td>66.7</td>
<td>61.1</td>
<td>63.6</td>
</tr>
<tr>
<td>Number of cases</td>
<td>15</td>
<td>18</td>
<td>33</td>
</tr>
<tr>
<td><strong>MINORITY DEFENDANT</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testimony rate (%)</td>
<td>61.7</td>
<td>43.3</td>
<td>47.3</td>
</tr>
<tr>
<td>Number of cases</td>
<td>60</td>
<td>215</td>
<td>275</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testimony rate (%)</td>
<td>62.7</td>
<td>44.6</td>
<td>49.0</td>
</tr>
<tr>
<td>Number of cases</td>
<td>75</td>
<td>233</td>
<td>308</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001.

with criminal records (p = 0.024, Fisher’s exact test). A similar large difference exists for first-degree murder cases (p = 0.056, Fisher’s exact test).

B. Juries’ Learning About Prior Criminal Records: Case Characteristics Considered Separately

Testifying is risky for defendants with prior criminal records because the records may be revealed on cross-examination. To assess whether juries learn of criminal records, we limit the sample to those cases in which the defendant had a prior record. Using this reduced sample, Table 4 shows the relation among defendant characteristics, evidentiary strength, and whether the jury learned about the defendant’s criminal record.

Panel A first shows the association between whether the defendant testified and the jury’s learning of the prior record. Note that by far the most frequent pattern, accounting for about half the cases, was for the defendant not to testify and for the jury not to learn about the prior record. Interesting variation nevertheless emerges. Panel A shows a statistically significant association (p < 0.001) between defendants’ testifying and juries’ learning about the records. About 52% of juries learned of a defendant’s record if the defendant testified. In contrast, juries learned about criminal record if defendants did not testify in less than 9% of cases, a low rate, similar to that reported by Kalven and Zeisel.70 Because only about half the juries with testifying defendants learned of criminal records, the results suggest that judges, as evidentiary rules require, balance the relevance of a prior criminal record with the possible prejudice to the defendant.

70 See Kalven & Zeisel, supra note 40, at 147 (reporting that juries learn of records in 13% of the cases in which defendants do not testify).
Juries in minority defendants’ cases were more likely to learn of criminal histories than were juries in white defendants’ cases. Of 226 minority defendants with criminal records, sixty-six (29.2%) had juries who learned of their criminal records. Of nineteen white defendants with criminal records, three (15.8%) had juries who learned of their records. But this difference does not reach traditional levels of statistical significance (p = 0.291), and more observations, especially of white defendants, are needed to support conclusions.

Panel A also suggests gender differences in the rate at which juries learned of criminal records. Juries learned of criminal records for

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**TABLE 3. PERCENT OF CASES IN WHICH DEFENDANT TESTIFIED, BY CASE TYPE AND EXISTENCE OF PRIOR RECORD**

<table>
<thead>
<tr>
<th>Case type</th>
<th>No prior record</th>
<th>Prior record</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assault (not sexual)</strong></td>
<td>15 (93.3)</td>
<td>21 (57.1)</td>
<td>36 (72.2)</td>
</tr>
<tr>
<td><strong>Attempted murder</strong></td>
<td>4 (25.0)</td>
<td>7 (14.3)</td>
<td>11 (18.2)</td>
</tr>
<tr>
<td><strong>Burglary</strong></td>
<td>4 (50.0)</td>
<td>10 (60.0)</td>
<td>14 (57.1)</td>
</tr>
<tr>
<td><strong>DUI/DWI</strong></td>
<td>5 (40.0)</td>
<td>7 (42.9)</td>
<td>12 (41.7)</td>
</tr>
<tr>
<td><strong>Illegal drug possession</strong></td>
<td>2 (50.0)</td>
<td>24 (50.0)</td>
<td>26 (50.0)</td>
</tr>
<tr>
<td><strong>Illegal drug sale</strong></td>
<td>20 (50.0)</td>
<td>46 (45.7)</td>
<td>66 (47.0)</td>
</tr>
<tr>
<td><strong>Larceny/theft</strong></td>
<td>5 (40.0)</td>
<td>11 (45.5)</td>
<td>16 (45.8)</td>
</tr>
<tr>
<td><strong>Murder, first-degree</strong></td>
<td>6 (66.7)</td>
<td>23 (21.7)</td>
<td>29 (31.0)</td>
</tr>
<tr>
<td><strong>Murder, second-degree</strong></td>
<td>7 (14.3)</td>
<td>6 (16.7)</td>
<td>13 (15.4)</td>
</tr>
<tr>
<td><strong>Rape, other sex crimes</strong></td>
<td>11 (63.6)</td>
<td>7 (57.1)</td>
<td>18 (61.1)</td>
</tr>
<tr>
<td><strong>Robbery</strong></td>
<td>5 (40.0)</td>
<td>38 (44.7)</td>
<td>43 (44.2)</td>
</tr>
<tr>
<td><strong>Weapons</strong></td>
<td>6 (66.7)</td>
<td>13 (38.5)</td>
<td>19 (47.4)</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>5 (60.0)</td>
<td>10 (70.0)</td>
<td>15 (68.0)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>95 (55.8)</td>
<td>233 (45.5)</td>
<td>328 (48.5)</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Cells show counts with percents of cases with the relevant characteristic in which defendant testified in parentheses.
TABLE 4. DEFENDANT TESTIMONY AND JURY KNOWLEDGE OF CRIMINAL RECORD

<table>
<thead>
<tr>
<th>Panel A. Defendant Characteristic, dichotomous variables</th>
<th>Jury did not learn of criminal record (N)</th>
<th>Jury learned of criminal record (N)</th>
<th>% learning of criminal record</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant: testified</td>
<td>55</td>
<td>50</td>
<td>51.8</td>
</tr>
<tr>
<td>did not testify</td>
<td>125</td>
<td>12</td>
<td>8.8***</td>
</tr>
<tr>
<td>Defendant: was minority</td>
<td>160</td>
<td>66</td>
<td>29.2</td>
</tr>
<tr>
<td>was minority</td>
<td>16</td>
<td>3</td>
<td>15.8</td>
</tr>
<tr>
<td>Defendant: was male</td>
<td>162</td>
<td>71</td>
<td>30.5</td>
</tr>
<tr>
<td>was female</td>
<td>16</td>
<td>2</td>
<td>11.1†</td>
</tr>
</tbody>
</table>

Panel B. Case Characteristic, continuous variables

<table>
<thead>
<tr>
<th>Mean of cases, jury did not learn of criminal record</th>
<th>Mean of cases, jury did learn of criminal record</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence strength—judges’ view</td>
<td>4.94</td>
</tr>
<tr>
<td>Evidence strength—jurors’ view</td>
<td>4.75</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Cells show counts. Sample is limited to cases in which defendant had a prior criminal record. For significance levels, † indicates p <0.10; *** indicates p <0.001. Significance levels at the case level account for stratification of sample by site. Significance levels at the juror level account for both site stratification and the non-independence of observations at the case level. The minority-white comparison treats blacks and Hispanics as minorities and excludes two Asians and fifteen defendants classified as being of “other” races. Strength of evidence in Panel B is coded on a one-to-seven Likert scale, with higher values indicating evidence more favorable to the prosecution.

about 30% of male defendants, compared to 11% for female defendants. This difference is marginally significant at p = 0.107, with the low number of female defendants this time being an issue.

Differences in juries’ learning about criminal records are not significantly associated with the overall strength of the case. This is so whether one uses the judges’ or the juries’ views of evidentiary strength.

Table 5 reports the relation between the type of criminal case and whether the jury learned of a criminal record. The sample is again limited to cases in which the defendant had a criminal record. Although the overall significance of the table is merely p = 0.121 and the numbers are small for most case types, the most striking result is that jurors learned of criminal records in 71% (five of seven) rape–sexual battery cases. Only one other case type, burglary, had even a 50% rate.

The noticeably higher rate in sex cases likely is due at least in part to special evidentiary rules applicable to such cases. California’s general prohibition on admissibility of character evidence71 does not ap-

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Table 5. Jury Learning of a Defendant’s Criminal Record by Type of Case

<table>
<thead>
<tr>
<th>Case type</th>
<th>Jury did not learn of criminal record</th>
<th>Jury learned of criminal record</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault (not sexual)</td>
<td>16</td>
<td>6</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>(72.7)</td>
<td>(27.3)</td>
<td>(100)</td>
</tr>
<tr>
<td>Attempted murder</td>
<td>7</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>(87.5)</td>
<td>(12.5)</td>
<td>(100)</td>
</tr>
<tr>
<td>Burglary</td>
<td>5</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>(45.5)</td>
<td>(54.6)</td>
<td>(100)</td>
</tr>
<tr>
<td>DUI/DWI</td>
<td>7</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(100.0)</td>
<td>(0.0)</td>
<td>(100)</td>
</tr>
<tr>
<td>Illegal drug possession</td>
<td>17</td>
<td>7</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>(70.8)</td>
<td>(29.2)</td>
<td>(100)</td>
</tr>
<tr>
<td>Illegal drug sale</td>
<td>33</td>
<td>16</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>(67.4)</td>
<td>(32.7)</td>
<td>(100)</td>
</tr>
<tr>
<td>Larceny/theft</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>(63.6)</td>
<td>(36.4)</td>
<td>(100)</td>
</tr>
<tr>
<td>Murder, first-degree</td>
<td>22</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>(88.0)</td>
<td>(12.0)</td>
<td>(100)</td>
</tr>
<tr>
<td>Murder, second-degree</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>(66.7)</td>
<td>(33.3)</td>
<td>(100)</td>
</tr>
<tr>
<td>Rape, other sex crimes</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(28.6)</td>
<td>(71.4)</td>
<td>(100)</td>
</tr>
<tr>
<td>Robbery</td>
<td>26</td>
<td>12</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>(68.4)</td>
<td>(31.6)</td>
<td>(100)</td>
</tr>
<tr>
<td>Weapons</td>
<td>10</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>(76.9)</td>
<td>(23.1)</td>
<td>(100)</td>
</tr>
<tr>
<td>Other</td>
<td>15</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>(75.0)</td>
<td>(25.0)</td>
<td>(100)</td>
</tr>
<tr>
<td>Total</td>
<td>173</td>
<td>71</td>
<td>244</td>
</tr>
<tr>
<td></td>
<td>(70.9)</td>
<td>(29.1)</td>
<td>(100)</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Cases limited to defendants with criminal records. Cells show counts with percents of cases with the relevant characteristic in which jury learned or did not learn of criminal record in parentheses.

Applying to the admissibility of prior sexual crimes in cases involving sexual offenses,72 Arizona loosens restrictions on character evidence in sexual misconduct cases.73 The District of Columbia follows a rule that “allows proof of a defendant’s past sexual misconduct, similar to the sexual misconduct for which he is being tried, in order to show that

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72 See id. § 1108(a).
73 See Ariz. R. Evid. 404(c).
TAKING A STAND ON TAKING THE STAND 1377

he has an ‘unusual sexual preference.’” 74 Similar legislation has been proposed in the New York State Assembly,75 but the absence of special prior-sexual-offense legislation does not necessarily preclude impeachment of New York defendants with prior sexual offenses.76

C. Modeling Influences on the Decision to Testify and Juries’ Learning About Prior Criminal Records

With respect to defendants’ testifying, considering variables in isolation from one another, we find that the existence of a prior criminal record, case type, race, and gender are associated with the decision to testify. This section combines these factors in models of the decision to testify. With respect to juries’ learning of a defendant’s criminal record, defendants’ testifying is the strongest influence, but the other factors considered have notable, albeit not statistically significant, differences. This section considers the factors explored simultaneously in regression models.

Table 6 reports regression models of the decision to testify that combine the factors explored in subpart A. Model (1) does not account for type of case. Model (2) uses dummy variables to account for type of case. A test of the hypothesis that the coefficients for these variables are collectively equal to zero yields $p = 0.148$, though some case types are individually significant. Both models account for the sample stratification by site.77 Of the factors explored in modeling the decision to testify—the existence of a prior criminal record, race, sex, strength of the evidence, and case type—only prior record and case type (not shown separately) are statistically significantly associated, or marginally significantly associated, with the decision to testify. The models explain the data substantially better than a simple model of testifying that would be correct in 51% of the cases based on the simple frequencies in Table 2. Similar models, using site fixed effects, do not materially differ from those reported here.

It is possible that a defendant’s testifying is associated with the overall closeness of the case and that the closeness of the case is simultaneously associated with whether a defendant testified. Defense

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76 See People v. Williams, 806 N.Y.S.2d 266, 268 (N.Y. App. Div. 2005) (allowing cross-examination in a rape case regarding the existence and underlying facts of prior sex-related convictions); see also Fed. R. Evid. 413(a) (stating that evidence of other sexual assault offenses “may be considered for its bearing on any matter to which it is relevant”).
77 We have also explored, but do not report, multilevel models, see, for example, ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 301-21 (2007), to account for locale and type of case. The results do not materially differ from those reported here.
TABLE 6. LOGISTIC REGRESSION MODELS OF DECISION TO TESTIFY

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dependent variable = defendant testified</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(0=no, 1=yes)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant had prior record</td>
<td>$-0.541^\dagger$</td>
<td>$-0.663^*$</td>
</tr>
<tr>
<td></td>
<td>(1.89)</td>
<td>(2.02)</td>
</tr>
<tr>
<td>Minority defendant</td>
<td>$-0.474$</td>
<td>$-0.478$</td>
</tr>
<tr>
<td></td>
<td>(1.17)</td>
<td>(0.88)</td>
</tr>
<tr>
<td>Male defendant</td>
<td>$-0.718$</td>
<td>$-0.438$</td>
</tr>
<tr>
<td></td>
<td>(1.64)</td>
<td>(0.95)</td>
</tr>
<tr>
<td>Evidentiary strength</td>
<td>$-0.101$</td>
<td>$-0.063$</td>
</tr>
<tr>
<td></td>
<td>(1.19)</td>
<td>(0.67)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.919**</td>
<td>0.888</td>
</tr>
<tr>
<td></td>
<td>(2.83)</td>
<td>(0.91)</td>
</tr>
<tr>
<td>Observations</td>
<td>295</td>
<td>279</td>
</tr>
<tr>
<td>Case types treatment</td>
<td>not accounted for</td>
<td>fixed effects</td>
</tr>
<tr>
<td>Correctly classified</td>
<td>59.0%</td>
<td>60.6%</td>
</tr>
<tr>
<td>Goodness of fit p-value</td>
<td>0.962</td>
<td>0.434</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Table reports coefficients with t-statistics in parentheses; † indicates $p < 0.10$, * $p < 0.05$, ** $p < 0.01$. Goodness-of-fit p-value based on Hosmer-Lemeshow statistic with 10 groups.

counsel may be influenced to have clients testify depending on the strength of the evidence. But the judge and jury may react to the evidence in part on the basis of whether the defendant testified. We therefore explored separate models of not only whether a defendant testifying is associated with the strength of the evidence as reported by juries, but also whether the strength of the evidence, as reported by judges, is associated with whether a defendant testified. We found no significant association in either relation.

Table 7 reports regression models of the jury’s learning about a defendant’s prior criminal record. Model (1) does not account for type of case. Model (2) uses dummy variables to account for type of case. A test of the hypothesis that they are collectively equal to zero yields $p = 0.228$, though some case types are individually significant. Both models account for the sample stratification by site.78

The models again show a consistent pattern of only one factor having a substantial, statistically significant effect. A defendant’s testifying is the only factor substantially and significantly contributing to whether the jury learned of the defendant’s prior criminal record.

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78 We also explored, but do not report, multilevel models to account for locale and type of case. The results do not materially differ from those reported here. See id.
Similar models, using site-level fixed effects, do not materially differ from those reported here.

**Table 7. Logistic Regression Models of Jury Learning of Criminal Record**

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant testified</td>
<td>2.421**</td>
<td>2.806**</td>
</tr>
<tr>
<td></td>
<td>(6.36)</td>
<td>(6.23)</td>
</tr>
<tr>
<td>Minority defendant</td>
<td>0.814</td>
<td>1.069</td>
</tr>
<tr>
<td></td>
<td>(1.18)</td>
<td>(1.19)</td>
</tr>
<tr>
<td>Male defendant</td>
<td>1.287</td>
<td>0.942</td>
</tr>
<tr>
<td></td>
<td>(1.55)</td>
<td>(1.04)</td>
</tr>
<tr>
<td>Evidentiary strength</td>
<td>−0.133</td>
<td>−0.169</td>
</tr>
<tr>
<td></td>
<td>(1.04)</td>
<td>(1.16)</td>
</tr>
<tr>
<td>Constant</td>
<td>−3.747**</td>
<td>−4.788**</td>
</tr>
<tr>
<td></td>
<td>(3.55)</td>
<td>(3.10)</td>
</tr>
<tr>
<td>Observations</td>
<td>223</td>
<td>210</td>
</tr>
<tr>
<td>Case types treatment</td>
<td>not accounted for</td>
<td>fixed effects</td>
</tr>
<tr>
<td>Correctly classified</td>
<td>74.9%</td>
<td>79.1%</td>
</tr>
<tr>
<td>Goodness of fit p-value</td>
<td>0.554</td>
<td>0.679</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Table reports coefficients with t-statistics in parentheses; ** indicates p < 0.01. Goodness-of-fit p-value based on Hosmer-Lemeshow statistic with 10 groups.

**IV**

**The Effect of Juries’ Learning of Criminal Records**

Defendants presumably testify when they believe it promotes acquittal more than not testifying would. As shown in Part III, the decision whether to testify is significantly associated with the existence of a prior record. And the jury’s learning of a defendant’s prior record is significantly associated with whether that defendant testified. Table 4 shows that juries rarely learn of criminal records unless defendants testify. We now explore whether, for the cases of defendants with criminal records, juries’ learning about criminal records is associated with whether they convict defendants.

Prior models of conviction using the data analyzed here found that the perceived strength of the evidence was the only consistent factor significantly associated with the probability of conviction,79 but

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79 Eisenberg, Hannaford-Agor, Hans, Waters, Munsterman, Schwab & Wells, supra note 54, at 197 tbl. 9.
those models did not include whether juries learned about criminal records. One study using these data reports no relation between learning of a criminal record and conviction.\textsuperscript{80} However, that study did not control for evidentiary strength.

Studies of jury behavior indicate that the strength of the evidence dominates decision making. Evidence strength is so powerful that it is difficult to study the influence of other factors.\textsuperscript{81} Indeed, Kalven and Zeisel determined that many factors affected jury decision making and caused juries to disagree with what the judge would have decided primarily in cases in which the evidence was closely divided. Jury researchers typically calibrate the evidence in their mock jury experiments so that the evidence is ambiguous and the independent variables have a chance to influence the verdict.

In our study of real juries, because jurors were asked about the strength of evidence, we can control for case strength using that measure. The question is whether juries’ learning about criminal records influences conviction rates after accounting for their views of evidentiary strength.

A. Evidentiary Strength, Conviction Rate, and Knowledge of Record

Table 8 shows the relation between the jury’s learning of a criminal record and conviction. As noted above, the sample is limited to cases with defendants who had prior criminal records. For defendants who testified, there was no meaningful difference in the overall conviction rate between cases in which juries learned of the criminal record and cases in which they did not. Similarly, for defendants who did not testify, no meaningful difference emerged between defendants with and without records. In addition, convictions rates did not noticeably differ between defendants who testified and those who did not. All four conviction rates were between 71% and 78%.

\textsuperscript{80} See Givelber, supra note 48, at 1190.

\textsuperscript{81} See, e.g., John Guinther, The Jury in America 102 (1988) (“Juries are evidence-oriented . . . .”); Sally Lloyd-Bostock, Law in Practice: Applications of Psychology to Legal Decision Making and Legal Skills 48 (1989) (“[T]he most important aspect of any case with very few exceptions tends to be the strength of the evidence.”); Michael J. Saks & Reid Hastie, Social Psychology in Court 68 (Robert E. Krieger Pub’g Co. 1986) (1978) (“[T]he power of evidence is so well recognized by jury researchers that when studying processes other than evidence, they must calibrate the evidence to be moderate so that it leaves some variance to be influenced by the variables under study.”); Valerie P. Hans, The Jury’s Response to Business and Corporate Wrongdoing, 52 Law & Contemp. Probs. 177, 194 (1989) (“Typically the evidence . . . drives juror decisionmaking.”); Christy A. Visher, Juror Decision Making: The Importance of Evidence, 11 Law & Hum. Behav. 1, 13–14 (1987) (emphasizing the importance of evidence in comparison to extralegal factors). But see Eisenberg, Hannaford-Agor, Hans, Waters, Munsterman, Schwab & Wells, supra note 54, at 205 n.60 (finding juror characteristics associated with capital sentencing).
Of course, the strength of the evidence against a defendant may confound the seemingly equivalent conviction rates and mask real differences. If evidence against a defendant is noticeably weaker in cases in which juries learned of convictions, knowledge of prior records may serve to bolster marginal evidence. Table 8, therefore, also includes information about the strength of the evidence for each case category. The measure of evidentiary strength is based on jurors’ reports. Using judges’ reports about evidentiary strength (not reported here) does not materially change the results.

Table 8. Jury Knowledge of Prior Criminal Record and Conviction

<table>
<thead>
<tr>
<th></th>
<th>Number not convicted</th>
<th>Number convicted</th>
<th>% convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Evidence strength)</td>
<td>(Evidence strength)</td>
<td>(Evidence strength)</td>
</tr>
<tr>
<td><strong>Defendant Testified</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jury did not learn of record</td>
<td>11</td>
<td>36</td>
<td>76.6</td>
</tr>
<tr>
<td>Mean evidence strength</td>
<td>(3.10)</td>
<td>(5.40)</td>
<td>(4.86)</td>
</tr>
<tr>
<td>Jury learned of record</td>
<td>12</td>
<td>42</td>
<td>77.8</td>
</tr>
<tr>
<td>Mean evidence strength</td>
<td>(2.79)</td>
<td>(4.96)</td>
<td>(4.48)</td>
</tr>
<tr>
<td><strong>Defendant Did Not Testify</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jury did not learn of record</td>
<td>32</td>
<td>80</td>
<td>71.4</td>
</tr>
<tr>
<td>Mean evidence strength</td>
<td>(3.09)</td>
<td>(5.30)</td>
<td>(4.67)</td>
</tr>
<tr>
<td>Jury learned of record</td>
<td>5</td>
<td>8</td>
<td>72.7</td>
</tr>
<tr>
<td>Mean evidence strength</td>
<td>(2.53)</td>
<td>(5.30)</td>
<td>(4.54)</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Sample is limited to cases with defendants who had criminal records. Strength of evidence is coded on a one-to-seven Likert scale with higher values indicating evidence more favorable to the prosecution.

As expected, substantial differences exist in perceived evidentiary strength between cases with convictions and acquittals. Evidentiary strength is naturally the most powerful factor explaining case outcomes. On the one-to-seven scale, evidentiary strength in cases with convictions clustered around five. Evidentiary strength in acquittals clustered around three. The question of interest here is whether juror knowledge of criminal records contributes to explaining those outcomes beyond the explanatory power of the evidentiary strength.

Figure 1 helps assess the influence of knowledge of a criminal record while accounting for evidentiary strength. The jurors’ view of the evidence is averaged for each case and rounded to the nearest integer from one to seven. Thus, each case is assigned an evidentiary strength of one through seven. The conviction rate is computed at each of the integer values. The cases with the strongest perceived evidence values, six or seven, had nearly 100% conviction rates whether or not juries learned about criminal records.

Conviction rates for rounded evidentiary strength values less than four, below the middle of the Likert scale, show interesting variety.
FIGURE 1. CONVICTION RATE AS FUNCTION OF: EVIDENTIARY STRENGTH & KNOWLEDGE OF RECORD

Strength of evidence (larger # = stronger)

Proportion convicted

Note: NCSC data covering trials at four sites in 2000–2001. Evidentiary strength on the x-axis is rounded to the nearest integer value of the mean strength in a case as reported by multiple jurors. Conviction rates, reported on the y-axis, are computed separately for cases in which jurors did and did not learn of prior records and are computed separately for each value on the x-axis. Symbol sizes are proportionate to the number of cases comprising the observation. For example, there were only two cases with prior criminal records and evidentiary strength equal to one. Principal results of interest are the gap between cases with and without record at evidentiary strength equal to three and the absence of such a gap at other evidentiary strengths.

One quirk is the 50% conviction rate for evidentiary strength equal to one, the case with the weakest evidence favoring conviction. But, as the small size of the shaded circle for that evidentiary value suggests, this rate is based on only two cases and one conviction. Interestingly, the conviction was one in which the jury learned of a criminal record.82 The most striking conviction rate is for cases with evidence strength equal to three in which the jury learned about a criminal record. Despite the relatively weak evidence, the conviction rate exceeded 60%, far greater than the rate for cases with evidentiary strength equal to three in which the jury did not learn about a criminal record, and far greater than the conviction rate for evidentiary

82 The case was in the Bronx, involved illegal drug sales, and had two counts. The judge predicted that the jury would find the defendant guilty on some charges and not guilty on others. The jury acquitted on one count and convicted on the other. The judge assigned the conviction an evidentiary strength of two but reported being “very satisfied” with the jury’s decision. The jurors’ report of low evidentiary strength was based on the report of only two jurors. Note that, as reported in Part II, the Bronx had a noticeably lower juror-response rate than the other sites.
strength equal to two. Unlike the minuscule sample for evidentiary strength equal to one, the surprisingly high conviction rate at evidentiary strength three is based on eleven cases. A similar pattern, shown in Appendix Figure 1, emerges if one uses the judges’ measure of evidentiary strength rather than the juries’ measure. The distributions of perceived evidence strength differ for juries and judges. In line with this differential pattern, Appendix Figure 1 shows that the pattern shifts downward somewhat so that the key divergence between cases in which juries do and do not learn about a defendant’s criminal record is now at the judge’s evidentiary strength level of two.

B. Regression Models of Conviction

Regression models in Table 9 explore whether the pattern in Figure 1 survives more rigorous statistical modeling. The models seek to explore whether knowledge of past criminal record influences a dichotomous outcome, whether any conviction resulted. We again limit the sample to cases in which defendants have criminal records. The controls, which vary across models, include evidentiary strength, gender, minority status, and type of crime.

The pattern across the regression models confirms the pattern suggested by Figure 1. Stratifying the data’s evidentiary strength indicates that jury knowledge of prior criminal history is significantly associated with conviction in weak cases and not significantly associated with conviction in strong cases. The models in Table 9 control for evidentiary strength, account for county-level effects through dummy variables, and cluster standard errors by case type.

83 See Eisenberg, Hannaford-Agor, Hans, Waters, Munsterman, Schwab & Wells, supra note 54, at 186–89 tbl.4, figs.1, 2.

84 For purposes of these models, DUI and attempted-murder convictions were included with the case type “Other” due to the lack of variation for these case types given the other variables in the models. We also ran (1) two-level random intercept logistic models with separate intercepts for each case type and county fixed effects and (2) three-level random intercept models with intercepts for case type and county. These models yield results similar to those in Table 9 except that, in the three-level model for the sample limited to evidentiary strength > 3.5, the coefficients and standard errors appear to be unstably large. Other models, not reported here, employ systems of two equations. The goal in those models was to account for the endogeneity of juries’ learning of past criminal history. The first equations modeled whether jurors learned of criminal record. As shown in Tables 4 and 7 above, this is largely a function of whether the defendant testified. The second equations model conviction after correcting for the nonrandom pattern of juries’ learning about criminal history. We found that, measured by a standard model assessment criterion (the Akaike information criterion, see Gelman & Hill, supra note 77, at 525), the second equations in multiequation models were inferior to similar single-equation models that did not include an adjustment. The extra parameter introduced by the adjustment is not worth the gain in explanatory power that accompanies adding an additional parameter. Models using fixed effects for case types are not satisfactory because of the reduced sample models’ lack of variation.
1384 CORNELL LAW REVIEW [Vol. 94:1353

TABLE 9. LOGISTIC REGRESSION MODELS OF CONVICTION

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dependent variable = jury convicted (0=no, 1=yes)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Full sample</td>
<td>Evidence strength ≤ 3.5</td>
<td>Evidence strength &gt; 3.5</td>
</tr>
<tr>
<td>Evidentiary strength</td>
<td>1.705**</td>
<td>0.411</td>
<td>2.272*</td>
</tr>
<tr>
<td></td>
<td>(7.41)</td>
<td>(0.81)</td>
<td>(2.20)</td>
</tr>
<tr>
<td>Jury learned criminal history</td>
<td>0.942</td>
<td>1.624*</td>
<td>−0.116</td>
</tr>
<tr>
<td></td>
<td>(1.11)</td>
<td>(2.52)</td>
<td>(0.12)</td>
</tr>
<tr>
<td>Site=Los Angeles</td>
<td>1.317†</td>
<td>1.666</td>
<td>1.615</td>
</tr>
<tr>
<td></td>
<td>(1.83)</td>
<td>(1.24)</td>
<td>(1.09)</td>
</tr>
<tr>
<td>Site=Maricopa</td>
<td>1.314†</td>
<td>1.973</td>
<td>1.606</td>
</tr>
<tr>
<td></td>
<td>(1.77)</td>
<td>(1.21)</td>
<td>(1.40)</td>
</tr>
<tr>
<td>Site=Bronx</td>
<td>1.793*</td>
<td>2.439†</td>
<td>1.190</td>
</tr>
<tr>
<td></td>
<td>(2.23)</td>
<td>(1.83)</td>
<td>(1.10)</td>
</tr>
<tr>
<td>Site=D.C. (reference category)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>−7.146**</td>
<td>−4.658†</td>
<td>−9.325*</td>
</tr>
<tr>
<td></td>
<td>(6.80)</td>
<td>(1.92)</td>
<td>(2.01)</td>
</tr>
<tr>
<td>Observations</td>
<td>214</td>
<td>58</td>
<td>156</td>
</tr>
<tr>
<td>Case types treatment</td>
<td>cluster</td>
<td>cluster</td>
<td>cluster</td>
</tr>
<tr>
<td>Correctly classified</td>
<td>89.7%</td>
<td>74.1%</td>
<td>92.3%</td>
</tr>
<tr>
<td>Goodness of fit p-value</td>
<td>0.388</td>
<td>0.411</td>
<td>0.014</td>
</tr>
</tbody>
</table>

Note: NCSC data covering trials at four sites in 2000–2001. Table reports coefficients with t-statistics in parentheses; † indicates p < 0.10, * p < 0.05, ** p < 0.01. Models cluster standard errors by case type and use county fixed effects. Goodness-of-fit p-value is based on Hosmer-Lemeshow statistic with 10 groups.

Model (1) includes all cases involving a defendant with a criminal record. Although Model (1) shows no significant criminal record effects, the other two models show that this full-sample story is seriously incomplete. Model (2) limits the sample to cases with weak evidence against the defendant. According to the average of individual juror reports of evidentiary strength, these cases had evidentiary strength of less than or equal to 3.5 on the one-to-seven scale. This model shows that the evidentiary-strength variable does not approach statistical significance in weak cases. This is consistent with the non-monotonically increasing pattern of conviction rates at the low end of evidentiary strength in Figure 1. Thus, most of the contribution to the significance of the evidentiary-strength variable is from cases with strong evidence, those with average evidentiary strength exceeding 3.5. This is confirmed by the large statistically significant coefficients on the evidentiary-strength variable in the sample limited to strong cases, as shown in Model (3). Model (2) does show a substantial, significant, positive association between learning of a criminal record and conviction. This too is consistent with the separation of cases in which jurors did or did not learn of the defendant’s criminal record in Figure 1.
The magnitude of the effect of knowledge of criminal record can be strikingly large. In Model (2), in cases that round to evidentiary value three, the marginal effect of knowledge of criminal conviction in the District of Columbia is to increase the probability of conviction by 0.36. The corresponding increase is 0.30 in Los Angeles, 0.32 in Maricopa, and 0.10 in the Bronx. As the overall probability of conviction at evidentiary level three without a criminal record is just below 0.20, the presence of a criminal record increases the probability of conviction from less than 20% to about 50% or greater. In contrast, at rounded evidentiary level four in Model (3), the marginal effect of knowledge of a criminal conviction is small and insignificant in all four jurisdictions.

Additional models that control for gender and minority status, not reported here, do not yield results materially different from those reported here. But reduced sample models that include these variables cannot include all observations because of lack of variation in outcome across gender and minority status. The small numbers of white defendants and female defendants, as shown in Tables 1 and 4 above, prevent systematic inclusion of these variables across the full range of models. Results are also not attributable to a single locale. Together, these results suggest that in strong cases—cases that have crossed the jury’s evidentiary threshold of 3.5—variations in evidentiary strength continue to contribute to the probability of conviction. The existence of a prior criminal record does not materially contribute to conviction probability. In weak cases, cases with evidence less than or equal to 3.5, the dominant tendency is not to convict. But, in the strongest of weak cases, the existence of a prior criminal record can prompt a jury to convict. The prior record effectively leverages the existing evidence over the threshold needed to support conviction.

The core results can be shown simply in Table 10, which contains the conviction rate for the bifurcated levels of evidentiary strength, further subdivided by whether the jury learned of the defendant’s criminal record.

C. Discussion of Results

We now consider the results in light of the theoretical reasons in Part I suggesting why prior record is important. Subject to the limitations of a nonexperimental design, our findings most directly support the fourth theoretical basis for believing prior record to be important.

85 Similar probability increases occur at lower evidentiary-strength levels, but the weaker evidence in those cases presumably limits the power of a criminal record to result in a conviction.

86 See supra fig.1.
TABLE 10. JURY KNOWLEDGE OF PRIOR CRIMINAL RECORD AND CONVICTION

<table>
<thead>
<tr>
<th>EVIDENCE STRENGTH ≤ 3.5</th>
<th>Number not convicted</th>
<th>Number convicted</th>
<th>% convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jury did not learn of record</td>
<td>32</td>
<td>7</td>
<td>18.0</td>
</tr>
<tr>
<td>Jury learned of record</td>
<td>12</td>
<td>9</td>
<td>42.9*</td>
</tr>
<tr>
<td>EVIDENCE STRENGTH &gt;3.5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jury did not learn of record</td>
<td>11</td>
<td>109</td>
<td>90.8</td>
</tr>
<tr>
<td>Jury learned of record</td>
<td>3</td>
<td>41</td>
<td>93.2</td>
</tr>
</tbody>
</table>

Note: Sample is limited to cases with defendants who had criminal records. Strength of evidence is coded on a one-to-seven Likert scale, with higher values indicating evidence more favorable to the prosecution. Strength of evidence is average for each case based on juror reports. For significance level, * indicates statistical significance at <0.05 using mid-p exact test.

The conviction threshold appears to differ for defendants with and without criminal records. As Figure 1 and the regression models suggest, jurors appear willing to convict on less strong other evidence if the defendant has a criminal past.

The results also help identify the cases in which the shifted conviction threshold has most effect. A prior record plays little role in cases with strong or even average (value four) evidence, hence the small differences in conviction rates at evidence values four through seven between cases with and without juror knowledge of criminal record information. Nor does prior criminal record often play an outcome-determinative role in cases with evidence too far below the conviction threshold of about four. Hence the small difference at evidence value two between cases with and without juror knowledge of criminal records and the low conviction rates for both classes of cases. But for cases with evidentiary value close to, but below, the threshold of four, a prior criminal record can lead to conviction.

One could view a prior record as “making up” for evidentiary deficiencies. Or, one might view the prior record as evidence tending to suggest guilt. Under either view, the prior record makes a difference. That the record effect occurs primarily in cases in which the evidence is not overwhelming resonates with Kalven and Zeisel’s classic finding that extralegal factors have the most impact primarily in close, as opposed to clear, cases.87

One can also assess the theory that prior record changes the meaning of evidence rather than shifting the conviction threshold. As suggested earlier, jurors may internalize knowledge of a criminal record into an overall view of the case as having stronger evidence favoring conviction. We hypothesized on the basis of the experimental jury research that knowledge of criminal history could directly affect the jurors’ (and even judges’) perceptions of evidentiary strength. We

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87 See Kalven & Zeisel, supra note 40, at 133–35.
also noted that the impact of criminal record on juror judgments about evidence might be difficult to detect because, if it operates as hypothesized, it would already be incorporated into jurors’ perceptions of the strength of the case.

With that as a cautionary comment, the relation between evidentiary strength and knowledge of criminal record seems more consistent with the threshold theory. Cases in which jurors learned of criminal records tend to have slightly lower perceived evidentiary strength than cases in which jurors lacked knowledge of criminal records, as shown in Table 8. When the defendant testified, cases ending in conviction had average evidentiary strength of 4.96 (knowledge of record) and 5.40 (no knowledge of record); cases ending in acquittal had average evidentiary strength of 2.79 (knowledge of record) and 3.10 (no knowledge of record). If knowledge of a criminal record changes the meaning of evidence towards conviction, it does so in a way that increases evidentiary strength merely to the level of, but not beyond, evidentiary strength in cases in which jurors do not learn of criminal records. Perhaps prosecutors viewed existence of prior convictions as warranting prosecution of otherwise weaker cases.

In addition to the lower conviction threshold, we also find evidence of a negative halo effect. Jurors were asked, on a one-to-seven scale, the degree of sympathy they had for defendants. In a regression model of the degree of sympathy as a function of knowledge of a criminal record, a statistically significant (p = 0.023) negative association existed between sympathy and record. In a model that includes evidentiary strength as an explanatory variable, the relation becomes more significant (p = 0.008). Results do not materially change if we also control for case type and defendant race and sex. But adding the degree of sympathy as an explanatory variable in close cases, those in Model (2) in Table 9, does not yield a statistically significant coefficient. Jurors may feel more negatively about defendants with criminal records, but that reduced respect does not help explain the conviction pattern in close cases.

With respect to the effect of prior record on credibility, we do not find evidence that criminal records affect defendant credibility. Jurors were asked to rate the believability of the defendant’s evidence on a one-to-seven scale. In cases in which defendants testified, criminal record was not significantly associated with the degree of believability. This was so whether or not one controlled for jurors’ perceptions of the strength of the evidence. This noneffect may of course be attributable to defendants’ being selective about the cases in which they testified. In cases in which testifying would be most damaging to credibility, defendants may simply decline to testify. However, it is worth noting the convergence of this finding with the
experimental research. In the jury experiments reviewed earlier that varied a defendant’s criminal record, the evidence in the case and the other characteristics and testimony of the defendant were held constant. In those controlled circumstances, researchers did not typically find strong links between the presence of a criminal record and changes in the defendant’s credibility.

The absence of an association between criminal record and credibility is deeply troubling given the theory underlying allowing impeachment based on a defendant’s criminal record. In most instances, the justification for allowing the use of a prior criminal record is to facilitate assessing the defendant’s credibility. Thus, “the government might show that the defendant had been convicted of a crime, to affect his credibility as a witness, but for no other purpose.” If, as our results and experimental results suggest, prior record affects case outcomes but not credibility, the historical justification for allowing the use of criminal records is unfounded.

CONCLUSION

Avoiding conviction of the innocent is a preeminent goal of the criminal justice system. Lord Patrick Devlin’s oft-quoted statement captures much of the spirit underlying the jury-trial guarantee: “Trial by jury is not an instrument for getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.” As of this writing, over 200 post-conviction exonerations based on DNA evidence have been documented. The number of erroneous convictions is likely much higher because of the difficulty of establishing innocence in cases that do not involve DNA.

Experimental and real-world data, as confirmed by this study, uniformly suggest that knowledge of defendants’ prior records promotes conviction in close cases, those where one should be most concerned about erroneous convictions. The criminal-record effect could be even stronger than we have found in these analyses; the experimental work suggests that having a record for a similar offense creates the

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88 We thank Geoffrey Stone for pointing this out. 89 See, e.g., Commonwealth v. Gorham, 99 Mass. 429, 21 (1868) (“The defendant . . . offered himself as a witness, and the rules of evidence affecting the competency or credibility of witnesses were all applicable to him in that character.”). 90 Commonwealth v. Bonner, 97 Mass. 587, 588 (1867) (describing the trial judge’s ruling). 91 Givelber, supra note 48, at 1172 (stating that “[n]o one wants to participate in a practice that they believe routinely imprisons the innocent”). 92 Lord Devlin, The Criminal Trial and Appeal in England, Address at the University of Chicago for the Third Dedicatory Conference (Jan. 1960), quoted in Kalven & Zeisel, supra note 40, at 190. 93 See The Innocence Project, supra note 8. 94 See Gross et al., supra note 8, at 524.
most bias, and we had information only about the presence of a defendant’s criminal record, not its type. Together, our results and experimental results indicate that the historical basis for allowing prior record evidence—to challenge the defendant’s credibility—has little empirical support.

The enhanced conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions. A recent analysis of DNA exonerations suggests that many erroneously convicted defendants refrain from testifying because they fear the negative consequences of having their criminal records made known to the jury; while at the same time, juries who learn of the criminal records of innocent defendants who do testify are likely biased by the record information. This bias suggests the value of exploring the development of legal rules that encourage defendants, even those with criminal records, to testify. Although eliminating all testimony about prior criminal records is unrealistic, prosecutors making charging decisions and judges considering the prejudicial effect of prior records should take into account the dramatic effect that knowledge of criminal record can have in close cases. Similarly, criminal defense attorneys should think long and hard about having clients testify in what they believe juries might regard as close cases.

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95 See Blume, supra note 3, at 490–91.
96 Jeffrey Bellin, Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify, 76 U. Cin. L. Rev. 851, 882–96 (2008) (proposing legal reforms that arguably would make it more attractive for defendants with criminal records to testify at trial by, for example, prohibiting all mention of prior convictions or allowing in limine motions to exclude prior-conviction impeachment in exchange for the defendant’s commitment to testify).
APPENDIX

APPENDIX FIGURE 1.
CONVICTION RATE AS FUNCTION OF:
EVIDENTIARY STRENGTH (PER JUDGE) &
KNOWLEDGE OF RECORD

![Graph showing conviction rate as a function of evidentiary strength and knowledge of record. The graph includes two sets of data points, one for juries that did not know about the record and another for juries that knew about the record. The x-axis represents the strength of evidence, with larger numbers indicating stronger evidence. The y-axis shows the proportion convicted.]
The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom

Regina A. Schuller · Veronica Kazoleas · Kerry Kawakami

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Abstract The current study examines the impact of the challenge for cause procedure and its effectiveness in curbing racial prejudice in trials involving Black defendants. Participants were provided with a trial summary of a defendant charged with either drug trafficking or embezzlement. The race of the defendant was either White or Black, with participants in the Black defendant condition receiving (prior to the trial presentation) either no challenge, a close-ended standard challenge, or a modified reflective pretrial questioning strategy. Overall, the results revealed an anti-Black bias in judgments. While the closed ended challenge did little to reduce this bias, the reflective format demonstrated a reduction in racial bias. Theoretical and applied implications of these findings are discussed.

Keywords Racial bias · Juror selection · Challenge for cause

The potential for racial bias in trials involving minority member defendants has been explicitly acknowledged by the courts within both Canada and the United States. Indeed, in the early 1990s, the potential for racial bias was explicitly recognized by the Canadian courts in trials of Black defendants via the challenge for cause procedure (Regina v. Parks, 1993), and since this time, attorneys in Canada have been permitted to question prospective jurors in trials involving not only Black defendants but defendants of any visible minority (Regina v. Williams, 1998). Similarly, the voir dire, a less restrictive procedure than its Canadian counterpart, permits attorneys in the United States to question and eliminate potential jurors who might harbor racial bias in their decisions.

If one examines the body of archival research tracking the treatment of Blacks and other minority members at various decision points within the criminal justice system (e.g., Brownsberger, 2000; Demuth & Steffensmeier, 2004; Mustard, 2001), as well as the juror simulation research exploring the impact of defendant race on judgments (for a review see Sommers & Ellsworth, 2001), there appears to be justification to the court’s concern. To date, however, empirical investigations of the remedies in place for dealing with issues of racial bias (i.e., juror selection procedures) have been scarce, with much of this work focusing on juror race and attorney use of preemptory challenges (Rose, 1999; Sommers & Norton, 2007). As such, the current research examines the impact of the Canadian challenge procedure and its effectiveness in identifying and curbing racial prejudice in trials involving Black defendants.

In addition to the question of whether or not the procedure can successfully identify individuals who would likely demonstrate bias, its impact on the decisions of those who survive the screening of partiality is also examined. Although it is possible that the challenge for cause procedure may have little impact on jurors’ subsequent decisions, participation in this procedure may have independent effects on judgments (for an examination of process effects in “death qualification,” see Haney, 1984). While some suggest that the procedure may enhance the jurors’ ability to remain impartial, a claim asserted in Parks and echoed in subsequent decisions (Regina v. Koh, Lu and Lim, 1998), current social psychological research and theorizing indicates that it may also result in over or under corrections. It is within this context and with these questions in mind that the present study is cast.
THE RACE-BASED CHALLENGE PROCEDURE

In contrast to the United States, prospective jurors in Canada are not typically questioned, leaving attorneys with only information pertaining to the prospective jurors’ age, gender, and demeanor to exercise their preemptory challenges. When a judge has been convinced, however, that there is an “air of reality” to the claim that some of the jurors on the panel may be partial, as has occurred in trials of Black defendants since the Parks decision, the challenge for cause procedure can be invoked. The challenge itself involves a brief, structured questioning of the prospective juror, with the potential jury panel typically removed from the courtroom while prospective jurors are called in individually and questioned by the attorney invoking the challenge (Vidmar, 1997). In contrast to the U.S. voir dire procedure in which the judge renders the decision on the prospective juror’s partiality (Rose & Diamond, in press), in Canada this determination is made by two of the actual jurors serving on the jury (see Vidmar, 1997; Vidmar & Schuller, 2001).1

As well, in contrast to the voir dire, the format of the questioning in the challenge for cause procedure has been very restrictive, with its focus on the court’s sole concern, that is, the expression of bias in the juror’s decision. As such, prospective jurors may not be asked about their racial attitudes in general but only if their racial attitudes would affect their decision in the particular case (e.g., Regina v. Griffis, 1993). Typically, the standard challenge involves a single question, inviting a close-ended response from the potential juror; for instance, “Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is Black?” (Tanovich, Piacocci, & Skurka, 1997). Because the prospective jurors’ response to the question is limited to a “yes” or “no” response, triers only have prospective juror curt self-assessment to render their decision of partiality.

Recent research and theorizing on prejudice and discrimination suggests that such self-assessments may often be incorrect, thereby raising serious questions about the efficacy of the challenge procedure. For instance, Johnson, Whitestone, Jackson, and Gatto (1995) found that although White participants were more influenced by incriminating inadmissible evidence when a defendant was Black (as opposed to White), they reported feeling less affected by the inadmissible evidence than participants in a White defendant inadmissible condition. Similarly, theorizing related to aversive racism suggests that people may be unaware of existing biases and often maintain that they are personally fair and egalitarian (Dovidio & Gaertner, 1986; Gaertner & Dovidio, 1986; Son Hing, Li, & Zanna, 2002). In particular, research has demonstrated that while many people do not believe that they themselves are biased against Blacks, there is strong empirical evidence to suggest otherwise (Dovidio, Kawakami, & Gaertner, 2002; Dovidio, Kawakami, Johnson, Johnson, & Howard, 1997).

Furthermore, recent research demonstrates that even if people are able to identify the possibility that they may be biased against Blacks, they may not fully understand how and to what extent biases can affect their decisions. In particular, affective forecasting studies (Mallett, Wilson, & Gilbert, 2007; Nisbett & Wilson, 1977; Wilson, 2002; Wilson & Gilbert, 2003) demonstrate that in general people are often ignorant as to how they will respond to actual situations and are often woefully wrong in their beliefs about the impact of certain cues on their responses. More on point, in a study examining the effects of pretrial publicity, mock jurors’ self-assessment of pretrial information on verdicts revealed that the jurors’ self-assessment of the potential influence of the information on their verdicts was independent of the subsequent verdicts they rendered (Kerr, Kramer, Carroll, & Alfini, 1991). And finally, even if people can admit to their possible biases, they may still not correct for their partiality if they lack the motivation or cognitive capacity to counteract these attitudes (Kawakami, Dovidio, Moll, Herrmen, & Russin, 2000; Kawakami, Dovidio, & Van Kamp, 2005, 2007; Wegener & Petty, 1997; Wilson & Brekke, 1994).

THE RACE-BASED CHALLENGE VERSUS MORE REFLECTIVE VOIR DIRE PROCEDURES

In contrast to the work described above, some recent work on the voir dire process has indicated that it can have some of its desired effect. Using a mock jury simulation, Sommers (2006) assessed the impact of the American counterpart to the challenge for cause procedure, the voir dire, on jury deliberations and decisions in a trial involving a Black defendant. Results demonstrated that, in comparison to participants who received a race neutral pretrial selection questionnaire, those who completed a race relevant voir dire, which was designed to induce participants to think about their overall racial attitudes and how these attitudes might affect their reactions to the trial, were less...

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1 Two individuals from the panel are randomly selected to begin the process. These two confer on the impartiality of the questioned jurors. The first juror deemed impartial by these two (and who has survived attorney peremptory challenges) becomes the first member of the actual jury. One of the two original triers is then excused, and the second trier, along with Juror #1, assesses the impartiality of prospective jurors until Juror #2 is selected, after which the other original trier is excused. This process then continues with Jurors 1 and 2 assessing impartiality for the selection of Juror 3, Jurors 2 and 3 assessing impartiality for the selection of Jury 4, and so on until 12 jurors are impaneled.

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likely to find the defendant guilty. Although it is unclear whether these findings constitute attenuation of bias or overcorrection since a White defendant condition was not included in the study, the findings do suggest that the very process of questioning “may influence prospective jurors by reminding them of the importance of rendering judgments free from prejudice” (p. 606). While Canadian jurors are not asked to reflect upon the impact that racial attitudes may have on judgments, similar purported benefits of the procedure were explicitly noted by the courts in the Parks decision: “prospective jurors are sensitized from the outset…to the need to confront potential bias and ensure that it does not impact on their verdict” (see also Tanovich et al., 1997).

Notably, an important difference between the voir dire procedure employed in the United States (and modeled in Sommers’ work) and the procedure used in Canada is that the former, although quite variable in its practice, can potentially result in a more reflective analysis of the impact of racial bias on the part of the prospective juror. Indeed, Vidmar and Hans’ (2007) recent examination of the voir dire suggests that limited forms of voir dire are not very effective at detecting which jurors may be biased. Moreover, rather than simply asking participants if their ability to judge the case fairly would be impacted by race, as in the Canadian procedure, the less restrictive questioning format of the voir dire opens up the possibility to the prospective juror that they actually could be biased and may result in a deeper analysis of the extent of this bias. Although a more reflective strategy of challenge may not necessarily result in more valid assessments of one’s own biases (Nisbett & Wilson, 1977; Wilson, 2002), it instructs participants to consider how bias can influence their judgments and so orients them more toward the process of correction rather than a simple denial of prejudice. This more reflective process may prove to be more effective in making people aware of their biases and motivating them to be vigilant of their possible biases, as was indicated by the work of Sommers (2006). A primary goal of the present study was therefore to compare a more reflective process of questioning potential jurors about their biases to the more restricted challenge for cause procedure.

OVERVIEW OF PRESENT RESEARCH

The goal of the present study was twofold: (1) to assess the effectiveness of the current challenge procedure used in Canada and a more reflective procedure in terms of identifying those who would likely demonstrate racial bias in their decisions, and (2) to examine the impact of these two procedures on mock jurors’ subsequent decision processes. To this end, participants were provided with a trial summary of a Black defendant who was charged with committing either a race congruent (drug trafficking) or a race incongruent (embezzlement) crime. Two different forms of pretrial questioning—a close-ended challenge that mimicked the standard currently used in the Canadian courts and a more reflective strategy that required participants to first reflect upon how their ability to judge the evidence might be affected by the fact that the accused was Black—were contrasted to a Black defendant no challenge condition. As well, to gauge the impact of race based bias across the drug trafficking and embezzlement cases, and to gauge the direction of any potential effects in the challenge conditions, a White defendant condition was also included. We expected that while a traditional challenge procedure would be unlikely to impact biases in juror decisions, we expected that a more reflective form of questioning could potentially reduce these biases. Our main prediction therefore is not solely based on no differences between the no challenge and challenge conditions, but includes ameliorative effects related to a reflective strategy condition compared to the no challenge condition.

CONTEXTUAL CONSIDERATIONS

While the race of the defendant has been found to influence jurors’ decisions, recent research also suggests that the type of crime committed may augment these effects (Gordon & Anderson, 1995; Gordon, Bindrim, McNicholas, & Walden, 1988; Jones & Kaplan, 2003; Maxwell, Robinson, & Post, 2003). Specifically, defendants charged with crimes that are stereotypically associated with the defendants’ race (e.g., Whites with crimes such as embezzlement, Blacks with crimes such as assault) are more likely to be viewed as dispositionally prone to committing such crime, more likely to be judged guilty, and treated more harshly than defendants charged with nonstereotypical crimes (Gordon, 1993; Gordon & Anderson, 1995; Gordon et al., 1988; Jones & Kaplan, 2003). A further goal of the present study was to examine how the challenge for cause might impact these crime congruency effects. It is possible that when the crime is race congruent, racial bias may be most pronounced, and so the challenge for cause will have the greatest potential to reduce racial bias. However, by drawing attention to race in the nonrace congruent crime, the challenge for cause procedure may activate people’s racial stereotypes, which in turn, if not corrected, may exert a negative influence on judgments. To examine these possibilities, the current research assessed the impact of the two pretrial questioning formats under conditions of both race-crime congruency (e.g., Black defendant charged with drug trafficking) and race-crime incongruency (e.g., Black defendant charged with embezzlement).
METHOD

Participants

Participants (159 women, 70 men; \( M_{\text{age}} = 20.42, SD_{\text{age}} = 3.97 \)) were recruited from undergraduate classes at a large Canadian university and received partial course credit for their participation. The vast majority were single (93%) and viewed themselves as middle (50%) or upper middle class (33%). The majority identified as White (52%), 17% as South Asian, 15% as Asian, 6% as Middle Eastern, 4% as Hispanic, and 4% as “other” (3 failed to complete the item).\(^2\)

Stimulus Case

Participants were presented with a trial summary of a criminal case involving either a charge of drug trafficking or a charge of embezzlement. The drug trafficking case, which was chosen as a stereotypic Black crime, was loosely based on Regina v. Barnes (1999), a case involving an undercover police operation in which an undercover officer claimed witnessing the defendant selling crack cocaine to an individual to whom the officer had provided with marked bills. At trial, conflicting accounts of the events were presented (e.g., the officer’s line of vision, defendant’s possession of drugs, and the origin of the marked bill were in dispute). Embezzlement, which was chosen as a nonstereotypic Black crime, involved a case in which the defendant was charged with making an unauthorized loan on behalf of the trust company at which he was employed. Conflicting accounts of the transaction revolved around the payment and authorization of the loan (e.g., portion of loan received by loan holder, defendant’s impatience with the approval procedures, recent inheritance accounting for recent purchases).

Within the two trial scenarios, the race of the defendant was varied, with the defendant described as either Jamal Jackson, a 29-year-old Black male, or as Michael Carlson, a 29-year-old White male. For the Black defendant, two additional conditions that invoked a challenge for cause procedure prior to the case presentation were included. In the close-ended condition, which was chosen as a nonstereotypic Black crime, involved a case in which the defendant was charged with making an unauthorized loan on behalf of the trust company at which he was employed. Conflicting accounts of the transaction revolved around the payment and authorization of the loan (e.g., portion of loan received by loan holder, defendant’s impatience with the approval procedures, recent inheritance accounting for recent purchases).

After providing responses in the close-ended challenge procedure and the more reflective form of pretrial questioning, participants rated how confident they were about their ability to remain impartial, using a 7-point scale (not at all confident to completely confident).

Verdict and Guilt Judgments

Participants rendered a verdict (guilty, not guilty) and then rated their confidence in this decision (“not at all confident” to “completely confident”). Using a 7-point scale, they also rated the likelihood of the defendant’s guilt (“not at all” to “completely”).

Case Judgments

Using 7-point scales, participants’ perceptions of the case were evaluated via a series of ten items tapping witness credibility, believability of the conflicting accounts (tailored to the particular case), strength of the Crown’s and strength of the Defense’s case. Subsequent principal components factor analyses, conducted separately for each case, revealed similar two factor solutions. Composite measures were thus created by summing and averaging those items with factor loading of ±.45 that were common

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\(^2\) Preliminary analyses comparing the responses of the White and non-White participants (collapsed across the race) revealed no effects. Given the findings of the metaanalysis conducted by Mitchell, Haw, Pfeifer, and Meissner (2005), however, which identified a more pronounced effect of in-group bias for Black participants, the 36 participants who self-identified as Black were omitted from the analyses. Moreover, given the small number and unequal distribution of these participants across the conditions, conclusions regarding the impact of the independent variables on Black mock jurors could unfortunately not be assessed.

\(^3\) In terms of participants’ responses to the “affirmation,” all but three in the challenge condition and one in the more reflective format affirmed that they would judge the case solely on the evidence and the instructions from the judge. All participants in the other conditions (White defendant, Black defendant-no challenge) affirmed they would judge the case based solely on the evidence and instructions provided.
across both cases for a factor. One of these composites, labeled *Crown strength*, was comprised of participants’ ratings of the Crown’s case, along with three items tapping the Crown’s position ($z_s = .67$ and $.75$, for drug trafficking and embezzlement; higher scores indicative of greater strength). The other composite, labeled *Defense strength*, was created by summing and averaging participants’ rating of the Defense’s case along with three items that tapped the defense’s position ($z_s = .72$ and $.82$, for drug trafficking and embezzlement; higher scores indicative of greater strength).

*Manipulation Check*

Without reference to the preceding materials, participants indicated the race of the defendant (Black, White).

**RESULTS**

**Manipulation Checks**

Two participants who incorrectly identified the race of the defendant and four participants who failed to provide a response in the reflective strategy condition (i.e., failed to reflect upon how race might impact upon their decision) were dropped from the subsequent analyses. Their inclusion, however, produced a similar pattern of results.

**Responses to Pretrial Challenge Procedures**

In total, 18% of participants in the drug trafficking (collapsed across close-ended and reflective) and 15% (collapsed across close-ended and reflective) in the embezzlement case indicated that their ability to judge the case without prejudice would be affected by the fact that the defendant was Black. Participants who responded to the pretrial questioning in the affirmative (collapsed across case) were significantly less confident in their ability to remain impartial ($M = 5.41, SD = .94$), compared to those who responded in the negative ($M = 6.19, SD = .86$), $t(112) = -3.38, p = .001$. Examination of responses across the other dependent measures (e.g., verdict, guilt, crown and defence strength), however, revealed no differences between these two groups ($\chi^2(N = 114) = .21$, for verdict; all ts $(112) < 1$, for the continuous measures). As well, examination of the data, if participants who responded in the affirmative are dropped from the analyses, revealed the same pattern of results as those described below (which included these participants). In short, explicit responses to the close-ended and reflective strategy pretrial questioning did not appear to discriminate mock jurors in terms of their decisions. It is important to note, however, that the sample size was small and so these analyses may have had insufficient power.

**Main Analyses**

To examine the impact of the challenge for cause on participants’ responses to the Black defendant, a series of $2 \times 4$ ANOVAs were conducted on the dependent measures. Within these analyses, the defendant condition effect was partitioned into three orthogonal contrasts comparing the Black defendant in the no challenge condition to the other three conditions (White defendant, Black close-ended challenge, Black reflective strategy).

**Verdicts**

To determine whether verdicts varied as a function of crime type, defendant condition, and gender, these variables were dummy coded and analyzed via logistic regression. Following a hierarchical procedure, the initial inclusion of crime type and gender revealed significant effects for both these variables, Wald $\chi^2(1, N = 224) = 8.5, p = .004$, and 6.15, $p = .013$, with women (62%) as compared to men (45%) rendering more guilty verdicts and those in the embezzlement (66%) as compared to the drug trafficking (47%) case rendering more guilty verdicts. Next, the addition of the three dummy variables comprising the defendant condition manipulation added significantly to the model, $\chi^2(3, N = 224) = 8.37, p = .04$ (see Fig. 1). Despite this overall effect, only the contrast comparing verdicts in the Black condition to the White condition was marginally significant, $\chi^2(1, N = 224) = 2.73, p = .098$. Contrasting the Black condition to the close-ended challenge condition indicated verdicts were similar across these conditions, $\chi^2(1, N = 224) = .76, ns$, and although verdicts in the Black reflective strategy condition appear less harsh than those rendered in the Black no challenge condition this difference was not significant, $\chi^2(1, N = 224) = 1.84, ns$. The inclusion of the two- and three-way interactions involving these variables failed to add significantly to the model.

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4 Given the unequal number of male and female participants, preliminary analyses assessing the impact of gender were conducted. These analyses uncovered some gender effects, and thus, gender has been retained in the analyses reported.

5 Embezzlement coded 1, drug trafficking coded 0; women coded 1, men coded 0; the three dummy variables for the Black condition coded 0-0-0, the three dummy variables for the White condition coded 1-0-0, the three dummy variables for the Black close-ended condition coded 0-1-0, and the three dummy variables for the Black reflective condition 0-0-1.
To obtain a more sensitive measure of guilt, verdicts (−1 for not guilty, +1 for guilty) were multiplied by participants' rating of verdict confidence, thus producing a 14-point scalar measure of verdict-confidence (−7 reflecting complete confidence in guilt, +7 reflecting complete confidence in not guilty). As with the dichotomous measure of guilt, a 2 (type of crime) × 4 (defendant condition) by 2 (gender) ANOVA conducted on this measure resulted in main effects for crime type, gender, and defendant condition. Results of the ANOVA conducted on the composite measure of the strength of the Crown’s case revealed a main effect for gender, $F(1, 209) = 4.40, p = .04$, with women ($M = 4.95$) evaluating the crown case more favorably than did men ($M = 4.67$). A main effect was also found for defendant condition, $F(1, 209) = 4.46, p = .005$. Examination of the specific contrasts revealed that participants in the Black no challenge condition ($M = 4.98$) rated the crown’s case more favorably than did participants in the White defendant condition ($M = 4.59$), contrast estimate $= .53, p = .02$, and more favorably than participants in the reflective strategy condition ($M = 4.61$), although this latter difference was not statistically significant, contrast estimate $= .32, p = .14$. Notably, ratings of the crown’s case in the Black no challenge condition did not differ from the close-ended challenge condition, contrast estimate $= -.20, ns$.

**Defense Strength**

The ANOVA conducted on the measure of defense case strength revealed only a main effect for crime type, $F(1, 209) = 12.86, p = .001$, with participants rating the defense stronger in the embezzlement ($M = 6.07$) than the drug trafficking ($M = 5.53$) case.

**DISCUSSION**

Consistent with prior research, the present findings suggest that bias continues to exist in mock jurors’ judgments related to Black defendants. Across the defendant measures, and regardless of case type, the Black defendant in the no challenge condition, in comparison to the White defendant condition, was judged more harshly. Moreover, with respect to the pretrial challenge procedures under investigation, the findings suggest that the current procedure that the Canadian courts rely upon to deal with the problem of racial bias may be an inadequate mechanism for dealing with the issue. A number of assumptions underlie the efficacy of the challenge for cause procedure to assess and control biases. These include assumptions (1) that
people are accurate in their self-assessments of impartiality, (2) that they understand how and to what extent biases can affect their decisions, and (3) that people understand their own motivations and ability to counteract these biases. Because self-knowledge, especially knowledge related to racial biases, is often limited (Dovidio et al., 1997, 2002; Gaertner & Dovidio, 1986), the accuracy of participants’ responses as to whether they will be influenced by race is dubious and the current results are consistent with such a conclusion. Given that no differences were found between those who responded to the challenge in the affirmative (either close-ended or reflective) and those who responded in the negative, no support for the diagnostic value of the challenge procedure was found, but the small sample size and resultant power inherent in these analyses must be recognized.

While limited in their ability to identify biased jurors, the differential influence of the two pretrial questioning procedures on judgements suggests some ways in which the procedure may be modified such that it may exert a more favorable influence on judgments. Although asking participants how race might impact their assessment may not impact the accuracy of their belief in their own impartiality, it may make them aware of the general influences it can have and the extent to which it can influence decisions, thereby influencing the second and/or third assumption. Consistent with the findings of Sommers (2006), our findings indicate that the latter more thoughtful format may have enabled the potential jurors to reflect on the powerful influence of race and this deliberative mindset may have simply made them more cautious in their responses.

Given the promising nature of the findings related to the more reflective strategy in comparison to the close-ended format, it is imperative that future research begin to address the mechanism by which the former process exerts its impact. For instance, might it operate by increasing the jurors’ attention to, and/or scrutiny of the evidence? Or might it alter the weight given to the various pieces of evidence? For instance, Sargent and Bradfield (2004) found that, under conditions of low motivation, White mock jurors processed legally relevant information more systematically (i.e., attended more to the strength of the evidence) for a Black (as opposed to White) defendant, a finding they attributed to the jurors attempt to curb their potential biases.

In addition to exploring what impact the reflective pretrial questioning might have on jurors’ evidence evaluation and motivation, many other questions remain regarding the use of the procedure. For instance, given that the decision about the prospective juror’s partiality is rendered by lay triers (actual jurors), it is imperative that this aspect of the process be assessed in future research. That is, how is the decision of partiality made and what factors influence the decision? Responses to the current close-ended challenge, which tends to elicit a yes/no response, leaves little else for the triers other than the prospective jurors’ self-assessment, but responses to a more reflective challenge are likely to yield richer and more varied information. How these responses will be evaluated by the triers for determinations of partiality is unclear.

Recently, Rose and Diamond (in press), using an experimental paradigm, investigated judicial rulings on challenges for cause in a series of studies in which they presented legal professionals (judges, attorneys), as well as mock jurors, with vignettes of voir dire exchanges between judges and prospective jurors with ‘problematic biographies.’ Within the vignette the prospective jurors’ expressed confidence in their ability to be fair was subtly manipulated (e.g., I would be fair vs. I am pretty sure I would be fair). Participants provided assessments of the prospective jurors’ likely bias, as well as estimations of whether the average judge would excuse the juror for bias. Results indicated that, while judges’ decisions of partiality, as well as attorneys and mock jurors estimations of judges’ decisions, were influenced by the jurors’ self-reported confidence, the jurors’ expressed confidence level did not influence the attorneys’ and jurors’ assessments of partiality. These group differences in perceptions of neutrality highlight the importance of conducting research that explores both prospective jurors’ responses to the questions, as well research that explores how this information will be utilized and assessed by the triers in their determination of partiality.

An additional observation of note in the present research is the absence of a crime congruency effect. One possible explanation for this may stem from the materials employed. Overall, results suggested that participants found the embezzlement case less ambiguous (significantly more guilty verdicts were rendered in this condition) than the drug trafficking case and given that extralegal factors, such as race, are more likely to influence verdicts in ambiguous situations the absence of the interaction may be due to the fact that the embezzlement case was not seen as ambiguous. Alternatively, although these results are somewhat at odds with previous juror simulation studies (Gordon & Anderson, 1995; Gordon et al., 1988), the lack of race-crime congruency effects are perhaps not surprising and may not be inconsistent with real trial biases. While Whites may be given the benefit of a doubt when they commit a crime that is not stereotypically associated with their group, Blacks may not be given this same advantage. Consistent with this interpretation, Jones and Kaplan (2003) found that White mock jurors preferred to use a confirmatory information strategy (i.e., seeking information consistent with that of guilt) when the defendant was
Black, regardless of the stereotypicality of the crime (auto theft or embezzlement). It is important to note, however, that although we found no crime congruency effects in the Black no challenge procedure and the White control condition, with Blacks consistently being judged more harshly, the main goal of the present research was to compare the two pretrial questioning strategies to reduce bias. Although preliminary, the present findings suggest that crime congruency might not interact with the effects of these strategies.

As with other studies investigating defendant race and juror decision making (e.g., Johnson et al., 1995; Jones & Kaplan, 2003), and jury simulation research more generally (Weiten & Diamond, 1979), it is important to consider the limitations of the current methodology and sample employed (i.e., undergraduates). Although a review of jury simulation research (Bornstein, 1999) found few studies that demonstrated differences between different mock juror samples and trial formats, undergraduates are likely less prone to bias as level of education is negatively correlated with racism. Thus, it is important that future research replicate these findings with a more heterogeneous and representative sample. More importantly, however, in contrast to the current research, which elicited responses and judgments privately, prospective jurors’ responses to the challenge in actuality are elicited in open court. As previous research demonstrates a more public format may compromise the truthfulness of an individual’s response (Krysan, 1984; Lambert, Cronen, Chasteen, & Lickel, 1996). On the other hand, the public nature of the procedure may enhance the jurors’ commitment to respond without bias and thus future research that explores this aspect of the procedure is clearly warranted.

Notwithstanding these limitations, the present study provides provocative findings related not only to the impact of race in the courtroom but also to the efficacy of the challenge for cause procedure. Our results demonstrate an anti-Black bias against defendants that is not resolved by the current challenge for cause procedure used in Canadian courts. While disheartening, the findings also suggest a more effective alternative to the present approach. Given the dearth of empirical research on race and jury selection, future research investigating the process effects inherent in jury selection procedures is clearly warranted. Though preliminary, the finding of the current study suggests important avenues for ameliorating racial discrimination and we hope that this research encourages others to assess the tenability of more reflective screening approaches in the courtroom.

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REFERENCES


Kawakami, K., Dovidio, J. F., & Van Kamp, S. (2007). The impact of naive theories related to strategies to reduce biases and correction processes on the application of stereotypes. Group...


