Jury Trial Innovations

Second Edition

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Acknowledgments

Many individuals contributed to the development of this manual. Their contributions were reviewed and edited by persons representing differing perspectives. Materials prepared by jury consultants were reviewed by judges and litigators, while materials prepared by judges were reviewed by attorneys and academicians. Our intent was to offer a balanced presentation of these techniques and innovations, based on what is known through formal evaluation and practice, without endorsing their use by trial courts in every instance. Because of these considerations, individual authorship is not specified. Rather, we have listed those individuals who contributed to each section and let their specific contribution be taken with the whole.

A number of individuals, however, gave more than modestly of their time to this project. They include Judge Thomas Barland (ret.), Eau Claire County Circuit Court (Eau Claire, Wisconson); Judge Michael Dann (ret.), Superior Court of Arizona (Phoenix, Arizona); Professor Shari Diamond, American Bar Foundation and Northwestern University School of Law (Chicago, Illinois); David B. Graeven, Trial Behavior Consulting Inc. (San Fransico, California); Curtis E. von Kann, Esq., Ross, Dixon & Masback, L.L.P.(Washington, D.C.); Professor Nancy King, Vanderbilt University School of Law (Nashville, Tennessee); Professor Stephen Landsman, DePaul University College of Law (Chicago, Illinois); Professor Nancy S. Marder, Chicago-Kent College of Law (Chicago, Illinois); Judge Howard McKibben, U.S. District Court, District of Nevada (Reno, Nevada); Peter G. Pappas, Esq., Adams, Kleemeir, Hagan, Hannah & Fouts (Greensboro, North Carolina); Vicki Smith, Ph.D., Gary Siegal Organization, Inc. (Lincolnwood, Illinois); and Judge Leslie Brooks Wells, U.S. District Court, Northern District of Ohio (Cleveland, Ohio).

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Preface to the Second Edition

At the conclusion of the introduction in the first edition of *Jury Trial Innovations*, we said that "we believe this manual contains worthwhile and practical suggestions for remedying [rigid trial procedures that reflect false assumptions about jury decision making], and we welcome the opportunity to contribute to the continued expansion and strengthening of the institution of trial by jury." What a difference a mere decade makes! Little did we realize in 1997, much less anticipate, that jury reform would capture the imagination of so many judges, lawyers, researchers, and citizen-jurors. It has been an exciting ten years as federal, state, and local courts have experimented with, refined, and added new innovations to the ones that we included in the first edition of *Jury Trial Innovations*.

More important than the implementation of these individual innovations is the dramatic paradigm shift that has taken place in judicial and legal thinking about the role of the jury in contemporary litigation. This book was published very shortly after two states, Arizona and New York, began statewide implementation of a variety of jury reforms. Between the two, their efforts encompassed the full range of jury trial procedures. New York focused mainly on pretrial jury administration, while Arizona focused on juror performance and satisfaction during in-court proceedings. The results of their efforts provided the content for much of the first edition of *Jury Trial Innovations* and inspired the rest of the country to examine their own jury systems with an eye toward treating jurors with dignity and providing them with appropriate decision-making tools, facilities, and guidance on their role and responsibilities.

Since then, many more national initiatives have been undertaken. In February 2001, all but one state and several foreign countries sent delegates to the Jury Summit in New York City to learn about innovative practices. In 2004 ABA president Robert Gray, Jr. spearheaded the American Jury Initiative, a two-part program to update and consolidate various ABA jury standards into a single set of governing principles and to provide outreach to the public, the legal profession, and the courts about the importance of the American jury system. On the legislative front, the American Legislative Exchange Council developed model legislation titled "the Jury Patriotism Act" designed to ensure greater public participation in jury service. That legislation has been adopted in eight states thus far. The American Judicature Society, the American Board of Trial Advocates, the American College of Trial Lawyers, the International Association of Defense Counsel, and many other organizations have made jury reform a hallmark of their national agendas. The overall result of local, state, and national activities has been a sea change in our understanding of how court procedures can support (or undermine) juror performance and decision making, the effects of which are evident across the country in judicial and legal policy making, including case law, education, court administration, and trial practice.

The fundamental basis of the techniques described in this book is that people are not blank slates upon which facts are written and perfectly recalled in the jury room. Rather, jurors have beliefs, which influence their behavior as jurors. The trial process must recognize how people receive, process, recall, and interpret things they hear and see if the trial process is to become a more effective place to teach and to learn. This is particularly important as juries become more diverse and as technology changes the way adults learn. Diversity comes not just from gender, age, race and ethnicity, and geographic region. Cultural norms and experiences affect everything from understanding language to attitudes toward western institutions and customs, the ability to interpret facial expressions and tones of voice, and appropriate behavior in small-group decision making.

Simultaneously, computers and other high-technology devices have affected how well many people pay or do not pay attention to oral or written information, and the kinds of

data they trust upon which to base decisions. With this complexity, which continues to proliferate in the courtroom, it is imperative that judges and lawyers quickly address these major improvements and develop new tools to meet these educational challenges.

The techniques described in this book move the trial toward a model of the interactive juror. Studies show that throughout the trial, jurors participate interactively, organizing information around a story, theirs or someone else's, evaluating the evidence as it is introduced, testing what they hear and see by their beliefs and values, by analogies, and by concepts of fairness. Thus, pre-instructions help frame the issues presented at trial, interim commentary reminds them of the topics at issue, note taking improves recall, and juror questions keep jurors involved. These techniques can markedly improve efforts to ensure that the modern jury gets all the help it needs to render fair and knowledgeable decisions.

In preparing to revise *Jury Trial Innovations*, we were very mindful of the features that made it so useful to judges and lawyers—concise and practical descriptions, reference to pertinent legal authority, and citations to relevant legal commentary and empirical research—and strove to retain those features here. The overall organization and format for the book are basically the same, with relevant updates to applicable case law, statutes, court rules, and literature citations as appropriate. At the beginning of each chapter, we have added some brief commentary that describes major trends or issues related to the topic as well as significant changes in content. The procedures sections, however, reflect practitioners' experience with and refinements to many of these innovations that have been communicated to us over the past decade.

Readers familiar with the first edition will note the addition of several new innovations, especially in the chapter on jury administration. In part, these additions reflect a change in our own assessment of the likely audience for this book. In 1997 we envisioned judges and lawyers as our intended readership and, foolishly, did not think that they would have as much interest in jury administration issues. Over the past ten years, we found out that many of them have an intense interest, particularly as jury administration contributes both to a representative jury pool and to positive juror attitudes about jury service and the justice system. We also found that court administrators and jury managers—the audience to whom we generally direct jury administration news—are likewise interested in how jurors are treated once they leave the jury assembly room. Other major changes are the consolidation of contributors at the beginning of the book and a significant culling of appendices at the back of the book.

One key characteristic about *Jury Trial Innovations* has remained the same: every innovation included in this book describes an idea and the actual implementation of that idea by some judge, lawyer, or court administrator who recognized an aspect of jury service that could be improved. This book is dedicated to those innovators. All we ask is that motivated individuals continue to innovate, continue to implement those ideas, and continue to let us know about them.

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Introduction

In June 1992, the Section of Litigation of the American Bar Association and the Brookings Institution cosponsored a symposium in Charlottesville, Virginia, titled "The Future of the Civil Jury System in the United States."[1] In attendance were judges, litigators, researchers, trial consultants, and representatives of insurance and consumer groups. During this three-day conference, the attendees developed recommendations to improve civil jury procedures based both on their unique perspectives and on the findings of commissioned papers that were presented at the conference.

One paper, "Recent Innovations in the Jury Trial Procedures," highlighted innovations that state and federal courts were introducing in civil jury trials.[2] The authors acknowledged the lack of consensus over the relative merits of some of those innovations, but stressed the importance of a forum in which to exchange and evaluate new techniques and procedures.[3] This manual, a joint effort by the Jury Initiatives Task Force of the ABA Section of Litigation and the National Center for State Courts, is intended to be such a forum.

With funding from the State Justice Institute (SJI), many individuals from the American Bar Association and others interested in the improvement of the jury system donated their talents, time, and expertise to prepare this manual. Additionally, a videotape illustrating some of the techniques described in this manual is in the planning stages.[4]

Before we proceed further, an explanation of the manual's organization and format is appropriate. Contemporary understanding of how jurors individually and collectively process information has benefited greatly from the insights of social scientists and psychologists. Drawing on their expertise, Chapter 1 describes how jurors conceptualize evidence and testimony to arrive at their verdict and why innovations in jury trial procedures are so necessary.

There is a little disagreement among social scientists (or even among most lawyers and judges) that traditional trial procedures have largely failed to take account of how jurors process new information. Recognition of this shortcoming, and the need to modify existing trial procedures, is the first step toward improving the effectiveness of the jury as an integral component of our justice system.

Subsequent chapters of the manual describe various techniques that better accommodate this more accurate understanding of juror decision making. The chapters progress in more or less sequential order through the typical stages of a typical trial. The format, which, as one of our contributors observed, is neither elegant nor eloquent, merits some explanation. Each innovation is featured in a subsection beginning with a description of the technique ("Technique") and a brief list of the more frequent questions and policy debates ("Issues") that its use often provokes. Next follows a brief discussion of the techniques ("Procedures"), including instructions for their implementation, advisory warnings about traps for the unwary, and reports of success or failure from individuals and jurisdictions that have attempted them.

The sections titled "Advantages" and "Disadvantages" highlight the technique's primary benefits and detriments with respect to jurors' ability and willingness to fulfill their legitimate role in the justice system. In articulating these characteristics, we have attempted to identify only those arguments for and against each technique that have some legitimate basis in fact. In some cases, these determinations are admittedly subjective. In all cases, however, readers should consider the advantages and disadvantages in light of the experiences of other judges, lawyers, and court staff as reported to the "Procedures" section.

Furthermore, it was our intent that the Advantages/Disadvantages sections focus on each technique's tendency to increase juror comprehension and satisfaction with jury service, thus improving the effectiveness of the jury's fact-finding and decision-making

1. See generally the Brookings Institution, Charting a Future for the Civil Jury System (1992).

2. H. Lee Sarokin & G. Thomas Musterman, *Recent Innovations in Civil Jury Trial Procedures*, in Verdict: Assessing the Civil Jury System 378 (Robert E. Litan ed., 1993).

3. *Id.* at 395

4. For information, see the International Association of Defense Counsel Foundation Web site at http://www.iadclaw.org/trialinnov.cfm

process. Readers should also note, however, that many of the techniques have benefits (and detriments) that affect other individuals in the trial proceedings—namely, the parties, their attorneys, and the judge and court staff.

New ideas rarely appear fully formed out of thin air. It is even more rare that they are immediately enacted as legislation, adopted as court rules, or formally recognized in case law. Indeed, as anyone familiar with the legal precedent knows well, new law is almost never "unprecedented," but only "previously unrecorded." Thus, it should surprise none of our readers that the relatively few references to legal authority tend to repeat the commonly voiced phrase that "matters of trial procedure lie within the sound discretion of the court." The references cited in the "Authority" section do not provide a comprehensive, state-by-state list of relevant law for each technique. Rather, they are intended to be illustrative of existing case law and court rules relevant to these innovations.

The section titled "References" identifies the scholarly and practical literature relevant to each technique. Many references contain a more comprehensive treatment of the implications of the technique on the various actors in the trial proceedings. "References" are distinguished from "Studies" insofar that the latter are reports of methodologically sound, empirically based evaluations of the effectiveness of the referenced technique. Although the scholarly articles listed under "References" often incorporate the findings of empirical studies to support their respective positions, the studies themselves are firsthand reports that include a description of the methodology, the precise findings, and the implications of the research of the jury systems. Obviously, few of these innovations have undergone rigorous evaluation. Indeed, if we waited for all of them to be conclusively proven or disproven, little progress toward an improved jury system could be reported here—or perhaps could even be possible. As one participant at the Brookings symposium quipped, "Some things are so obvious that performing an evaluation would be an insult to our intelligence."

A final word on the overall tone of the manual is also in order. We have attempted to present these innovations and techniques in a neutral and objective fashion without specific endorsement or criticism. We found this task to be more difficult than we imagined, given our enthusiasm for many of these innovations. Some of the individual techniques, reported for the sake of inclusiveness, provide the reader with a broad view of the variety and resourcefulness of suggested improvements to our jury system. Other techniques appear to conform more closely to the contemporary understanding of how jurors process information (discussed in Chapter 1). While we assume responsibility for this license, we welcome any reactions or comments to be included in our next edition.

Innovations in jury trial procedures are both necessary and long overdue. The institution of trial by jury is not fatally flawed, as some critics have suggested. Rather, the problem lies with rigid trial procedures and evidentiary rules that reflect false assumptions about jury comprehension and decision making. We believe this manual contains worthwhile and practical suggestions for remedying these problems, and we welcome the opportunity to contribute the continued expansion and strengthening of the institution of trial by jury.

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Chapter 1

How Jurors Make Decisions: The Value of Trial Innovations

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Recent interest in the American jury system raises important questions about how to maximize the quality of decision making in trials. Debates over the competence of jurors to decide cases have prompted some commentators to argue that judges should also assume more decision-making responsibility. Others advocate reforming the trial process to make the jury's task more manageable.[1] Empirical research on jury decision making has revealed that in many cases juries perform their duties quite competently.[2] When problems arise, it is often the quality of the presentation that is implicated, rather than inherent deficiencies in jurors' abilities to process the information provided. Thus, improvements in jury performance can be achieved by improving the quality of communications with the jury.[3] An important step in realizing such gains is to understand how jurors process information and make decisions—specifically, how well jurors perform various tasks, what kinds of problems arise, and what factors influence the quality of their decisions.

The research literature indicates that in relatively uncomplicated cases, juries are efficient and accurate fact finders.[4] Memory of the evidence is reasonably good among individual jurors, and juries have the advantage of pooling individual recollections in group discussions. This pooling significantly improves recall of evidence in two ways: (1) gaps in individuals' memories are often filled by the other jurors, and (2) errors of fact are generally discovered and corrected in group discussion. In one study, deliberating juries recalled an average of 90 percent of the evidence presented.[5]

Jurors do have more trouble with complex evidence. Scientific and technical evidence is especially difficult for jurors, and statistical evidence is often misused.[6] However, jurors are not alone in their confusion. Judges also have difficulty with this kind of evidence.[7] Despite jurors' difficulties understanding complex evidence, there are reasons to be optimistic about the competence of juries as decision makers in complex cases. First, improving the clarity of evidence presentation can improve jurors' understanding of the use of complex evidence.[8] Second, other aids to jurors understanding and recall are also available. In one study, reviewing a trial transcript before choosing a verdict improved the quality of the jurors' decisions in a complex medical malpractice case.[9]

Learning the law is perhaps the most challenging task jurors face. Jurors must learn complicated and generally unfamiliar legal concepts from a series of complex instructions. Then they must effectively integrate these newly acquired rules with the facts presented. Jurors do, in fact, have considerable difficulty understanding the judge's instructions of the law, often scoring at chance levels on tests of comprehension.[10] However, changes in the method of presenting the instructions can make the task more manageable. Linguistic changes, such as presenting the instructions in simpler language,[11] and procedural changes, such as presenting the instructions before the evidence,[12] can significantly improve jurors' understanding and use of the law.

These findings illustrate how the creative attention to trial management and presentation strategy can improve jurors' performance. Achieving these gains requires considering the psychological factors that influence the quality of people's information processing and decision making. Armed with an understanding of these influences, judges and attorneys can work together to structure the trial in more effective ways and evaluate the likely impact of proposed trial innovations on jury performance

Beliefs and Expectations

Jurors bring to trial a host of beliefs and expectations about people, places, and events. These beliefs include theories about how the world works, how social interactions operate,

1. Compare, e.g., Warren A. Burger, *The State of the Judiciary*, 57 A.B.A. J. 885 (1971); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68 (1981).

2. See Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U.L. Rev. 727 (1991); Phoebe C. Elsworth, *Are Twelve Heads Better Than One?* 52 Law & Contemp. 205 (1989); Reid Hastie, Steven D. Penrod & Nancy Pennington, Inside the Jury (1983).

3. See, e.g., Cecil et al., *supra* note 2; Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 Judicature 224 (1996).

4. Elsworth, *supra* note 2; Hastie et al., *supra* note 2.

5. Hastie et al., *supra* note 2.

6. David L. Faigman & A.J. Baglioni , Jr., *Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence*, 12 Law & Hum. Behav. 1 (1988); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?* 52 Law & Contemp. 9 (1989).

7. Faigman & Baglioni, *supra* note 6; Neil Vidmar, *Assessing the Impact of Statistical Evidence: A Social Science Perspective*, in The Evolving Role of Statistical Assessments as Evidence in the Courts (S. E. Feinberg ed., 1989)

and how the justice system functions. Some of these theories are correct, some incorrect. Regardless of their accuracy, such beliefs may affect jurors' performance at all stages of the trial, including their interpretations and evaluations of the evidence, the attorneys' opening and closing remarks, and the judge's instructions. This situation can complicate the communication process. However, careful attention to people's beliefs and expectations can help shape effective communication strategies. For example, misperceptions about jury service may be alleviated by providing citizens with information about jury trials before they are called to be jurors. Providing this information may be accomplished in a variety of ways, including public education programs or juror orientation via cable television.

The fact that jurors bring beliefs and expectations to trial is not in itself a problem. One of the primary functions of a jury is to serve as the conscience of the community in the administration of justice. To that end, jurors are supposed to rely on their commonsense notions of the world when rendering a verdict. Beliefs and expectations become problematic when they impair a person's ability to be fair and impartial, and voir dire is designed to remove from the jury individuals with such beliefs. Thus, jurors surviving voir dire are not free of beliefs and expectations, only those that are believed to impair impartiality. As a group, members of the jury bring a variety of beliefs and expectations to trial, and it is in this variety that the jury ideally represents the community. Indeed, many trial innovations, including the use of additional source lists and stratified jury selection, are designed to enhance this representativeness.

Preserving the variety of community beliefs, theories, and expectations does create a challenge for judges and attorneys in optimizing their communication strategies. Jurors' beliefs influence their information processing in several important ways. First, information that is consistent with one's beliefs or theories is quickly and easily processed. Theory-consistent information requires no interpretation effort or transformation, which speeds the processing of the information. Second, theory-consistent information is generally better remembered than inconsistent information.[13]

Third, ambiguous information tends to be interpreted as theory consistent.[14] It is easier to incorporate ambiguous information into our existing beliefs than to reevaluate the beliefs themselves. Thus, our beliefs and expectations filter incoming information and provide context for determining its meaning. The result is that people with different beliefs can interpret the same stimulus or event in markedly different ways. For example, in one experiment pro-Israel and pro-Arab students watched a 36-minute compilation of actual news coverage of the 1982 massacre of civilians in Lebanese refugee camps, then evaluated the news coverage.[15] Partisans on both sides perceived the media coverage to be hostile to their positions. Pro-Israel participants indicated that the news coverage was biased against Israel; pro-Arab participants perceived the bias in favor of Israel. These perpetual differences even influenced participants' judgments about the content of the news coverage. Pro-Israel participants estimated that only 16 percent of the references to Israel were favorable and 57 percent were unfavorable. In contrast, after viewing the same news clips, pro-Arab participants estimated that 42 percent of the references to Israel were favorable and only 26 percent were unfavorable. Thus, the prior beliefs of the participants produced a powerful bias in their evaluations of the information presented.

Fourth, information that is inconsistent with our beliefs and expectations is more carefully scrutinized and more likely to be rejected than consistent information. For example, in one experiment participants who held strong beliefs either favoring or opposing a deterrent effect of capital punishment read reports of two research studies on this issue.[16] One study indicated that there is a deterrent effect; the other study indicated equally strongly that there is no deterrent effect. After reading both reports, participants were asked to evaluate the quality of the studies and to indicate their current opinions about

8. Cecil et al., *supra* note 2.

9. Martin J. Bourgeois, Irwin A. Horowitz & Lynne Forester Lee, *Effects of Technicality and Access to Trial Transcripts on Verdicts and Information Processing in a Civil Trial*, 19 Personality Soc. Psychol. Bull. 220 (1993)

10. Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 Law & Hum. Behav. 163 (1977); Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. Applied Psychol. 220 (1991).

11. Elwork et al., *supra* note 10.

12. Smith, *supra* note 10.

13. Anne Locksely, Charles Stangor, Christine Hepburn, Ellen Grosovsky & Mariann Hochstrasser, *The Ambiguity of Recognition Memory Tests of Schema Theories*, 16 Cognitive Psychol. 421 (1984).

14. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. Personality & Soc. Psychol. 129 (1954); Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perception of Media Bias in Coverage of the Beirut Massacre*, 49 J. Personality & Soc. Psychol. 577 (1985).

15. Vallone et al., *supra* note 14.

the deterrent effect of capital punishment. The results revealed that regardless of whether their initial belief favored or opposed a deterrent effect, participants judged the study supporting their initial belief to be more convincing and better conducted than the study opposing their initial belief. Evidence supporting the initial belief was accepted with little scrutiny; opposing evidence was harshly criticized. Even more surprising was the impact of the evidence on participants' beliefs. After reading one study confirming their position and one study contradicting their position, participants were more convinced of the correctness of their beliefs than they were before reading any evidence. Logically, mixed evidence that supports two opposing positions with equal force should not result in a polarization of beliefs. Such evidence should reduce confidence in one's position, not increase it. These results indicate that the tendency to scrutinize and reject information that is inconsistent with an individual's beliefs and expectations can result in judgment errors.

In general, we try to maintain consistency among our beliefs, theories, and expectations, and, when possible, we will interpret incoming information in a way that achieves consistency. This does not mean that our beliefs or theories are immutable, only that there is resistance to change. The tendency to interpret new information in light of our expectations usually occurs outside of our awareness. We do not deliberately shade the meaning of incoming information so that it is consistent with our theories; this process operates powerfully behind the scenes to influence our judgments.

During voir dire questioning, many potential jurors express beliefs or attitudes that suggest they cannot be fair and impartial. To "rehabilitate" such jurors, judges often ask them if they can set aside their beliefs and base their decisions solely on the evidence and law presented at trial. This question strongly implies that competent and cooperative decision makers can accomplish this task. It is not surprising, then, that many people say they can set aside their prior beliefs. However, such claims should not be taken at face value. In most instances, people do not have accurate insight into their own decision processes, especially for complex decisions.[17] Beliefs and expectations are not simply factored into the decision process before rendering a judgment. As we have seen, they have pervasive effects on information processing, influencing the interpretation of evidence, judgments of its credibility, and the likelihood of retrieving it from memory. These processes are not easily controlled. Thus, assurances by jurors that they are able to set aside their beliefs and expectations should be viewed with skepticism, even if confidently asserted.

16. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979).

17. Richard E. Nisbert & Timothy D. Wilson, *Telling More than We Know: Verbal Reports on Mental Processes*, 84 Psychol. Rev. 231 (1977).

18. *See, e.g.*, Richard T. LaPiere, *Attitudes vs. Actions*, 13 Soc. Forces 230 (1934); Allen W. Wicker, *Attitudes versus Actions: The Relationship of Verbal and Overt Behavioral Responses to Attitude Objects*, 25 J. Soc. Issues 41 (Autumn 1969).

19. Andrew R. Davidson & James J. Jaccard, *Variables that Moderate the Attitude-Behavior Relation: Results of a Longitudinal Survey*, 37 J. Personality & Soc. Psychol. 1364 (1979).

Attitudes and Behavior

Considerable effort is expended in voir dire trying to discover whether potential jurors harbor attitudes that are inconsistent with fair and impartial decision making. This effort is based on the assumption that attitudes are good predictors of jurors' verdict choices. Do we, in fact, gain insight into how a person will evaluate the evidence and decide the case based on that person's general attitudes? Intuition suggests that people's behavior is largely determined by their attitudes. We perceive attitudes as the driving force behind behavior and assume that the behavior a person chooses reflects his or her true attitudes. However, when people's attitudes are measured and their behavior observed, the consistency between the two is surprisingly low.[18] For example, student's attitudes toward cheating are not a good predictor of whether they actually do cheat; women's attitudes toward birth control are not a good predictor of their use of birth-control pills; and people's attitudes about race are not a good predictor of their behavior in actual interracial situations.[19]

Why is the correspondence between attitudes and behavior low? One reason is that we do not have direct access to people's attitudes. We must rely on self-reports, and a person's attitude statement may not accurately reflect the underlying attitude. Why? Because people are not practiced at articulating their beliefs, and they may not give a clear statement of their true attitudes. In other instances, people are reluctant to espouse unpopular beliefs. Strong social pressures against racial or sexist attitudes, for example, discourage people from admitting such beliefs publicly. The more public the forum, the more pressure there is to portray oneself in socially desirable ways. Other jurors may shade their attitude statements to appear fair-minded and balanced in their views, qualities that are clearly valued in jurors. Many people also wish to be cooperative and helpful when responding to questions about their beliefs. They may give the answer the questioner wants to hear rather than an accurate appraisal of their attitudes. Judges and attorneys can decrease this tendency by asking balanced, open-ended questions that do not reveal the desired response and that encourage jurors to respond freely. Some judges and attorneys have found that posing questions in a factual context that differs from that of the case at bar is an effective method of encouraging jurors to reveal their true beliefs.

A second reason that attitude-behavior consistency is low is that behavior is influenced by a variety of forces, attitudes being only one. Situational pressures to behave in a certain way can overpower the influence of attitudes. For example, members of the House of Representatives voted overwhelmingly to give themselves a salary increase one year when the vote was anonymous. When a roll call was taken, the pay increase was overwhelmingly defeated. People's behavior is sensitive to social norms and constraints of the situations they face. Jurors, too, can be subject to strong pressures to vote in a particular way, especially during group discussion, and they may endorse verdicts that are inconsistent with their general attitudes.

How, then, do we maximize the usefulness of jurors' attitude statements as predictors of behavior? First, questioning should be structured to encourage honesty and candor. Obstacles to truthful responding should be identified and removed whenever possible. For example, in camera voir dire may be appropriate in some cases to reduce social constraints on expressing unpopular attitudes. Questionnaires may also be a valuable substitute for face-to-face questioning about sensitive issues. It is easier to disclose one's true beliefs on an impersonal questionnaire than to look a judge or an attorney in the eye and say something he or she may dislike.

Second, questions about attitudes should be as specific and relevant as possible to the behavior being predicted, whether one is trying to predict how a potential juror will evaluate the evidence or what verdict that person will choose. The more relevant the attitude question, the better the predictive power of the response. For example, women's attitudes toward birth control in general are not a good predictor of their use of birth control in the succeeding two years. However, women's attitudes about using birth-control pills in the next two years are a substantially better predictor of this behavior.[20] Thus, attitude questions should be as specific and relevant as possible to the behavior being predicted.

Third, the stronger, more stable, and salient an attitude, the better its predictive power.[21] Voir dire questioning should focus on these kinds of attitudes if the goal is to predict a juror's behavior.

20. *Id.*

21. Carl A. Kallgren & Wendy Wood, *Access to Attitude-Relevant Information in Memory as a Determinant of Attitude-Behavior Consistency*, 22 J. Experimental Soc. Psychol. 328 (1986); Mark Synder & William B. Swann, Jr., *When Actions Reflect Attitudes: The Politics of Impression Management*, 34 J. Personality & Soc. Psychol. 1034 (1976).

Jurors as Information Processors

The traditional legal model of jury trials conceptualizes jurors as passive observers and recorders of information who suspend judgment on the evidence and issues until they retire for deliberation.[22] The goal of delaying evaluation until the trial is concluded is appropriate given the protracted and adversarial nature of trials. If jurors render judgments on the early evidence, their decisions will be based on an incomplete and possibly one-sided view of the facts. It is, therefore, important that jurors remain open-minded throughout the proceedings.

Contrary to the traditional legal model, jurors do not simply record the evidence in memory for later use. They actively process the incoming information, evaluating it and making judgments about it throughout the trial. This active approach to information processing is necessary because people have limited processing capacity. They cannot process and remember all the information that is presented, so they must decide what to commit to memory and what to dismiss as unimportant or irrelevant. As a result, they interpret, evaluate, and organize the evidence throughout the trial, as it becomes available.

Does this mean that jurors are not open-minded? Not necessarily. Several studies have investigated people's ongoing judgments in trial simulations.[23] After each segment of the trial, participants were asked to indicate their opinions about the likely guilt of the defendant. The results indicated that participants' judgments tracked evidence in reasonable ways. Likelihood-of-guilt ratings increased after direct examination of prosecution witnesses and decreased after cross-examination. Similarly, likelihood-of-guilt ratings decreased after direct examination of defense witnesses and increased after cross-examination. Thus, although participants actively processed the incoming evidence and rendered midtrial judgments on it, their judgments were not immutable. Participants were responsive to subsequent evidence, attending to it and incorporating it into their judgments. In that sense, then, these mock jurors remained open-minded.

Active information processing has at least two other potential advantages for jurors' performance. First, it may help jurors concentrate on the information being presented and keep their attention focused on the trial. The less time jurors' minds wander from the task, the more information they can potentially process. Second, involved audiences are more likely than uninvolved audiences to think about and evaluate a message's content.[24] Uninvolved audiences tend to rely on the expertise or attractiveness of the communicator as a means of evaluating persuasive messages. This suggests that jurors' evaluations of the evidence content can be enhanced by keeping them actively involved in the trial process. Allowing jurors to take notes during the trial and to ask questions of the witnesses are two trial innovations that capitalize on these processing effects. Both techniques encourage jurors to remain actively involved in the trial.

Evidence Representation

How do jurors make sense out of the evidence presented at trial? They must turn a collection of facts that vary in importance, credibility, and consistency into a verdict preference. How is this accomplished? Jurors process trial evidence by building a story about what happened.[25] People have extensive experience listening to, composing, and telling stories. A story is a familiar framework that allows people to process efficiently large amounts of information. It is understandable, then, that jurors would choose to build stories

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

23. *See, e.g.*, H. P. Weld & E. R. Danzig, *A Study of the Way in Which a Verdict Is Reached by a Jury*, 53 Am. J. Psychol. 518 (1940); Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives (1988).

24. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 Advances in Experimental Soc. Psychol. 124 (1986).

25. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. Personality & Soc. Psychol. 242 (1986) (hereinafter Pennington & Hastie, *Evidence Evaluation*); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgments*, 14 J. Experimental Psychol.: Learning, Memory and Cognition 521 (1988) (hereinafter Pennington & Hastie, *Explanation-Based Decision Making*).

in the trial context, where the goal is to determine what happened and make judgments about an incident.

Jurors' stories are based on the evidence presented at trial, with gaps in the stories filled by the jurors' inferences about the evidence. These inferences are based on jurors' prior knowledge of the physical and social world. Once the story is complete, jurors can compare the story to the available verdict categories and choose the verdict that best fits the story constructed. Jurors' preference for the story framework has important implications for judges' and attorneys' presentation strategies. Jurors will try to build a story, and the easier this is to accomplish, the more credible the information will be perceived.

In one experiment, participants read an account of an actual murder trial, in which the evidence was presented in either story order or trial order.[26] Story order presented the evidence in chronological sequence; trial order did not follow a chronological sequence. The evidence presented in both conditions was identical; the only difference was the order in which it was presented. The researchers hypothesized that evidence presented in story order would be easier to process and consequently more persuasive. Consistent with this reasoning, they found that 78 percent of participants found the defendant guilty when the prosecution evidence was presented in story order and the defense evidence was presented in trial order. However, only 31 percent of participants voted guilty when the prosecution evidence was presented in trial order and the defense evidence in story order. As predicted, information presented in a story format was more persuasive than information that violated a story structure.

The story model of jurors' information processing is an instance of a more general phenomenon known as "framing." People's decisions are influenced by the way information is presented, or framed. Many decision tasks can be framed in different ways without changing the objective characteristics; the underlying decision is the same, but the surface features vary. Logically, people's decisions should not be sensitive to changes in surface features, or frame; the objective characteristics of the problem should govern the solution. However, people are influenced by framing.

In one experiment, participants were asked to choose one of two programs for combating a disease outbreak.[27] "Imagine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programs are as follows:

> If Program A is adopted, 200 people will be saved.
>
> If Program B is adopted, there is a one-third possibility that 600 people will be saved and a two-thirds possibility that no one will be saved.

When given the choice between Programs A and B, 72 percent of participants choose program A. However, when these program descriptions were reframed to specify about many people will die rather than how many people will be saved, the decision maker's preferences were dramatically different.

> If Program C is adopted, 400 people will die.
>
> If Program D is adopted, there is a one-third possibility that nobody will die and a two-thirds probability that 600 people will die.

26. Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making*, *supra* note 25.

27. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 Am. Psychol. 341 (1984).

Program C if objectively identical to Program A—only the frame is different. The disease is expected to kill 600 people; if Program A saves 200 people, then 400 people will die, which is Program C's claim. Similarly, Program D is objectively identical to Program B. Therefore, Programs C and D offer exactly the same choice as Programs A and B. However, when given the choice between Programs C and D, only 22 percent of the decision makers chose Program C.

Logically, the frame is irrelevant, but psychologically it has meaning and influence. This means that our decisions are not always based solely on a rational evaluation of the decision alternatives. The way those alternatives are framed can have a powerful impact on our decisions, which suggests that attention should be given not only to the objective content of information presented to the jury, but also to the way in which that content is presented. For example, as in the health-policy decision described above, decision makers can be encouraged to accept more or less risk, depending on how the facts are framed.

Allowing attorneys to make interim commentary and summations has been proposed to assist jurors to process new information more effectively by placing it in context within the "frame" of the trial. Periodically during the trial, each attorney is given the opportunity to speak directly to the jury, to clarify or simply remind jurors of the evidence that has been presented. This procedure potentially has the advantage of refreshing jurors' memories about key evidence for both sides.

Application of the concept of framing to the instruction process suggests that instructions from the judge on the governing law should also help jurors frame the issues in legally appropriate ways, rather than basing their judgments on their naïve understanding of the law. The reasoning assumes, of course, that the instructions are comprehensible to jurors.

Comprehending the Law

Because most jurors have no formal training in the law, the judge's instructions become the primary vehicle for educating jurors about the governing legal principles. This places considerable pressure on judge-jury communications to fulfill jurors' educational needs. Empirical research on pattern jury instructions across the country has revealed that people's comprehension of the instructions is quite poor.[28] On tests of comprehension, instructed participants often score no better than uninstructed participants. Linguistic barriers to comprehension include the use of legal jargon, unfamiliar vocabulary, complex grammar, and poor organization. Whenever possible, communications with the jury should be carefully worded to avoid these barriers. Significant improvements in mock jurors' comprehension of the law have been achieved when jury instructions are rewritten in simpler language.[29] Although delivery of pattern instructions is mandated by statute in many jurisdictions, judges do have freedom to provide additional helpful information to the jury. In this spirit, judges might consider paraphrasing difficult sections of the pattern instructions to improve jurors' comprehension. In addition, judges can improve the comprehensibility of their other communications with the jury by being aware of these linguistic obstacles to understanding.

How should judge's instructions be presented to maximize their educational value? Traditionally, the instructions are presented at the close of trial so that jurors have the law fresh in their minds when they retire for deliberations. Consequently, legally naïve jurors listen to days or weeks of testimony with little or no guidance from the judge about how to interpret and evaluate the evidence. As we have seen, jurors actively process the

28. Diamond & Levi, *supra* note 3; Elwork et al., *supra* note 10; Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc. Rev. 153 (1982).

29. Diamond & Levi, *supra* note 3; Elwork et al., *supra* note 10; Severance & Loftus, *supra* note 28.

information presented at trial, as it becomes available. In the absence of information about the legal rules, jurors must process the evidence and testimony through the filter of their own prior beliefs and chosen stories. In other words, incoming information will be interpreted in ways that are consistent with whatever knowledge structure they have in place at the time that information is presented. To enhance jurors' abilities to process the evidence in legally appropriate ways, the judge should present the legal framework at the beginning of the trial, before the evidentiary stage of the trial. In fact, empirical research has revealed that jurors instructed both before and after the evidence are better able to integrate facts and law than jurors instructed only after the evidence is presented.[30]

Providing a hard copy of the instructions, either written or taped, should also benefit jurors' comprehension. The instructions present a large volume of new and complex information that jurors must remember. However, memory space is limited, and memories decay over time. As a result, jurors cannot retain all of the information contained in the instructions. Having access to a hard copy of the instructions can relieve some of the pressure on jurors to recall the law. In addition, the instructions are usually delivered orally by the judge while the jurors listen passively. They may understand some parts of the instructions and miss others. Written or taped instructions afford jurors the opportunity to fill the gaps in their understanding by rereading or replaying the appropriate segments.

Written instructions potentially have two additional advantages. Educational research has revealed that students understand and remember more information when they read texts than when they listen to lectures.[31] Jurors' comprehension should improve by reading a written copy of instructions. In addition, material is better remembered when it is presented in several different forms than in a single form. Having the juror both listen to and read the instructions should capitalize on this effect.

The effectiveness of procedural reforms of the instruction process depends on the presentation of comprehensible instructions. There is little value in preinstructing or providing a hard copy of instructions that are unintelligible to jurors. However, if the instructions are made accessible to lay people, these and other procedural changes can potentially enhance jurors' understanding and use of the law.

Jury simulation research has demonstrated that jurors spend about 20 to 25 percent of their deliberation time discussing the law.[32] Errors are frequent in these discussions; one study found that only 51 percent of jurors' statements about the law were accurate, and the errors of law were corrected only 12 percent of the time.[33] In fact, it was just as likely that an accurate statement would be rejected in favor of an inaccurate one during discussion as it was that an inaccurate statement would be corrected. Clearly there is considerable room for improvement in jurors' comprehension, and some linguistic and procedural reforms may be helpful in achieving that goal.

30. Smith, *supra* note 10.

31. Kassin & Wrightsman, *supra* note 23.

32. Hastie, Penrod & Pennington, *supra* note 2; Elsworth, *supra* note 2.

33. Elsworth, *supra* note 2.

34. Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influence upon Individual Judgment*, 51 J. Abnormal & Soc. Psychol. 629 (1955).

Juries as Decision Makers

When jurors retire to deliberate, they enter as individuals with independent opinions about the case and the appropriate outcome, and their goal is to combine those independent beliefs in a rational and meaningful way into group judgment. How is consensus achieved? In group discussions, two types of social influence occur.[34] The first is informational influence, in which people are genuinely convinced by the persuasive arguments of their fellow discussants. Real opinion change occurs and the group decision reflects a genuine consensus among group members. The second is normative influence, in which people accede to the majority opinion to avoid social rejection. In this situation,

individual group members may privately disagree with the group decision, making any consensus reported more apparent than real.

Ideally, jury deliberations should be dominated by informational influence, with normative pressures playing a minimal role in the consensus process. In reality, however, both types of influence occur in most groups, which suggests that the jury environment should be structured to encourage open information exchange and to minimize normative strong-arming. For example, when a jury deadlocks, a judge's efforts to break the stalemate should be geared toward encouraging or assisting the resolution of the jury's informational conflicts and should avoid tipping the balance of normative pressures. One tool available to judges for helping juries break deadlocks is the *Allen* charge. However, empirical research indicates that the *Allen* charge does not have the desired effect of enhancing the jury's use of informational influence. Rather, it operates by tipping the balance of normative pressures in favor of the majority, coercing the members of the minority faction into changing their votes.[35]

One proposed trial innovation is designed to break deadlocks specifically by assisting the jury's information exchange.[36] When a jury reports deadlock, the judge offers the assistance of court and counsel in resolving disputed factual or legal issues. This process may involve providing additional jury instructions, allowing further evidence to be presented on certain issues, or permitting counsel to present supplementary closing arguments. These procedures have at least two important advantages. First, they encourage jurors to keep their attention focused on resolving their informational disagreements, rather than simply intensifying normative pressure on the minority faction. Second, these interventions provide meaningful assistance in the resolution of disputed factual or legal issues. They are a means of filling gaps in the jurors' memories or clearing up misunderstandings that may stall the deliberation process.

35. Saul M. Kassin, Vicki L. Smith & William F. Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors,* 14 Law & Hum. Behav. 537 (1990); Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries,* 17 Law & Hum. Behav. 625 (1993).

36. Dann, *supra* note 22.

The Judge's Response

Jurors face a difficult challenge making sense out of a large volume of evidence and testimony, learning a multitude of complex legal principles, integrating these two bodies of information, and achieving consensus on the appropriate verdict through group discussion. Because of the complex and multifaceted nature of the task, numerous obstacles to optimal decision making can arise. Careful attention to the knowledge and skills jurors bring to the trial, the structure of the decision environment, and the context of communications with the jury can circumvent some of these problems and overcome others. The information-processing and decision-making strategies described in this chapter should provide a useful backdrop for evaluating the trial reforms proposed in this manual and identifying their potential costs and benefits for jurors' performance. With some creativity, judges can structure a trial environment that moves jurors closer to the goal of optimal decision making.

Chapter 2

Jury Administration and Management

This chapter focuses on innovations in jury system management. It encompasses all of the preparatory steps that courts must take to ensure that they will have an adequate supply of jury-eligible people reporting for jury service. From this pool a fair and impartial jury can be selected to try the case. This aspect of the jury trial is often invisible to judges and lawyers, but it is no small feat. The process is often logistically complex, labor-intensive, and time-consuming. More critically, these pretrial steps can have a profound effect on the racial and ethnic composition of the jury pool and on the attitudes and expectations of citizens reporting for service.

When we drafted the first edition of *Jury Trial Innovations*, we envisioned its primary audience as judges and lawyers and, regrettably, we assumed that they would have little interest in these preliminary steps. We were wrong in that assumption. In an attempt to correct this oversight, this edition expands the topics related to jury administration.

The new topics are an important addition, but the updates to previous topics are also substantial. Jury system management has experienced tremendous changes in the last decade. The development of new technologies, for example, offers new ways to communicate with jurors and to manage large volumes of jurors through automation of previously manual tasks. As in other areas of court management, one of the dangers of new technologies is the tendency to assume that they work flawlessly every time. They do need constant evaluation to ensure that they actually support the goals of jury system management and that they are working as intended. The impact of improved jury system automation is apparent in the sections on juror lists, additional source lists, stratified jury selection, juror orientation, follow-up on nonrespondents, and reduction in undeliverable summonses.

The state budget crises of the late 1990s have had a significant impact as courts become more cognizant of the costs associated with poor jury management practices. It has become imperative for courts to more closely monitor jury yield* and juror utilization** to improve the cost-effectiveness of jury operations. In this edition, the new sections on screening for English-language proficiency, reduced panel size, follow up on nonrespondents, and reducing undeliverable summonses are all related to these concepts, as are revisions to the sections on one day/one trial, juror payment, and additional source lists.

Demographic changes throughout the country continue to challenge courts in their efforts to ensure a jury pool that reflects a fair cross-section of the community. We now have much more precise information about the relationship between demographic characteristics, such as race, ethnicity, and socioeconomic status, and key jury operation measures, such as nonresponse, undeliverable and FTA rates, and disqualification, exemption, and excusal rates. The new sections addressing these issues provide information on how to measure and minimize these effects on the representativeness of the jury pool.

One final trend that we have noticed over the past decade is courts' increased cognizance of the relationship between jury service and public trust and confidence in the courts. This awareness has led to practices that treat jurors like the valuable resource in the justice system that they are. We see these practices reflected in improved juror utilization and in upgraded jury assembly rooms with basic amenities and courtesies to jurors when they are not serving on a specific trial.

* Jury yield is defined as the number of jurors available to report for service as a proportion of summonses mailed. Jury yields can range from as low as 10% in major urban areas to 50% or higher in more rural areas. The NCSC suggests that a yield of 30% is acceptable. National Center for State Courts, CourTools, Measure 8, Effective Use of Jurors.

** Juror utilization refers to the number of prospective jurors sent to a courtroom and questioned during voir dire as a proportion of jurors reporting for service. The NCSC suggests a goal of 90% juror utilization.

§ 2.1 Citizen Education Campaigns about Jury Service

Technique

Techniques consist of any of a variety of public outreach strategies in which the community learns about the concept of trial by jury, including the importance of jury service. Examples include:

- press conferences with leaders of all branches of government pronouncing a period of appreciation for jurors;
- public-service advertising campaigns using newspapers, television, mass transit, public buildings, libraries, grocery stores, courthouses, and schools;
- targeted media outreach using informal radio and television interviews and opinion articles or editorials in print media;
- targeted educational outreach to high school government, speech, American history, or civics classes through which judges explain the role of the jury in the judicial process;
- the development of educational videos that put student audiences in the role of a simulated jury, hearing evidence and jury instructions and deciding cases; and
- the development of jury pages on court Web sites that highlight the importance of trial by jury in the American justice system and discuss recent efforts by courts to improve the conditions of jury service.

Issues

- How do organizers of jury education campaigns encourage public relations experts to contribute their expertise and ideas for reaching the public effectively on a pro bono basis?
- How do organizers of jury education campaigns obtain the support and participation of judicial leadership to encourage broad involvement by trial court judges in these activities?
- How do organizers of jury education campaigns raise sufficient financial resources to print poster campaign literature or to produce and disseminate educational videos?
- How do organizers of jury education campaigns secure the active involvement and follow-through of the "partnering" bar or civic groups that coordinate jury education programs with the court?
- How do organizers of jury education campaigns develop new twists, themes, or dimensions for the jury education campaign to keep them interesting for the public year after year?

Procedures

The endorsement and support of court leadership is the key to forming a broad-based committee to plan and execute proposed citizen education campaigns about jury service. In addition to judges and court staff, the planning committee should include representatives from the local legal community, government agencies, and community organizations.

A legislative resolution that proclaims the month of October (for example) as "Jury Appreciation Month" is an easy and useful vehicle on which to build an annual citizen education campaign. A public relations program organized around a "Jury Service Week" or other period of limited duration has many advantages. It provides the judiciary with a forum in which to educate citizens about the justice system generally and jury service in particular. It provides a method to correct misinformation or distortions about jurors' responsibilities that special-interest groups may be actively promulgating. It fosters more effective court relations with the community. Finally, it operates as a form of self-assessment, offering judges and court staff the opportunity to gauge the level of public understanding about the jury system.

If public service advertising is to be used, it is frequently necessary to request mass-transit advertising space six to twelve months in advance of the campaign. While public service advertising through posters and other media is not prohibitively costly, it can cost $2,500 to $7,500 to design, print, and disseminate 1,000 to 2,000 jury education campaign posters. Donated corporate sponsorship of a poster campaign is one avenue for financing this activity.

One example of a successful campaign took place in Pittsburgh, Pennsylvania. The theme "Jury Service: Your Role in the Justice System" was selected. During the week, a giant electronic billboard that overlooks the city broadcast the theme and thanks to those who serve on jury duty. A booth in the lobby of the City-County Building had staff in jury t-shirts who passed out literature on jury service, demonstrated the new automation system ("see, it is random"), distributed a "juror quiz" that asked everyday jury questions ("Who was the 12th Angry Man?"), and even gave away bumper stickers. A video terminal showed juror orientation videos throughout the day. Citizens serving on jury duty that week were given special lapel buttons. Local TV news coverage focused on the booth.

In Duluth, Minnesota, a longer-term effort had many facets, including advertising and posters around the city and in the newspapers that carried the catchy slogan "It Isn't Fair, If You're Not There." The initiative was successful because of the involvement of a number of different organizations and individuals. The Lake Superior Ad Club provided technical expertise in creating the multimedia approach. They produced several audio and video public-service announcements using the theme. The League of Women Voters was instrumental in tying the responsibility for jury service with voter registration drives conducted districtwide throughout the year. A free bus-pass program was developed with the transit authority for jurors. Placards were placed in the buses as well. Mailers were specially targeted for distribution in low-income and minority areas of the district. The cost to the court for all of these brochures, audiotapes and videotapes, posters, and the outside help was under $4,000.

The use of educational videos that explain the jury system can open up a whole new avenue of court/school system interchange. The Council for Court Excellence, a civic group based in Washington, D.C., has "You Decide," an educational package with a companion teachers' guide that is now in use in school systems in more than twenty states. A personal

appearance by a trial court judge during school classes or at civic group meetings also makes a significant impression. To encourage this type of interaction, the chief judge can send a personal letter to each secondary-school principal or to each civic-association president, encouraging him or her to invite judges to speak about trial by jury.

Advantages

1. Jury education campaigns provide an opportunity for the judicial branch to teach important values of citizenship, such as trial by jury.

2. Jury education campaigns provide a vehicle for fostering effective court relations with the community.

3. Jury education campaigns educate the judiciary about the extent of public knowledge and understanding of jury service.

Disadvantages

1. An effective jury education campaign takes considerable work to plan and execute. Support and interest by the judicial leadership are a critical foundation.

2. Many judges are uncomfortable communicating with the media.

3. Evaluating the effect of a public education campaign is very difficult.

REFERENCES

The Council for Court Excellence has numerous publications and educational materials available for conducting public education campaigns about jury service. For additional information, contact the Council for Court Excellence at http://www.courtexcellence.org.

The American Bar Association Commission on the American Jury has developed a comprehensive set of public outreach materials that are available on the ABA Web site at http://www.abanet.org/jury/jurorkit.html.

Since 1995, many courts have begun using their Web sites for public education and outreach activities. For links, go to the NCSC Center for Jury Studies at http://www.ncsconline.org/Juries/links.htm.

§ 2.2 One-Day/One-Trial Terms of Jury Service

Technique

A person's term of jury service is limited to the completion of one trial. If not selected for a jury on the first day, he or she fulfills the jury service term by having been available on that day. Persons may be on call for several days, but once they report, their service is completed by serving one day or one trial.

Issues

- How severely does a one-day/one-trial system affect the administrative costs associated with jury management?
- What effect does the loss of "seasoned" jurors have on jury verdicts?
- By what amount should jury managers adjust the number of persons called for service to compensate for the shorter duration of jury service and to ensure an adequate number of prospective jurors?

Procedures

The court calls prospective jurors to serve for a period of only one day. If selected as a juror on that day, the person serves until the case is completed. If not selected, the prospective juror is considered to have fulfilled the obligation of service until called again—generally, many years later.

Some courts require prospective jurors to be available—that is, to call in and see whether they must report for jury service—for several days or weeks. Once the person has been summoned for jury service, however, his or her obligation ends at the completion of one day or one trial. Some courts consider persons who are available, but are not asked to report, to have completed their obligation.

The practice was first used in Houston (Harris County), Texas, in 1972. Today, approximately 50% of all U.S. citizens live in jurisdictions that use one-day/one-trial systems, both in small and in large courts. The practice is statewide in Arizona, California, Colorado, Florida, Indiana, Massachusetts, New York, and Utah. The ABA *Principles for Juries and Jury Trials* specifically endorses the one-day/one-trial term of jury service, as does language in the Jury Patriotism Act.

Advantages

1. Jury service that is limited to the longer of one day or one trial reduces the hardship associated with service, thus reducing the need for exemptions or excuses from jury service.

2. The reduced number of persons excused with one-day/one-trial jury service terms increases the representativeness and inclusiveness of the jury pool.

3. One-day/one-trial jury service terms encourage courts to make more efficient use of juror time (since they have only one day to use the prospective juror's services), thus increasing juror satisfaction with jury service.

4. Because one-day/one-trial jury service terms require courts to summon greater numbers of prospective jurors, more persons have the educational experience of serving on a jury, which is generally a positive experience.

Disadvantages

1. Compared with courts that have longer terms for jury service, courts that use a one-day/one-trial system have to summon greater numbers of persons for jury service.

2. Compared with longer jury service terms, one-day/one-trial systems have increased administrative costs for postage, forms, and court staff.

3. One-day/one-trial systems necessarily preclude the development of "seasoned jurors" or the ability to track juror performance on prior trials.

4. One-day/one-trial systems require courts to conduct juror orientation more frequently.

5. Inefficient use of juror time by courts using one-day/one-trial systems can result in a wasted day and a poor jury experience for the person summoned for jury service.

AUTHORITY

Mass. Ann. Laws, ch. 234A§39 (1996) (defining the "reasonable" term of jury service as three days and prohibiting trial courts from releasing persons called for jury service unless the three-day term would impose an extreme hardship).

Cal. R. Ct, Rule 861 (establishing a one-day/one-trial term of jury service for California effective January 1, 2000).

Ind. Jury R., Rule 9 (establishing a one-day/one-trial term of jury service for Indiana effective January 1, 2005).

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Janice T. Munsterman, G. Thomas Munsterman, Brian Lynch & Steven D. Penrod, The Relationship of Juror Fees and Terms of Service to Jury System Performance (National Center for State Courts, 1991).

§ 2.3 A More Sensible Way to Pay Jurors

Technique

The financial hardship of serving on a jury is related to the fees paid to jurors as well as to the length of jury service and the employment status of the juror. In recognition of this relationship, jurors in many one-day/one-trial courts are not paid for the first day, but are paid if they are selected for a trial that requires them to return for a second day (or more days). Other courts pay a nominal fee to jurors for their first day of service and a higher rate for successive days. Unemployed persons, including those retired or those at home, are reimbursed for actual expenses, including child care if applicable. The effects of increased juror fees can be supplemented by state legislation mandating employers to provide compensation to employees while on jury service or providing economic incentives to do so. These techniques differ from the traditional method of paying jurors, which is by flat rates ranging from $5 to $40 per day plus mileage in many jurisdictions.

Issues

- How do courts determine a "reasonable daily rate" for jury fees?
- Should parking, mileage, and child care be included with juror fees? If so, how should these costs be indexed?
- If most persons serve only one day under one-day/one-trial systems, should they be paid for the first day of jury service?
- What is the projected cost to state and county governments of increasing juror fees for the second and subsequent days of jury service?
- Should public employees be paid juror fees?
- How willing are legislatures to mandate private employers to subsidize the jury system by requiring them to continue to compensate employees who are summoned for jury service? For how many days is it reasonable to require employers to continue compensation for employees summoned for jury service?
- What incentives could be provided to employers to encourage voluntary compensation for employees serving on jury duty?

Procedures

The state adopts a fee structure that bases the amount paid to jurors on their length of jury service, employer, and employment status. When jury service entails only a short period of time (e.g., three days or less), the daily fee should be sufficient to reimburse jurors for reasonable out-of-pocket expenses (transportation, parking, meals, and child care), but does not necessarily have to reimburse for lost wages. For jurors serving on longer trials, increased juror fees are appropriate to offset the financial hardship associated with lost wages. State law may require employers to compensate employees summoned for

AUTHORITY

Dean v. Gadsten Times, 412 U.S. 343 (1973) (holding that a state statute requiring employers to continue to compensate employees called for jury service is not unconstitutional).

Marquess v. City of Philadelphia, No. 98-1117 (E.D. Penn. Filed June 29, 1998) (recognizing a public-policy exception to the doctrine of at-will employment and creating a cause of action for unlawful discharge of an employee who responded to jury service).

Arz. Rev. Stat. § 21-222 (2005) (establishing the Arizona Lengthy Trial Fund).

Colo. Rev. Stat. § 13-71-126 (Supp. 1995) (requiring employers to pay employees regular wages up to $50 per day for the first three days of jury service).

Conn. Rev. Stat. § 51-247 (Supp. 1996) (requiring employers to pay employees regular wages for the first five days of jury service).

Mass. Gen. Laws Ann Ch. 234A § 48 (West 1986) (requiring employers to pay employees regular wages for the first three days of jury service).

jury service for a certain number of days or may provide economic incentives for employers to do so voluntarily. The ABA *Principles for Juries and Jury Trials* specifies that the daily juror fee should, at minimum, be sufficient to defray routine expenses associated with jury service. It also prohibits employers from requiring employees to use leave or vacation time or to make up time lost due to jury service, or to otherwise penalize employees who miss work due to jury service.

In seven states, employers are required by statute to pay employees who are summoned for jury service. In some states, this requirement is subject to the size of the employer (e.g., number of employees) or number of days of jury service. In addition, some states require the employer to make up the difference between the jury fee and the employee's regular salary or wages. Other courts, such as the Dallas County (Texas) District Court, have established systems that permit jurors to donate their juror fees to charity.

Three states, Arizona, Mississippi, and Oklahoma, have enacted the Lengthy Trial Fund (LTF) provisions of the Jury Patriotism Act, which provides additional compensation to jurors serving in longer trials who would otherwise experience financial hardship due to lost income. The LTF is funded by a fee imposed on civil filings. Louisiana has also enacted the LTF, but has not yet implemented the funding mechanism to support it.

Advantages

1. More equitable systems of juror compensation decrease the need to grant exemptions or excuses based on financial hardship, thus improving the representativeness of the panels from which juries are selected.

2. More equitable systems for juror compensation recognize the value of jurors' service, thus increasing juror satisfaction.

3. The increased costs associated with implementing more equitable juror compensation systems encourage courts to use jury pools more efficiently.

Disadvantages

1. More equitable juror compensation systems are more costly to state and county governments.

2. State statutes that require employers to continue to compensate employees who are summoned for jury service shift the cost of jury service to private employers.

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Janice T. Munsterman, G. Thomas Munsterman, Brian Lynch & Steven D. Penrod, The Relationship of Juror Fees abd Terms Of Service to Jury System Performance (National Center for State Courts, 1991).

§ 2.4 Additional Source Lists

Technique

The court supplements its primary juror source lists (usually voter registration lists) with additional source lists to enhance the inclusiveness and representativeness of the jury pool.

Issues

- How difficult is it to eliminate duplication among the various source lists?
- How many additional names will be gained by supplementing the master jury list with additional source lists?
- What types of source lists are appropriate supplements to voter registration lists?
- What costs does the court incur to obtain additional source lists?
- How often should supplemental source lists be updated?

Procedures

Voter registration lists vary with respect to their inclusiveness and representativeness of the population. Voter registration lists typically include only 60 to 70% of the population over age 18 and historically have overrepresented older, upper-income, well-educated, and nonminority persons in the jurisdiction. To enhance the representativeness of the jury pool and to expand the coverage of those persons who may be called, the court may combine and supplement its voter registration lists with additional source lists. The ABA *Principles for Juries and Jury Trials* recommends the use of "two or more regularly maintained source lists" for compiling the master jury list. The most commonly used supplement is the list of licensed drivers and holders of identification cards provided by the state Department of Motor Vehicles. Among other lists considered are state-income-tax payers, state welfare and unemployment recipients, state census lists, newly naturalized citizens, property owners, and motor vehicle owners.

The utility of adding additional lists is determined by the unique names that the supplemental list provides over the lists already used. For instance, if the voters plus drivers list combination covers close to 100% of the population, which typically occurs, additional lists will add only the names of those persons who do not drive or are not registered to vote. Some jurisdictions permit residents to add their names to the master jury list if they are not already included on existing source lists, which simply adds their names to the source list but does not give them any priority over other persons. Many of these supplemental source lists have a secondary advantage insofar that records are more frequently updated, thus providing more-accurate juror addresses.

After the juror source lists have been combined, the names can be sorted by Social Security number or some other matching criteria (e.g., date of birth) to identify duplicates. Removing duplicates is necessary to provide each person with an equal probability of selection. Most commercial jury management systems now feature sophisticated matching

algorithms that can be programmed to remove or retain suspected duplicate records to conform to court policy concerning the degree of certainty that two or more records are duplicates. In addition, some source lists must be reformatted to remove distinguishing characteristics that might indicate from which source list the name originated, especially lists such as unemployment and welfare recipients that may carry some measure of social stigma. As of September 2005, only six states require courts to use a single source list exclusively.

Advantages

1. Additional source lists increase inclusiveness, thereby bringing more people into the jury process and distributing the educational value and burden more equitably across the population.

2. Representativeness of the jury pool is improved.

3. Some source lists are more frequently updated, providing more accurate addresses of prospective jurors.

Disadvantages

1. Combining multiple lists creates duplication of names. If duplicates are not removed, some persons have an increased probability of selection.

2. Use of additional source lists requires courts to establish policies concerning the degree of certainty that must exist before a suspected duplicate record is removed or retained.

3. Some lists may contain the names of persons unqualified for jury service (e.g., noncitizens, minors), which reduces the yield of the number of persons summoned.

AUTHORITY

People v. Harris, 679 P.2d 433 (Cal. 1984) (concluding that the state's use of a voter registration list, which did not represent a fair cross-section of the community, as the sole source list for impaneling juries deprived the defendant of his right to a jury trial).

People v. Wheeler, 503 P.2d 748, 759 (Cal. 1978) ("Obviously if [the source] list is not representative of a cross-section of the community, the process is constitutionally defective ab initio.").

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Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 Duq. L. Rev. 39 (1994).

G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 11 Just. Sys. J. 1 (1986).

§ 2.5 Stratified Jury Selection

Technique

The court uses weighted sampling techniques based on location within the jurisdiction or on the racial or ethnic characteristics of the prospective jurors. This technique improves the likelihood that the panels from which juries are selected fairly represent the demographics of the court's jurisdiction. It can compensate for jury source lists that do not fairly represent the population or for disproportionate response and qualification rates by persons called for jury service. Stratified selection is also known as structured or clustered sampling.

Issues

- Are stratified juries constitutional based on contemporary equal-protection and due-process jurisprudence?
- Do stratified juries meet the requirement of the federal Jury Selection and Service Act and corresponding state statutes?

Procedures

The court evaluates the response and qualification rates of prospective jurors according to a given set of demographic characteristics, such as geographic locality, race, or ethnicity. Using that information, the court calls a disproportionately higher number of persons for jury service from those geographic jurisdictions or racial or ethnic minorities that have comparatively lower response or qualification rates. This system is more likely to produce jury panels that reflect the racial and ethnic composition of the court's jurisdiction. Because of concerns about deviating from a strictly random system, most courts that have implemented some form of stratified jury selection have done so only after other strategies have failed to produce a fair cross-section of the community. Strategies include supplementing the master jury list with additional source lists, updating addresses, implementing follow-up procedures for persons who fail to respond to jury summonses, increasing juror compensation and services, and decreasing the term of jury service. Courts that use stratified juries include the United States District Court for the District of Connecticut, which mails additional juror questionnaires to "municipalities . . . whose Hispanic Population is equal to or greater than ten percent of its total population." The Georgia Unified Appeals Procedure requires county jury commissioners to "balance the jury box" to ensure a venire that reflects the proportional representation of the community by race (black/white) and gender.

One form of stratified selection has been ruled unconstitutional. The United States District Court for the Eastern District of Michigan previously used a "subtraction method" in which the court would randomly strike white and "other" potential jurors from the list of qualified jurors to obtain a qualification list that reflected the population. The federal Sixth Circuit Court of Appeals ruled that the subtraction method violated the Equal Protection Clause in *U.S. v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

Advantages

1. Stratified selection corrects for underrepresentation in jury pools.

2. Conducting the research necessary to implement stratified selection helps the court identify specific causes of underrepresentation.

3. Stratified selection may protect jury selection systems from legal challenge based on intentional discrimination or Sixth Amendment claims.

Disadvantage

Stratified jury selection may be subject to legal challenge based on the Equal Protection Clause or the Due Process Clause of the U.S. Constitution or the federal Jury Selection and Service Act (and corresponding state statutes).

AUTHORITY

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U.S. v. Ovalle, 136 F.3d 1092 (6th Cir. 1998).

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§ 2.6 Compliance with the Americans with Disabilities Act

Technique

Title II of the Americans with Disabilities Act prohibits public entities, including state court programs and services, from excluding from participation, denying benefits to, or otherwise discriminating against individuals with disabilities. The act requires state courts to make reasonable modifications in policies, practices, and procedures to ensure effective communication with disabled persons and to make physical facilities accessible to disabled persons.

Issues

- Is the juror source list likely to include persons with disabilities?
- Does state law exempt or excuse individuals from jury service based on disability?
- What "reasonable accommodations" are necessary to permit disabled individuals to serve as jurors (e.g., sign-language interpreters, computer-aided transcriptions or assisted-listening devices for persons with visual impairments)?
- What modifications should be made to make the courthouse physically accessible to disabled persons?

Procedures

The court conducts a thorough review of its juror source lists to determine the extent to which persons with disabilities are excluded. In some instances, persons with disabilities may be excluded as a result of state statutes or court rules pertaining to juror qualifications, exemptions, or excuses. Such statutes and court rules should be repealed or overruled. To make courts accessible to persons with disabilities, courts may need to make physical modifications to their facilities, which may include securing access to jury rooms by installing ramps or elevators in multilevel facilities, wide-frame doors, handicapped-accessible bathrooms, and large-print signs. Juror orientation and educational materials should be available in a handicapped-accessible form (e.g., plain English, large print, Braille, video captions, and audiotapes).

During trials, assistance services, such as sign-language interpreters, computer-aided transcriptions, and assisted-listening devices, should be provided as needed. Trial judges should instruct lawyers, litigants, and witnesses about accommodations for jurors with disabilities. Jury instructions should be provided verbally and in writing and should include any special instructions concerning deliberations with disabled jurors. When a sign-language interpreter is needed to assist a hearing-impaired juror, the judge should also instruct jurors about the interpreter's role, including the interpreter's ethical responsibilities to the court, during trial and during deliberations.

AUTHORITY

Americans with Disabilities Act, 42 U.S.C. §§ 12131-134 (Supp. 1996).

Tennessee v. Lane, 541 U.S. 509 (2004) (holding that states do not have sovereign immunity from liability under the Americans with Disabilities Act for failure to make courthouses accessible to disabled persons).

U.S. v. Dempsey, 830 F.Supp. 1084 (1987) (permitting a sign-language interpreter in deliberation room).

Galloway v. Superior Court, 816 F. Supp. 12 (D.C. 1993) (enjoining court from categorically excluding blind persons from jury selection).

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Advantage

Compliance with the ADA expands the pool of potential jurors and increases the overall representativeness of juries.

Disadvantage

Education for court personnel, facility modifications, and assistance services for disabled persons may require additional expenditures of court funds.

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§ 2.7 Limited Releases from Jury Service

Technique

The court adopts standards or rules for excusing individuals from jury service that ensure that such releases will be granted only under very limited circumstances.

Issues

- What policies and procedures should the court adopt to govern the grant or denial of releases from jury service?
- Should particular classes of persons be excused from jury service automatically?
- How will limiting the grounds for being excused from jury service affect the number of persons who fail to report at all?
- If a person defers jury service until a later date, how much time should be permitted to elapse before the court requires a person to fulfill his or her obligation for jury service?

Procedures

Jury service is an important aspect of citizenship, and all appropriate means should be used to ensure that qualified citizens serve. Exemptions and excuses from jury service generally are limited to the following qualifications:

- that jurors be 18 years of age or older;
- that jurors be citizens of the United States;
- that jurors be residents of the jurisdiction in which they have been summoned to serve as jurors;
- that jurors be able to understand and communicate effectively in English; and
- that jurors convicted of felonies have had their civil rights restored.

Other classes of jurors are not automatically released from service, and releases are based on true hardship rather than inconvenience. The court requires persons requesting to be released from jury service to swear by affidavit or otherwise that their excuse is legitimate. A deferral—preferably of short duration—should be the preferred alternative to an outright and permanent release from jury service.

The court designates one or more judges to serve as the jury judge and confers on him or her the authority to grant or deny requests to be released from jury service. If judges individually excuse jurors for hardship, they should discuss among themselves the criteria that they will use to make those determinations so as to reduce the potential for disparity in excusal decisions.

California has established written guidelines for judges that recognize eight forms of undue hardship sufficient to justify an excusal from jury service:

1. No transportation to court;

2. Excessive distance to court (e.g., more than one and one-half hours);

3. Extreme financial hardship that compromises jurors' ability to support themselves or their dependents or disrupts their economic stability;

4. Extreme risk of injury or destruction of property;

5. Undue risk of physical or mental harm;

6. Public health and safety workers for whom it is not feasible to make arrangements for relief from those responsibilities;

7. Care of sick, aged, or infirm dependents, or of children and no comparable substitute care is available or practical; and

8. Previous jury service within the past twelve months.

REFERENCES

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American Bar Association, Principles for Juries and Jury Trials 7-10, 52, 58-61 (2005) (Principles 2(A) and 10(C) discuss qualification, exemption, and excusal criteria).

Advantages

1. Having established criteria for granting releases from jury service reduces the incidence of discriminatory, inconsistent, or arbitrary standards.

2. Limiting releases from jury service broadens the base of prospective jurors.

Disadvantage

The court's failure to release persons from jury service on the grounds of inconvenience may result in some dissatisfaction.

§ 2.8 Jury Orientation

Technique

The court provides orientation materials to inform prospective jurors about key aspects of jury service. Some orientation materials should be provided before the juror reports for jury service and should include directions to the courthouse, information about public transportation or public parking, the term of service, daily juror fees, and materials to bring to the courthouse. After reporting for jury service, the court should provide basic information about jury service, including jurors' roles in the trial process. Orientation materials can be distributed in a variety of ways, including with the summons through U.S. mail, cable television, or the Internet.

Issues

- What information should be routinely provided to prospective jurors about jury service?
- When should juror orientation information be provided?
- How should information be communicated?

Procedures

As courts increasingly adopt shorter terms of jury service (see § 2.2 One-Day/One-Trial Term of Jury Service), a greater proportion of citizens are reporting for jury service for the first time in their lives. Many of them have some expectations about what to expect, but not all of these expectations are realistic, and many people have no idea what to expect. Courts can help alleviate much of the anxiety and confusion by providing jurors with orientation materials that answer jurors' practical questions about what jury service entails.

The timing of orientation is a key issue: courts should not overload citizens by providing every potential piece of information all at once, but should segment the orientation in a way that ensures that jurors have adequate information about each stage of the jury process as they begin it. Jurors who have just been summoned, for example, should receive information about the location of the courthouse, parking or public transportation options, the expected term of service, suggested information for employers, and information about the court's excusal or deferral policies. Questions about the history of the American jury, the identity of key courtroom participants, the role of jurors in criminal or civil trials, and burden of proof are not usually foremost in jurors' minds at this point and can be saved until jurors report for service to the courthouse.

Many courts include brochures containing preservice orientation materials with the jury summons, but others make this type of information available through a variety of ways. For example, the Farmington, New Mexico courts made additional copies of their in-court orientation video and placed them in the local public libraries and retail video outlets (available at no charge). The Fairfax, Virginia Circuit Court was the first court to arrange to have its juror orientation broadcast at regular intervals on the local cable television station. The jury summons informed jurors of the station channel and viewing times. Many courts now include jury service FAQs on their Web sites, and several even broadcast their orientation videos through broadband from the Web sites.

Once jurors report for service, the court should provide additional orientation materials that address questions such as when jury panels will be called to go to courtrooms; what to expect during jury selection; the location of smoking, food-vending, and eating areas; and when jurors can expect to be released for lunch or at the end of the day. Basic background information about the history and role of juries in the American justice system can also be imparted at this time.

The in-court orientation can be conducted through a combination of live presentations by a judge or court staff, video or DVD presentations, and printed materials. A judicial welcome and introduction makes an especially good impression to jurors and sets the tone for the seriousness and importance of the jury's task.

Juror orientation is a form of preliminary instructions. So it is critically important that all orientation materials and presentations correctly state the applicable law concerning jurors' roles and responsibilities. The Connecticut judiciary recently had to recall all of its juror orientation videotapes because two statements concerning the burden of proof might have unintentionally diluted the presumption of innocence for criminal defendants. Jury staff should also be trained to avoid statements in live presentations or announcements that might prejudice the parties.

AUTHORITY

Connecticut v. L'Heureax, Nos. MV 02 345555, CR 0380375 (Super. Ct., Tolland Dist. Jan. 7, 2004).

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G. Thomas Munsterman, *Jury News*, 9 Ct. Mgr. 6, 20 (Fall 1994) (describing the cable-television juror-orientation program established in Fairfax, Virginia).

STUDY

Irma S. Jones, Janna B. Arney & Dianna C. Blankenship, *Juror Information on the Web: A Design and Usability/Bias Study of Hispanic Population Counties in Texas*, 20(2) Ct. Mgr. 16 (Spring 2005) (comparing the design and comprehensibility of online juror information on six Texas court Web sites).

Advantages

1. Answers to jurors' most immediate questions are available in a timely manner and through a variety of media.

2. Segmenting orientation materials for each phase of jury service prevents jurors from becoming overloaded with extraneous information.

3. Making orientation available through electronic or Internet media provides public education about jury service for interested people.

Disadvantages

1. Televised juror orientation requires coordination with cable television personnel.

2. The court must provide alternative methods of presenting juror orientation for individuals who do not own televisions or lack access to cable television systems.

§ 2.9 How to Relieve Juror Boredom

Technique

To minimize the boredom associated with juror "downtime" during pretrial and trial proceedings, the court equips the jury-waiting area with an environment conducive to private work and supplies appropriate entertainment or diversion. This technique may supplement other strategies, such as call-in systems, designed to use jurors' time effectively and efficiently. For lengthy breaks during court proceedings, the court also may permit jurors to leave the courthouse with instructions to return at a certain time. This technique may also be helpful during especially lengthy or sequestered trials or deliberations.

Issues

- What types of entertainment or diversions are appropriate for the jury room (e.g., videotapes, newspaper clippings, group outings)?
- Who is responsible for organizing activities and preparing materials?

Procedures

The court equips jury facilities with quiet work areas and telephones and computer modem access to permit jurors to conduct personal business during court recesses and proceedings that do not require their attendance. These facilities can reduce any hardship imposed on jurors who are absent from work. Other helpful facilities include a snack bar, a newsstand, and isolated areas in which jurors can watch television or videos.

The juror summons or juror information handbook should instruct jurors to bring materials with them to keep them occupied during court recesses. Some courts have made arrangements to provide appropriate diversions for jurors. Examples include:

- establishing a lending branch of the local public library;
- obtaining undeliverable magazines and newspapers from the U.S. Postal Service for juror use;
- encouraging jurors to donate books for a juror library;
- scheduling speakers on local public activities and functions;
- providing audiotape lectures on topics of public interest;
- distributing jury newsletters with information about jury service and local court efforts to improve the justice system; and
- providing maps that highlight local attractions within walking distance of the courthouse.

At all times, the court should keep jurors informed of the progress in the disposition of the docket or calendar. During lengthy breaks from court proceedings, the court may permit jurors to leave the courthouse with instructions to return at a certain time or provide them with beepers to call them back as needed. Jurors may take the time to visit area shops or enjoy walking tours near the courthouse. If the courthouse is located near local museums or area attractions, the court may provide jurors with free or discounted passes for these activities.

Advantages

1. Providing appropriate diversions and accommodations reduces juror stress and aggravation, which tends to increase juror attention during court proceedings and deliberations.

2. Decreased juror boredom increases satisfaction with jury service.

Disadvantage

The court incurs the incidental costs of providing diversions and accommodations, such as the costs of the activities themselves and the administration and monitoring of juror activities.

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Shari S. Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in Verdict: Assessing the Civil Jury System 282, 286-87 (Robert E. Litan ed., 1993).

§ 2.10 Jury Fee Donations

Technique

When jurors report for service, they are informed that they have the ability to voluntarily donate their juror fee to a charity as a part of a court partnership with charitable organizations. Some variations on this technique have included donations to help others serve by putting the donated money into jury-related projects.

Issues

- What is the process for determining which charities will be eligible for donations of juror fees?
- Do donations through the court qualify for tax deductions?
- Will current software programs be able to manage the fiscal transactions involved in donating juror fees?
- Can jurors donate only a portion of their fee and keep what remains?
- Should donated juror fees used for jury projects in the court be termed as "charitable donations" or is this misleading to jurors?

Procedures

The court establishes, via state statute or court rule, a charity, set of charities, or another beneficiary to receive funds donated by jurors. Jurors are then given the option upon reporting for service of giving all or part of their reimbursement to that cause. In some cases, literature may be distributed to give information on the charity that the juror would be aiding.

Certain states, including Texas, where the idea of donating jury fees originated, have statewide statutes regulating where donated jury fees go. Texas Government Code Section 61.003 clearly outlines the procedure for making donations, including charitable options. In this program, jurors are given a form letter that when signed by the prospective juror directs the county treasurer to donate all of the prospective juror's reimbursement for jury service. Donations go to the Compensation to Victims of Crime Fund, the county Child Welfare Board, or "any other program approved by the commissioners of the court of the county."

Nevada is stricter about the regulations related to jury fee donations that they set out by statewide statute. Section 6.155 of the Nevada Revised Statutes makes clear that while each board of county commissioners has ultimate authority over the specific agency receiving juror donations, that organization must be one "which provides child welfare services and that is located in the county in which the person is serving as a juror." It goes on to specifically define child welfare services.

Other states, however, allow courts to establish their own programs and guidelines for jury fee donations, a fact that some courts have used to better themselves. For example, in Lake County, Illinois, juror fee donations go to support a child-care center in the courthouse. The fees go toward paying for the furnishings of the facility, as well as for

materials needed and staff, while the county takes care of the space and the insurance. The child-care center can be used by any persons using the courthouse, including jurors.

After the juror has decided to donate the fee to charity, computer programs in charge of managing juror payments automatically divert the earmarked fee to another account dedicated to donated funds.

Advantages

1. The ability to donate funds allows jurors to feel as though they are giving back to the community and thus gives a greater sense of satisfaction in their service.

2. Donated juror fees create stronger ties between the court and the community.

Disadvantage

There is greater cost and time required to earmark and direct funds to charitable organizations.

AUTHORITY

Nev. Rev. Stat. §6.155 (establishment of a program to allow jurors to donate money they are entitled to receive for services and expenses to a local agency for prevention of child abuse and neglect).

REFERENCE

G. Thomas Munsterman, *Donation of Juror Fees*, 10(2) Ct. Manager 6 (Spring 1995).

§ 2.11 Screening for English-Language Proficiency

Technique

The court screens out jurors who are unable to speak, read, or understand English to ensure that language is not a barrier to understanding courtroom proceedings.

Issues

- Does screening jurors for English proficiency decrease the representative nature of the jury pool?
- Who is responsible for making the ultimate decision on a juror's English proficiency?
- Is the court responsible for providing interpreters for those who do not possess a proficiency in English, but are otherwise qualified to serve as jurors?

Procedures

All states except New Mexico require that jurors be sufficiently fluent in English to understand trial proceedings, including jury instructions. Citizens who are not proficient in English are ineligible for jury service. In many urban areas, and increasingly in less-urban areas, citizens who do not speak English as a first language comprise a sizable portion of the local population. In the case of Hispanic or Asian citizens, their wholesale exclusion from jury service can skew the racial or ethnic representation of the jury pool.

The court develops criteria to determine prospective jurors' proficiency in the English language sufficient to understand courtroom proceedings. These criteria will vary. Some courts require only that jurors can understand and speak English, while others require abilities in reading and writing as well.

After these criteria are established, the court creates a means of measuring English comprehension. Techniques may include personal interviews, written questionnaires, or simply a check box on the summons itself. If the court uses a personal interview or written questionnaire, which requires a subjective measure of proficiency, it appoints a representative of the court (judge, jury commissioner, clerk, etc.) to evaluate the level of proficiency and ultimately decide on whether to excuse the juror on those grounds.

Advantages

1. Screening jurors for English proficiency ensures that the jury will be able to understand the proceedings.

2. A preliminary screening will save time, as it will not force the judge to screen for language in the courtroom during voir dire.

Disadvantages

1. Screening out non-English speakers may reduce the representative nature of the jury pool.

2. Creating an effective screening practice requires increased administrative time and cost.

REFERENCES

American Bar Association, Principles for Juries and Jury Trials.

G. Thomas Munsterman, *No Se Habla Jury Duty? English Proficiency and Hispanic Representation Issues*, 18(4) Ct. Manager 29-31 (2003).

§ 2.12 Reduced Jury-Panel Size

Technique

Courts increase juror utilization by reducing the size of jury panels sent to a courtroom for jury selection. By establishing set panel sizes for certain types of cases, and emphasizing efficient use by attorneys and judges alike, the court is able to use jurors' time more effectively and save money in administrative costs by summoning fewer citizens.

Issues

- How do courts determine the appropriate panel size for given types of cases?
- Does reducing the panel size make jury selection less representative of the general public?
- What happens if a court runs out of potential jurors before jury selection is completed?

Procedures

The court administrator examines existing juror utilization records to determine the proportion of potential jurors that are actually sent to a courtroom and questioned compared to the proportion that are not questioned during the selection process. If a large percentage of potential jurors are not reached, the size of the jury panel is too large for the type of case being tried. In this case, the court administrator meets with judges to determine new, smaller panel sizes to recommend for different types of cases to better utilize the jury pool. While the ideal situation would be 100% utilization of the pool, more realistic goals should approach 80 to 90% and above.

In late 2002, the Contra Costa County (California) Superior Court mandated reductions in jury panel sizes in response to budgetary constraints. More than three-quarters of the judges were able to impanel juries under the new panel-size policy without seeking supplemental panels. As a result, the court was able to reduce the number of citizens summoned for jury service by 25% with a savings of more than $25,000 in the first ten weeks of the new policy. In addition to direct cost savings, the reduction in workload in the jury services office permitted the court to reassign jury staff for up to twenty-four hours per week to other functions within the court, mitigating the impact of a hiring freeze.

A statewide study of juror utilization in California found that approximately 30% of citizens reporting for jury service were not sent to a courtroom for jury selection, and an additional 24% who were sent to a courtroom were ultimately not needed to impanel the jury. That study concluded that the state could potentially save up to $6 million annually by improving these two aspects of juror utilization.

Advantages

1. Reduced panel sizes require fewer jurors to be summoned to the courthouse, thus reducing administrative costs and burden, as well as demanding less of the general public in terms of service.

2. Reduced panel sizes expedite the trial process, as managing fewer people allows both jury selection and administration to move faster and more efficiently.

3. Reduced panel sizes allow more citizens who report for jury service to serve as part of a selection or on a jury, thus increasing their satisfaction with their experience and reducing the common complaint that jury service is simply a lot of waiting around without playing a more direct role.

Disadvantages

1. Panel-size reductions may force judges to become more stringent in their decisions on requests by jurors to be excused and on motions by attorneys to remove for cause.

2. Courts must have the ability to provide supplemental panels on the rare occasions that the entire panel is exhausted before the jury is completely impaneled. This may be difficult for smaller courts that do not routinely conduct multiple jury trials simultaneously.

REFERENCES

American Bar Association, Principles for Juries and Jury Trials 7-8, 12-13 (2005) (Principle 2(D) addresses juror utilization issues).

G. Thomas Munsterman, Jury System Management 77-100 (1996).

STUDY

Paula L. Hannaford-Agor, Increasing the Jury Pool: Impact of the Employer Tax Credit (August 2004) (available at http://www.courtinfo.ca.gov/reference/documents/tax_credit_report.pdf).

§ 2.13 Follow-Up on Nonrespondents

Technique

The court establishes a procedure for following up on citizens who do not respond to a jury summons. This includes those that do not make previous arrangements with the court if they know they cannot be present for jury duty, those that fail to appear on the date they are scheduled, and, in two-step systems, those that fail to return a qualification questionnaire. The goal of this technique is to increase the jury yield, decrease administrative costs associated with jury management, and ensure that citizens understand that jury duty is a civic requirement, not a request.

Issues

- What is the threshold failure-to-appear (FTA) rate at which courts should implement a follow-up program?
- What types of follow-up are appropriate when citizens fail to appear for jury duty?
- Is failure to appear for jury service subject to civil- or criminal-contempt proceedings?
- Will following up with citizens actually have the desired effects of increasing yield and respect for jury service?

Procedures

Courts around the country are paying closer attention to nonresponse rates and their impact on jury yields and administrative costs. Some portion of the FTA rate can usually be attributed to summonses that never reach the prospective juror, but are not returned to the court as undeliverable. The remainder reflects a combination of people who are not qualified for jury service, but do not realize that they still need to respond to the summons; forgetful people; people who are generally supportive of jury service, but for whom the reporting date is particularly inconvenient; and true jury scofflaws. According to one study, the single biggest predictor of FTA rates was whether prospective jurors believed that failing to appear would result in negative consequences.

Consistently applied follow-up procedures convey to the community that courts are aware when citizens fail to respond to jury summonses and will take appropriate action. It is very important that courts follow up on nonresponders at all stages of the jury-summoning process, including nonresponse to qualification questionnaires in two-step jury systems. A typical progression of follow-up steps begins with a follow-up letter or second summons, followed by an FTA notice, followed by an order-to-show-cause notice, followed by criminal sanctions. Many courts find a decreasing return on investment after the second or third attempt to follow up on nonresponders. Often they proceed with sporadic OSC hearings or criminal sanctions, ideally accompanied by heavy media coverage.

Massachusetts is credited with creating the first statewide "Delinquent Juror Prosecution Program" in 1996, and has gradually expanded it. The goal was "the consistent, persistent, yet gentle enforcement of [the] law . . . to ensure that all prospective jurors fulfill their duty and obligation under the law." The program maintains its own Web site, and

specifically lays out what is considered a "delinquent juror," as well as a scaled punishment system that is dependent on the amount of time a citizen goes without responding to a summons. This scale ranges from a follow-up letter to a $2,000 fine. However, at almost all stages of this scale, the citizen is given the opportunity to fulfill their jury service as an alternative to punishment. Between 1996 and 1999, the program issued 24,446 delinquent notices, of which, 86% were resolved without a criminal procedure.

The Los Angeles County Superior Court assessed its follow-up program and found that 29% of persons who failed to respond to the first summons did respond to the second summons; an additional 6% responded after receiving the FTA notice, and 18% responded after receiving the OSC notice. Thus, the overall effect of the Los Angeles follow-up program was that more than half (53%) of nonresponders eventually responded to the jury summons.

The California Task Force on Jury System Improvements has also developed an FTA Kit for courts, which includes:

- A program guide that outlines, step by step, the procedures for following up with potential jurors who fail to respond to their summonses;
- Sample correspondence and notices of delinquency;
- Order-to-show-cause, minute-order, and judgment forms;
- Information about contempt and monetary sanctions;
- Sample scripts for judges and court personnel; and
- Sample press release to alert the public about a failure-to-appear program.

Advantages

1. More citizens will understand the importance and requirements of jury duty.
2. The court establishes greater legitimacy by asserting its authority.
3. More jurors will be available to serve, as fewer jurors will fail to appear for service. This will increase the efficiency of the justice system.
4. Follow-up programs may result in more representative jury pools by reducing the impact of disproportionate nonresponse rates.

Disadvantage

There is increased time and costs associated with following up with those citizens who fail to appear.

REFERENCES

American Bar Association, Principles on Juries and Jury Trials, Principle 10(D) ("Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failrues to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.").

Jury Patriotism Act (available at http://www.ALEC.org/meSWFiles/pdf/0309.pdf).

Council for Court Excellence, Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington, D.C. 77-80 (1998) (Appendix B contains the Executive Summary of a study of low juror yield in D.C.).

G. Thomas Munsterman, *What to Do, Oh What to Do, with Persons Who Don't Answer the Summons*? 10(3) Ct. Manager (Summer 1995).

STUDY

Robert G. Boatright, Improving Citizen Response to Jury Summonses: A Report with Recommendations (1998).

§ 2.14 Reducing the Number of Undeliverable Summonses

Technique

The U.S. Postal Service grants licenses to a number of private vendors to access information from the Postal Service's National Change of Address (NCOA) database. For a minimal fee, these vendors can update the addresses on summonses, qualification questionnaires, or source lists for courts to reduce the number of undeliverable summonses and the attendant printing and postage costs. Some vendors can also verify the validity of an address.

Issues

- At what point does it become cost-effective to send summons or qualification-questionnaire lists to an NCOA vendor?
- When should these lists be sent to an NCOA vendor?

Procedures

Undeliverable summonses are a major factor in low juror yields and high administrative costs associated with jury operations. In some urban areas, undeliverable rates are as high as 50% of all summonses or qualification questionnaires mailed. These rates can be significantly reduced by using the services of an NCOA vendor that is licensed to access the U.S. Postal Service National Change of Address database. Several dozen vendors are currently licensed to provide these services. See http://www.usps.gov/ncsc/ziplookup/vendorslicensees.htm for a list of current vendors and licensees.

Fees charged by individual vendors vary substantially, but typically are based on the volume of records to be updated (e.g., $1.50 per thousand records, minimum $50 order). Vendors typically are able to send and receive records electronically, and the turn-around time is generally less than 24 hours. Given the minimal costs involved in the NCOA process, most courts can expect to save postage and printing costs with just a modest reduction in the undeliverable rate.

To determine the stage at which an NCOA update would be most cost-effective, the court should consider the volume of mail involved and the current undeliverable rate. Most courts that use this technique send the list of qualification questionnaires or summonses to the NCOA vendor immediately before mailing. Courts with lower volumes of qualification questionnaires or summonses may find it more cost-effective to conduct the NCOA update on the entire source list at least annually.

Courts should have an established policy to determine the response if an NCOA update indicates that the prospective juror has moved out of the jurisdiction of the court. Most courts continue to send the qualification questionnaire or summons to the new address, letting the prospective juror indicate that he or she is no longer qualified to serve in the jurisdiction due to nonresidency. This approach avoids the possibility of disenfranchising a citizen from jury service who might still be eligible (e.g., the move is temporary or the new address does not actually reflect a change in residency).

Advantages

1. NCOA updates can substantially reduce the undeliverable rate, thus increasing juror yields and reducing administrative costs.

2. For most courts, NCOA services are very cost-effective.

Disadvantages

NCOA updates may not be cost-effective in courts with a very low volume of qualification questionnaires or summonses or with a very low undeliverable rate.

REFERENCES

G. Thomas Munsterman & Paula L. Hannaford-Agor, The Promise and Challenges of Jury System Technology 20-21 (National Center for State Courts, 2003).

See http://www.usps/gov/ncsc/ziplookup/vendorslicensees.htm for a current list of vendors and licensees.

Chapter 3

Voir Dire (or, in Plain English, Jury Selection)

This chapter outlines a number of innovations related to the process of jury selection, or "voir dire." Ironically, there is probably no other stage of the jury trial that varies so dramatically from jurisdiction to jurisdiction, and even from judge to judge. Everyone seems to agree that the purpose of jury selection is to identify and remove prospective jurors who could not serve fairly and impartially, but beyond that basic agreement are widely different philosophies and practices with respect to 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 versus lawyer-conducted questioning, the use of general or case-specific questionnaires, and panel versus individual questioning. The two areas where we have seen the most change are on the topics of *Batson* enforcement and juror privacy.

The first edition of *Jury Trial Innovations* was published shortly after the U.S. Supreme Court issued its decision in *Purkett v. Elem*, which raised many questions among commentators about the Court's commitment to meaningful judicial oversight of *Batson* challenges. The crux of that decision focused on which party has the burden of persuasion regarding the discriminatory intent of a peremptory challenge once the challenging party satisfies its prima facie case, but the language of the opinion appeared to grant trial judges great discretion to accept "silly or superstitious" reasons proffered for the strike. The recent decision in *Miller-El v. Dretke*, however, seems to put some teeth back into *Batson* enforcement by advising judges that they should evaluate proffered reasons in the context of the striking party's conduct throughout the entire voir dire rather than narrowly focused on the individual juror. In *Miller-El*, for example, the prosecution's reasons for striking black jurors were equally applicable to white jurors who were not struck, and the questions posed to black and white jurors differed in form such that they would naturally elicit different responses.

Miller-El is the most recent case in a long line of state and federal cases that have attempted to clarify *Batson*'s three-prong test, which has proven to be extremely difficult to apply in practice. As Justice Breyer noted in his concurring opinion, *Batson* challenges are an inherently awkward procedure that requires the trial judge to use an objective standard to evaluate the subjective decision making of the striking party. When *Jury Trial Innovations* was published in 1997, we were concerned that the section discussing the possible elimination of peremptory challenges was too controversial and far-fetched to be considered even as an "innovation." Although to date no jurisdiction has eliminated peremptory challenges, we have seen a steady stream of courts consider the idea.

The issue of juror privacy is the other area of jury selection that has received greater attention over the past decade, particularly as courts have come to recognize how multifaceted and complex the concept of juror privacy really is. Courts have always understood that juror privacy refers to the desire of jurors for physical safety for themselves and their families, particularly as that relates to the integrity of the judicial process. Courts also recognize the legitimacy of jurors' desire to avoid disclosure of sensitive or embarrassing information. More recently, courts have come to recognize the desire of jurors to avoid disclosing personal information unless it clearly relates to their ability to serve fairly and impartially. In light of the growing public debate about the utility of peremptory challenges, it should be no surprise that jurors are becoming more reluctant to disclose information that may be used by lawyers to stereotype jurors. And as the incidence of identity theft becomes more serious and widespread, jurors understandably are also concerned that personal information disclosed during jury selection will not be used for unauthorized purposes.

Recognition of these issues has not necessarily led to substantially more coherent court policies, but on a trial-by-trial basis is it clear that judges and lawyers are trying to make reasonable accommodations to jurors' privacy interests. Many of the techniques described in this chapter—individual voir dire, private voir dire, case-specific questionnaires, and opening statements to the entire jury panel—are evolving with juror privacy in mind.

§ 3.1 Lawyer-Conducted Voir Dire

Technique

The court permits the trial attorneys to question the jury panel directly, rather than submitting all voir dire questions through the judge. See also § 3.2, Opening Statements to the Entire Jury Panel, and § 3.3, Questionnaires to Assist Jury Selection.

Issues

- Are voir dire questions posed by lawyers more likely to reveal juror bias than questions posed by the judge?
- Does the difference in status between the judge and the members of the jury panel intimidate potential jurors, preventing them from answering voir dire questions candidly or completely?
- What effect does permitting lawyers to conduct voir dire have on the length of proceedings?
- What restrictions should the judge place on lawyers conducting voir dire?

Procedures

Voir dire is a formal inquiry conducted to ensure that individuals selected as jurors will consider the evidence fairly and do not have biases that the court or counsel consider to be of such impact as to prevent them from hearing the evidence without prejudice to either side. Those disqualifying biases are better detected through open-ended questioning rather than rhetorical assertions. Many contend that lawyers are best suited to identify such attitudes. As a practical matter, however, voir dire also offers trial attorneys their first opportunity to give the jury a favorable impression about their respective clients and to introduce the outlines of their cases. Because of the inherent tension between these two objectives, uncovering juror bias and engaging in advocacy, the majority of federal judges and a substantial portion of state judges have, over time, assumed a more dominant role in examining potential jurors in voir dire. The judicial role during voir dire ranges across a continuum from judges who deny lawyers an active role in the examination of potential jurors to those who are not even present during the voir dire, leaving the lawyers to select a mutually acceptable jury among themselves. Many judges will use a questionnaire with attorney follow-up, or will use all or some of the questions suggested by attorneys and allow attorneys follow-up to ensure completeness of the prospective jurors' responses.

Proponents of lawyer-conducted voir dire offer several arguments to support their position. Relying on several empirical studies, they claim that lawyers identify juror bias more effectively than judges. Specifically, lawyers are more familiar with the facts of the case and the issues likely to arise at trial. Consequently, they are more attuned to the nuances in juror values or beliefs that may influence juror decision making. Jurors also tend to be less intimidated by lawyers than by judges and, thus, may be more likely to respond candidly and completely to questions posed during voir dire. Recognizing these considerations, more judges are permitting the trial lawyers to conduct part or all of the voir dire.

AUTHORITY

FED. R. CIV. PROC. Rule 47(a) (1996) (authorizing the court to permit the trial attorneys to question prospective jurors directly).

REFERENCES

AMERICAN BAR ASSOCIATION, PRINCIPLES ON JURIES AND JURY TRIALS, Principle 11(B)(2) (recommending that attorneys have the opportunity to examine jurors under the supervision of the court).

JOHN GUINTHER, THE JURY IN AMERICA 49-58 (1988) (summarizing the policy, history, and empirical literature about lawyer- and judge-conducted voir dire).

VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY 71-72 (1986) (discussing the arguments and evidence favoring and opposing lawyer-conducted voir dire).

David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L. J. 245,250-58 (1981) (examining the social-science literature relevant to attorney- versus judge-conducted voir dire).

Opponents of lawyer-conducted voir dire stress that this practice permits lawyers to abuse the voir dire process, converting it into an opportunity to establish rapport, to elicit promises from jurors, to indoctrinate the jury, and to intimidate or embarrass jurors. Permitting lawyers to question potential jurors directly converts jury selection into a part of the adversary process, rather than a routine function of court management and administration. They argue that lawyers have other methods available for eliciting information about jurors (e.g., juror questionnaires) that do not pose as great a risk for abuse. Finally, they claim that attorney-conducted voir dire greatly lengthens the jury selection process.

Judges who grant lawyers a substantial role in voir dire examinations report that setting clear guidelines about appropriate voir dire examination during the pretrial conference curbs excessive or inappropriate advocacy by the lawyers. For example, setting firm time restrictions on voir dire examination, requiring disclosure of the lawyers' expected lines of inquiry at the pretrial hearing, and reviewing the content of juror questionnaires provide the judge with effective tools for exercising appropriate control over the voir dire process. See also § 4.1, Pretrial Limits on Each Party's time at Trial; § 3.3, Questionnaires to Assist Jury Selection: and § 3.4, Privacy Considerations in Voir Dire.

Statistics indicate that about 30% of federal courts and a large percentage of state courts allow or require attorney participation in voir dire. Preliminary results from a national study of jury-trial practices found that attorneys actively participated in voir dire questioning in nearly three-quarters of all trials; only 9% of voir dire proceedings were conducted exclusively by the trial judge.

STUDIES

Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131 (1987) (study findings support the hypothesis that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors).

Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversarial Advocacy*, in THE TRIAL PROCESS 69, 75-92 (Bruce D. Sales ed., 1981) (discussing the conflicting interests of bench and bar in conducting voir dire and describing differences in practice according to regional and jurisdictional characteristics).

Advantages

1. Lawyers have intimate knowledge of the facts and issue of the case. As a result, they are likely to recognize problems of juror bias that often are not immediately apparent to the judge.

2. As advocates on an adversarial proceeding, trial lawyers tend to be highly motivated to search out bias in potential jurors, enabling them to make intelligent challenges, both for cause and for peremptory reasons.

3. Some studies suggest that jurors are less intimidated, and thus respond to voir dire questions more candidly, when lawyers conduct voir dire than when judges conduct voir dire.

4. Permitting lawyers to conduct voir dire impresses on the jury panel the importance of the participation of all parties from the very start of the trial proceedings.

5. Direct participation of counsel in voir dire heightens litigants' perceptions that the trial proceedings are fair and enhances their confidence in the justice system.

Disadvantages

1. Direct participation of counsel in voir dire tends to lengthen the trial proceedings.

2. Without adequate supervision by the trial judge, counsel may use voir dire inappropriately to engage in pretrial argument.

3. Without adequate supervision by the trial judge, lawyers may pose voir dire questions that inappropriately infringe on juror privacy.

§ 3.2 Opening Statements to the Entire Jury Panel

Technique

The trial attorneys make brief, nonargumentative statements to the entire jury panel before the voir dire examination of the prospective jurors by the judge or counsel. By setting the stage for the voir dire questions that follow, these statements provide the jury panel with some indication of the relevance of particular questions and the need for candid responses by the panel members.

Issues

- Do mini-openings by counsel impart more case-related information than the traditional brief synopsis usually read to the jury panel by the judge?
- Does this technique provide a better frame of reference about the case and the questioning process, enabling panel members to respond more appropriately?
- Do opening statements to the entire panel unduly protract the jury selection process?
- What time limitations, if any, should the judge set for opening statements to the panel?
- Will counsel be able and willing to resist the temptation to become argumentative and long-winded, requiring the judge to intervene?
- In what types of cases or litigation issues are opening statements to the panel appropriate?
- What other techniques, if any, should the trial judge employ in conjunction with opening statements to the jury panel?

Procedures

Before trial, the judge and attorneys discuss and decide whether opening statements to the entire jury panel will facilitate jury selection. This technique may be more helpful for cases involving complex or particularly difficult factual issues than for shorter, more routine cases. The trial judge instructs the attorneys that the statements are not an opportunity to engage in pretrial argument. Rather, the statements should inform prospective jurors about the case, including the case theme, the factual context of each party's case, and the issues that are likely to arise in voir dire. Time limits on the length of opening statements prevent these statements from prolonging jury selection excessively.

The trial judge may also require that counsel prepare preliminary jury instructions for distribution to the jury panel in conjunction with the opening statements. See § 5.9, Preinstructing the Jury. Using the combination of written preliminary instructions and verbal opening statements to highlight important trial issues serves a dual purpose. First, the jury panel is more likely to understand the basis for, and respond candidly to, voir dire questioning. Second, the jurors who are ultimately selected will be more attentive to trial testimony and evidence pertaining to those issues.

Before permitting counsel to begin, the judge informs the panel of the statements to be made by counsel, their purpose, and their anticipated length. Counsel then present short, informative statements that are designed to help prospective jurors understand the relevance of the voir dire questions and the need for candid responses to these questions. The judge may supplement the statements of the attorneys with any additional information about the jury selection process before beginning examination of the jury panel.

Little information is available regarding the history and frequency of use of opening statements to the entire jury panel. Arizona and Indiana are the only states known to have institutionalized the practice by court rule; however, judges in a number of jurisdictions have experimented with them or use them regularly. Generally, they report that the disadvantages commonly attributed to this technique are not borne out in practice. They note, however, that some attorneys have difficulty, at least initially, fashioning and delivering a brief, nonargumentative, and properly informative statement intended solely to set the stage for jury selection.

Advantages

1. By providing the jury panel with information about the case, opening statements help prospective jurors understand why particular questions are being asked and why candid responses will help the judge and attorneys identify jurors likely to be impartial.

2. Opening statements to the jury panel may reduce, and possibly eliminate, the need to preface jury selection questions with a description or reference to anticipated evidence—a technique that often provokes an objection and intervention by the judge.

3. The procedure affords the attorneys an early opportunity to introduce themselves, their clients, and their cases. As a result, the transition from judge-conducted voir dire to attorney-conducted voir dire, if the latter is allowed, tends to be smoother and shorter.

Disadvantages

1. If time limits for opening statements are not imposed and enforced, the jury selection process may take appreciably longer than it otherwise would.

2. Lawyers often are tempted to give their complete opening arguments rather than brief, nonargumentative statements designed to alert the panel members to issues likely to arise during voir dire.

3. Judges often have their hands full keeping voir dire within appropriate bounds without adding opportunities for counsel to engage each other in pretrial confrontations.

4. Little or no social-science research has been conducted to demonstrate that opening statements significantly improve the voir dire process either for the judges or attorneys conducting voir dire or for the prospective jurors.

5. The jurors who are ultimately selected will hear some of the same information twice, once during the opening statements to the jury panel and again during the opening arguments by counsel.

AUTHORITY

Ariz. R. Civ. Proc. Rule 47(b)(2) (authorizing the parties to present brief opening statements to the entire jury panel prior to voir dire).

Ind. R. Ct., Jury R., Rule 14(b) (authorizing the court to permit counsel to present brief statements of the facts and issues to the entire panel prior to jury selection).

REFERENCE

Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries 59-61 (1994).

§ 3.3 Case-Specific Questionnaires to Assist Jury Selection

Technique

In appropriate cases, the attorneys prepare juror questionnaires to be distributed to and completed by the jury panel before the commencement of the oral jury selection process. The attorneys use the questionnaire responses to focus their questioning during jury selection and better identify potential juror bias. Courts may also use juror questionnaires to prescreen the jury panel for availability to serve in particularly lengthy trials.

Issues

- Who is responsible for preparing, copying, distributing, and compiling the responses to the juror questionnaires?
- How long or comprehensive should the questionnaires be?
- What level of oversight should the trial judge exercise over the preparation and administration of juror questionnaires?
- What consequences do jurors face for failure to answer the questionnaire accurately or completely?
- How should the attorneys use juror questionnaire responses in the oral jury selection process?
- How much time should the court grant the trial attorneys to review and analyze the questionnaire responses?

Procedures

Case-specific questionnaires are tools that the court and attorneys can use to identify potential juror bias in addition to the traditional oral voir dire or general questionnaire process. This technique permits the trial attorneys to make the most efficient use of the voir dire process to select a fair and impartial jury.

In most jurisdictions, the attorneys for either party can move the court to permit case-specific juror questionnaires. The motion should include a copy of the proposed questionnaire. If the motion is granted, the court's order should note any modifications to the questionnaire and should include any procedural or administrative requirements for the questionnaires, such as the amount of time counsel will have to compile and analyze the responses. The moving party typically prepares the questionnaires and coordinates their administration. After the jury panel completes the questionnaires, the moving party also provides copies of the responses to the court and opposing counsel.

Distribution and administration of the juror questionnaires can be handled in a number of ways. To accommodate the amount of time required to compile and analyze longer, more comprehensive questionnaires, the court can mail the questionnaires to the jury panel with a stamped, self-addressed return envelope. Mailed questionnaires should include instructions about how to complete the questionnaire and the deadline for returning it.

Mailed questionnaires also should include a written oath to be signed by the prospective juror that he or she has personally completed the questionnaire and that the questionnaire responses are true and accurate to the best of his or her knowledge.

For questionnaires that do not require as much time for analysis, the jury panel may be instructed to bring the completed questionnaire with them when they report for jury service. Alternatively, the court clerk or jury manager can distribute the questionnaires at the time the jury panel reports for service. In the latter case, the written oath may be included in the questionnaire, or the court clerk can administer the oath verbally.

The questionnaire should include an introduction that informs the jury panel about the purpose of the questionnaire. The introduction should not make false assurances about the confidentiality of jury panel responses and should also inform jurors about the option to discuss answers privately in person. See § 3.4, Privacy Considerations in Voir Dire. The introduction often provides a brief explanation of the case. Questions included in the questionnaires should be clear, concise, stated in plain English, and easily understood by the jury panel. See also § 5.11, Plain English at Trial, and § 6.2, Plain-English Jury Instructions. Juror questionnaires typically ask jury panel members to answer questions about five basic areas of inquiry:

- Biographical and demographic information;
- Knowledge of the parties in the case, including the attorneys representing the parties and witnesses testifying for the parties;
- Awareness of the case, including firsthand knowledge or knowledge gained from pretrial publicity;
- Opinions about the case, including preexisting attitudes and beliefs about relevant case information; and
- Preexisting attitudes, beliefs, values, and experiences, including prior jury service or prior experience with the justice system as a victim, party, or witnesses.

The attorneys for the parties should develop an effective system for quickly identifying and evaluating questionnaire responses. Overly broad or open-ended questions tend to yield extraneous and often irrelevant information that is difficult and time-consuming to compile and analyze. Using supplemental data sheets to condense important information to one page for quick reference and constructing an electronic database to sort through large quantities of data are two common evaluation methods.

Advantages

1. Juror questionnaires can prevent contamination of the jury panel by hostile jurors. Members of the jury panel who have specific information or strong opinions about the case reveal this information in their responses to the questionnaire,

Disadvantages

1. Constructing and designing juror questionnaires can be difficult and cumbersome, particularly when the specific details of the case require inquiry into a broad range of juror attitudes and characteristics.

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 11(A) (1) (2005) (discussing the use of case-specific questionnaires).

Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loneland & G. Thomas Munsterman, Managing Notorious Trials 183-97 (National Center for State Courts, 1998) (Appendix 8 describes the use of juror questionnaires in *United States v. Marion S. Barry, Jr.*).

V. Hales Starr & Mark McCormick, Jury Selection: An Attorney's Guide to Jury Law and Methods 46-47, 132-33 (2d ed. 1993).

Richard B. Klein, *Low-Tech Automated Jury Instructions*, 35 Judges' J. 36 (Summer 1996) (describing videotaped instructions for the completion of general civil and criminal voir dire questionnaires).

Jeffrey T. Frederick, Mastering Voir Dire and Jury Selection 122-48 (1995) (practitioner's manual for preparing juror questionnaires).

Elissa Krauss & Beth Bonora, eds., Jurywork: Systematic Techniques 2.10[1][iii] (vol. 1, 2d ed. 1995) (describing preparation procedures for voir dire questionnaires).

Floyd J. Fowler, Survey Research Methods (rev. ed. 1988) (a technical manual for questionnaire design and administration).

Lisa Blue, Ted A. Donner & Jane N. Saginaw, Jury Selection: Strategies and Science 8:11-12 (1986) (provides sample jury questionnaires).

Advantages cont.

rather than through verbal statements before the entire jury panel.

2. Juror questionnaires maximize the efficient use of time allotted for voir dire by providing the judge and attorneys with routine biographical information and by identifying panel members with prior knowledge or strong preexisting opinions about the parties or the case. Based on this information, some members of the jury panel may be excused immediately while the trial judge and attorneys begin voir dire with case-relevant and follow-up questions to the remaining panel members.

3. Jury panel responses to written questionnaires may be more expansive and more candid than responses to verbal voir dire questions. Sensitive or personal information concerning prospective jurors can be revealed in their written responses, relieving jury panel members of concern about disclosing sensitive or embarrassing information publicly. Additionally, the use of pretrial questionnaires prevents jury panel members from conforming their responses to the perceived "correct" or majority response of the panel. See also § 3.5, Individual Voir Dire.

Disadvantages cont.

2. Answering juror questionnaires may be difficult or impossible for jury panel members who have poor written communication skills because of disability, lack of education, or limited familiarity with written English. See also § 2.4, Additional Source Lists, and § 2.6, ADA Compliance.

3. The administrative cost associated with distributing questionnaires to the jury panel and copying the responses for the court and opposing counsel can outweigh the benefits of this technique, especially with large jury panels.

STUDY

Dennis Bilecki, *Efficient Method of Jury Selection for Lengthy Trials*, 73 JUDICATURE 43 (June-July 1989) (study of the effect of pre-voir dire questionnaires on the costs associated with jury selection in complex trials).

4. Written responses to questionnaires deprive the trial judge and attorneys of the ability to observe prospective jurors' nonverbal communication during voir dire—an element of questioning on which many judges and attorneys claim to rely to determine the honesty and reliability of the individual's response.

5. A requirement that jury panel members sign a written oath that they have personally answered the questionnaire does not guarantee that the panel member has, in fact, done so. Sometimes a spouse or significant other will complete the questionnaire and fail to reveal important information, especially about juror attitudes and beliefs.

6. The use of pretrial juror questionnaires shifts control of the voir dire process from the trial judge to the attorneys—a result that some trial judges find objectionable, particularly if the technique appears to benefit one party to the detriment of the other or otherwise jeopardizes the appearance of a fair trial.

§ 3.4 Voir Dire in Chambers or at Sidebar

Technique

Voir dire often solicits very personal or potentially embarrassing or harmful information about prospective jurors. To protect juror privacy, the court offers jury panel members the option of responding to voir dire questions in chambers or at sidebar. The offer for private voir dire is extended to the panelists at the beginning of voir dire. If case-specific questionnaires are used, see § 3.3, the questionnaire instructions should inform jurors that they may opt to discuss information orally and in private, rather than in writing on the questionnaire. The use of this technique must adhere to the requirements of *Press Enterprises v. Superior Courts* (I), 104 S. Ct. 819 (1984).

Issues

- Does conducting voir dire in chambers or at sidebar place unwarranted restrictions on public or media access to judicial proceedings?
- How should the court inform the jury panel of the option to discuss private information in chambers or at sidebar?
- How should the court determine whether information solicited during voir dire is sufficiently sensitive to warrant private proceedings?
- Following the disclosure of a juror's private information during private voir dire, what criteria should the court consider in determining whether there exists a compelling justification for withholding or redacting the information from the record?

AUTHORITY

Press Enterprises v. Superior Courts (I), 104 S. Ct. 819 (1984) (holding that, absent a compelling justification, the First Amendment guarantees of open criminal proceedings apply to voir dire).

Pantos v. City and County of San Francisco, 198 Cal. Rptr. 489 (1984) (holding that the master list of qualified jurors, including subsidiary summons lists, are public records subject to public inspection).

Copley Press, Inc v. San Diego County Superior Court, 278 Cal. Rptr. 443 (1991) (requiring courts to inform venire members that responses to voir dire questionnaires are public records and cannot be held confidential).

People v. Simms, 29 Cal. Rptr. 2d 436 (2d Dist. 1994) (holding that a criminal defendant does not require prior court authorization to obtain the name, address, and telephone number of a juror).

REFERENCES

American Bar Association, Principles on Juries and Jury Trials 35-41 (2005) (Principle 7 addresses issues related to juror privacy).

Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 Judicature 18, 23-25, 44 (2001) (discussing jurors' different privacy interests and how courts can appropriately protect those interests).

Procedures

At the beginning of jury selection, the judge informs prospective jurors that they may respond to any voir dire questions either at sidebar or in the judge's chambers. The decision of whether the subject matter is sufficiently personal to warrant a private discussion should be left to the individual jurors. Some jurors are perfectly comfortable discussing private information before the entire panel; others are very uncomfortable discussing even routine and innocuous information in public. Some types of questions, such as those dealing with personal experience with sexual assault or child abuse, should routinely be done in private. Depending on the method of voir dire and the layout of the courtroom, it may be more convenient to ask jurors who wish to discuss private information to wait until a recess, rather than bringing each juror up to the bench or into chambers individually.

Private voir dire is still conducted on the record and with counsel for both parties present. In criminal trials, the defendant also has a right to be present for private voir dire, which may be awkward or even intimidating for jurors. If the defendant insists on being present for these discussions, it may be advisable to wait until a recess and conduct the discussion in the courtroom. Private voir dire, whether conducted in chambers or at sidebar, is subject to the legal standards set forth in *Press Enterprises v. Superior Courts*. Before conducting closed or private proceedings, the court must explore alternatives to

closed proceedings (such as securing the juror's consent to disclosure) and determine whether the juror has a compelling privacy interest that outweighs the presumption favoring public access to judicial proceedings. Compelling privacy interests of jurors include protection from physical harm or the threat of physical harm.

The judge has several alternative methods of protecting juror privacy if he or she finds that a juror has a significant privacy interest. The court may excuse a juror from jury service. He or she may conduct voir dire in camera, but release all or part of the transcript, depending on the nature of the information deemed to be private. For example, the full transcript may be released; the name of the juror may be withheld, with the remainder of the transcript released; or selected parts of the record may be sealed to protect the juror's privacy.

Advantages

1. In-camera voir dire protects jurors from the embarrassment or harm that might result from revealing private information in open court.

2. In-camera voir dire increases juror's willingness to respond candidly to voir dire questions, thus enhancing the likelihood of selecting an impartial jury.

Disadvantages

1. In-camera voir dire infringes on public and media access to judicial proceedings under the First Amendment.

2. In-camera voir dire may not result in more-honest responses to voir dire questions, insofar that the juror understands that all or part of the in-camera transcript will be released following the closed proceedings.

Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loveland & G. Thomas Munsterman, Managing Notorious Trials 113-34 (National Center for State Courts, 1998) (Appendix 1 is a primer on media-access rights to judicial proceedings, including voir dire).

Nancy A. Novak, Note, *Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 San Diego Just. J. 215 (1995) (examining whether jurors have a constitutional right to privacy).

Jennifer S. Buckley, Note, Press Enterprise Co. v. Superior Court: *A Juror's Right to Privacy*, 1985 Det C. L. Rev. 449 (1985) (describing the difficulty courts face in protecting juror privacy following the court's decision in *Press Enterprise*).

Susan L. Greenberg, Note, *Spotlight on the Jury: Trial Publicity and Juror Privacy*, 6 Comm./Ent. L. J. 369 (1984) (proposing that courts institute policies to secure a juror's consent to be identified before the media may release that information to the public).

STUDIES

Mary R. Rose, *Expectations of Privacy? Jurors' Views of Voir Dire Questions*, 85 Judicature 10 (2001) (study examining jurors' views of the intrusiveness of different types of voir dire questions).

§ 3.5 Individual Voir Dire

Technique

Members of the jury panel are sequestered from one another and questioned individually by the judge, attorneys, or both. Sequestering the panel members during voir dire encourages greater self-disclosure and enhances the likelihood of revealing juror bias without the potential risk of "tainting" the jury panel with the panel member's responses (e.g., concerning the panel member's knowledge of the case through pretrial publicity). Individual voir dire also protects juror privacy. See also § 3.4, Voir Dire in Chambers or at Sidebar. This technique is especially helpful in high-profile trials.

Issues

- Under what circumstances is individualized voir dire appropriate?
- What is the effect of individualized voir dire on the length of the trial procedures?

Procedures

Voir dire typically takes place in a group setting in which the panel members respond to questions posed by the trial judge or attorneys in the presence of other panel members. Studies about group conformity have demonstrated that to avoid calling attention to themselves, panel members subjected to collective questioning do not willingly volunteer information about themselves or reveal opinions that deviate from those of the other panel members. Sequestered and individualized voir dire prevents panel members from looking to one another for the "correct answers," thus encouraging more truthful self-disclosure by panel members. One study of individual voir dire found that as many as one in four prospective jurors disclosed case-relevant information during individual voir dire that they had not disclosed during voir dire proceedings with the entire panel. Nearly one-third of those jurors were subsequently removed for cause.

Collective questioning during voir dire is an appropriate technique for posing preliminary questions to the jury panel (e.g., "Does any member of this jury panel know the parties or their attorneys?" "Does any member of this jury panel have personal knowledge of the case?"). Follow-up questions that inquire of the opinions of the panel members concerning issues relevant to the case are posed to panel members individually and out of the presence of one another. Conducting individualized voir dire in a setting less formal that the courtroom (e.g., the jury room or the chambers of the trial judge) also enhances the panel members' willingness to disclose personal information. See § 3.4, Voir Dire in Chambers or at Sidebar. The use of supplemental juror questionnaires can facilitate this process by permitting individualized panel responses that are shielded from other panel members. See § 3.3, Case-Specific Questionnaires to Assist Jury Selection. A modified version of this method is to pose follow-up voir dire questions to smaller groups of panel members who responded in a similar manner to preliminary questions.

REFERENCES

Elissa Krauss & Beth Bonora, eds., Jurywork: Systematic Techniques 2.20[1][c][I] (vol. 1, 2d ed. 1995) (describing the technique).

American Bar Association, Project on Standards for Criminal Justice Standards Relating to Fair Trial and Free Press 130-36 (1983) (Standard 3.4(a) recommends individualized voir dire for cases involving a high risk that members of the jury panel may have been exposed to prejudicial pretrial media reports).

David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L. J. 245,258-61 (1981) (examining the social-science literature relevant to group conformity and its significance during voir dire).

Advantages

1. Individualized voir dire typically takes place in a less formal setting and requires a less formal conversational tone by the judge and attorneys. The relative lack of formality tends to place panel members more at ease, encouraging them to respond to questions more candidly than they might otherwise respond.

2. Individualized voir dire takes place out of the presence of other panel members, relieving panel members' discomfort about revealing personal information in front of each other. This technique also prevents individuals from overhearing the responses of the other panel members and conforming their answers to those perceived to be "correct" or held by the majority of the panel.

Disadvantage

Individualized voir dire may lengthen voir dire, particularly when alternative techniques, such as supplemental juror questionnaires, can accomplish the same objectives with less effort.

STUDY

Gregory E. Mize, *Be Cautious of the Quiet Ones*, VOIR DIRE (2003) (available at http://www.abota.org/publications/article.asp?newsid=94).

Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 CT. REV. 10 (Spring 1999) (finding that one in four jurors questioned individually disclosed case-relevant information that they had not disclosed during questioning with the full panel).

Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variation in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & BEHAV. 1 (1982) (study results showed that bias in potential jurors is best revealed when members of the jury panel are sequestered and examined individually).

§ 3.6 *Batson* Enforcement

Technique

In accordance with the three-step inquiry outlined in *Batson v. Kentucky*, the judge gives the opponent of a peremptory strike an opportunity to establish a prima facie case that the peremptory is being exercised in a discriminatory fashion based on race, ethnicity, or gender. If the attorney challenging the peremptory meets this burden, the judge permits the proponent of the peremptory to offer a nondiscrimatory justification for the strike. The judge then determines whether the justification offered is nondiscrimatory or pretextual. In making this determination, the judge may require that the attorney offering the justification fully explain his or her reasons for exercising the peremptory. This inquiry takes place on the record, but out of the presence or hearing of the jury. When ruling on the peremptory challenge, the judge clearly states the reasons supporting his or her finding that the peremptory is either neutral or pretextual.

AUTHORITY

U.S. v. Esparza-Gonzales, No. 04-10267 (9th Cir. Filed Sept. 6, 2005) (ruling that the prosecution's waiver of peremptory challenges, which removed the only prospective juror with a Latino surname, could support a prima-facie case of intentional discrimination for purposes of a *Batson* challenge).

Miller-El v. Dretke, No. 03-9659, U.S. S Ct. (June 13, 2005) (holding that the court may permissibly infer discriminatory intent for purposes of a *Batson* challenge based on the proffered reasons for the strike in the context of the voir dire of the entire jury panel).

Minetos v. City of New York, 925 F. Supp. 177 (1996) (barring the use of peremptory challenges on the grounds that they are used in an inherently discriminatory fashion and, thus, violate equal protection).

Purkett v. Elem, 115 S. Ct. 1769 (1995) (*per curiam*) (explaining that the burden of persuasion regarding racial motivation rests within, and never shifts from, the opponent of the strike).

J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) (extending *Batson* to prohibit exercise of peremptory strikes for a discrimatory purpose based on gender).

Issues

- How closely should the judge inquire into "implausible or fantastic" or "silly or superstitious" justifications that are offered to show that the peremptory is made in a nondiscrimatory fashion?
- Does the trial judge have an obligation to raise a *Batson* challenge if he or she observes a pattern of discriminatory peremptory strikes, even if the opposing counsel fails to do so?
- Have lawyers moved from offering race- and gender-based reasons for peremptory strikes to reasons that sound facially neutral but, in fact, mask underlying discrimination based on race or gender?
- What should judges do about peremptory strikes exercised on the basis of discrimination toward other groups, such as those based on religion, age, or sexual orientation, that are not currently recognized as a protected class under *Batson* jurisprudence?
- Insofar that judges will differ in determining whether a justification offered to support a peremptory strike is neutral or pretextual, can judges avoid inconsistency or the appearance of capriciousness in applying *Batson*?
- If, after applying the *Batson* test, the trial judge grants a peremptory challenge, should he or she replace the struck juror with a prospective juror of the same race or gender of the previously struck juror?
- Does a party's waiver of the peremptory challenge have the same effect as the exercise of a peremptory challenge?

Procedures

Batson v. Kentucky established a three-step inquiry for evaluating whether a peremptory strike is racially discriminatory and, thus, impermissible under the Equal Protection Clause of the Fourteenth Amendment. First, the party objecting to the peremptory challenge is required to establish a prima facie case of purposeful discrimination. The burden then shifts to the proponent of the peremptory challenge to offer a nondiscriminatory reason for exercising the peremptory. The judge must then determine whether the reason so offered is nondiscriminatory or pretextual. Although the trial judge has substantial discretion to determine the credibility of the proffered justification for peremptory challenges, these must be consistent with the trial record. In *Miller-El v. Dretke*, for example, the U.S. Supreme Court found that the proffered reasons for removing some jurors applied equally to jurors who were not removed. Moreover, the content of the questions posed to prospective jurors differed based on the jurors' race and gender. The Court held that both of these factors supported an inference that peremptory challenges had been exercised in a racially discriminatory manner.

To apply *Batson*, the judge provides an opportunity to the proponent of the peremptory to offer a race- and gender-neutral justification before ruling on the peremptory challenge. Some judges require the attorneys to submit peremptory challenges in writing to proponents of the peremptory before presenting them to the judge. Other judges inquire whether there are any objections to peremptory strikes, or pause to allow objections, before reading the names of stricken jurors. Any objections and discussion concerning the objections should be made on the record and outside the presence of the jurors.

The judge may inquire further into the justification offered by the proponent of the peremptory to determine whether the justification is pretextual. At each step of the *Batson* inquiry, the judge should state the facts on which he or she relied in making his or her findings (e.g., that the attorney challenging the peremptory strike has established a prima facie case of purposeful discrimination, that the proponent of the peremptory has offered a race- and gender-neutral, or pretextual, justification for exercising the peremptory).

If by waiving its remaining peremptory challenges, a party effectively excludes a previously identified juror (e.g., the parties have access to the randomized list and can identify the next juror to be called into the jury box for questioning), the waiver can be challenged under *Batson*.

Georgia v. McCollum, 112 S. Ct. 2348 (1992) (extending the *Batson* prohibition of the state's exercise of peremptory strikes for racially discriminatory purpose to the defendant's exercise of peremptory strikes).

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* to civil trials).

Powers v. Ohio, 499 U.S. 400 (1991) (holding that purposeful racial discrimination in the exercise of peremptory strike violates equal protection regardless of whether the defendant is of the same race as the stricken jurors).

Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting the state from using its peremptory strikes in a criminal jury trial to purposely exclude potential jurors on grounds of race).

REFERENCES

Shari S. Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 Cornell J. L. & Pub. Pol'y 77 (1997).

Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041 (1995) (proposing the elimination of peremptory strikes as inconsistent with the role of the jury as a reflection of community values and beliefs).

Advantages

1. Ensuring that all discussion concerning peremptory challenges, including the factual basis for the judge's ruling, takes place on the record permits appellate courts to review the decision without having to second-guess the actions of the trial judge.

2. Further inquiry by the judge into justifications offered by the proponent of peremptory strikes discourages the practice of obscuring discriminatory peremptory strikes with facially neutral justifications, thus enhancing the representatives of the jury.

3. Ensuring that jury selection is untainted by discrimination enhances the perception of the parties and the public that the court is a fair tribunal.

Disadvantages

1. Conducting each step of the *Batson* inquiry into the basis for exercising peremptory strikes may delay the voir dire proceedings.

2. Insofar that a peremptory strike is one that requires no explanation, inquiring into the basis for a peremptory strike is an inherent contradiction. It also intrudes on the judgment of the proponent of the peremptory and compromises the role of the judge as a neutral arbiter.

3. By requiring a nondiscriminatory justification for exercising peremptory strikes, the trial judge potentially forces the trial attorney to disclose his or her trial strategy or other information protected by work-product privilege.

Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, Wis. L. Rev. 514 (1994) (demonstrating that the procedures instituted in *Batson* have failed to reveal racially motivated peremptory strikes).

Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 163-211 (1989) (examines *Batson* and concludes that the Equal Protection Clause and peremptory challenges are incompatible).

STUDIES

Paula L. Hannaford-Agor & Nicole L. Waters, Examining Voir Dire in California (August 2004) (available at http://www.courtinfo.ca.gov/jury/reference/documents/voir_dire_report.pdf).

Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447 (1996) (comprehensive study analyzing the reasons proffered after a *Batson* challenge for use of peremptory challenges and concluding that the majority of peremptory strikes could be sustained as a strike for cause).

§ 3.7 Reducing or Eliminating Peremptory Challenges

Technique

By statute, court rule, or case law, the jurisdiction either reduces the number of peremptory challenges available to each party during voir dire or eliminates the use of peremptory challenges altogether.

Issues

- How will the reduction or elimination of peremptory challenges affect the standard for granting challenges for cause? Will judges feel compelled to grant challenges for cause for only the appearance of bias? Or will judges not adjust their standards at all, leaving potentially biased jurors on the panel?
- What effect will reducing or eliminating peremptory challenges have on the scope of inquiry during voir dire?
- Will reducing or eliminating peremptory challenges increase or decrease the likelihood of impaneling an impartial jury?
- Will reducing or eliminating peremptory challenges increase the number of appeals based on juror bias discovered after the verdict has been returned?
- How will reducing or eliminating peremptory challenges affect jury administration?
- What effect will reducing or eliminating peremptory challenges have on public confidence in the justice system?
- Will reducing or eliminating peremptory challenges improve the quality of jury deliberations?

Procedures

The peremptory challenge, a procedure used to remove people suspected of bias from the jury, is deeply rooted in the American justice system. Historically, the peremptory challenge was established by statute as a protective mechanism for criminal defendants. For both civil and criminal trials, peremptory challenges operated as a check against nonrandom selection, a common characteristic of "keyman" jury selection systems in use through the middle of the twentieth century.

Typically, both parties are permitted to exercise a certain number of peremptory challenges when selecting the jury, although some jurisdictions allot a greater number of peremptory challenges to criminal defendants. The number of peremptory challenges varies greatly among jurisdictions—up to twenty for criminal defendants in noncapital felony trials (ten in misdemeanor trials) and up to eight per side in civil litigation.

Recently, some jurisdictions have begun to question whether the traditional justifications for peremptory challenges continue to exist given the changes in the jury selection process. Only one court has issued an outright prohibition on peremptory challenges thus far. However, a number of jurisdictions have proposed reducing the

AUTHORITY

Miller-El v. Dretke, No. 03-9659, U.S. S Ct. (June 13, 2005) (Breyer, J., in concurrence, advocating that the Court reconsider both the *Batson* test and the peremptory challenge system as a whole).

Minetos v. City University of New York, 925 F. Supp. 177 (1996) (ruling that peremptory challenges are inherently discriminatory and unconstitutional under the Equal Protection Clause).

Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., in concurrence, argued for the elimination of peremptory challenges from the criminal justice system).

Ross v. Oklahoma, 487 U.S. 81 (1988) (reaffirming in dicta that peremptory challenges are not constitutionally mandated, but serve only as a means to select an impartial jury).

REFERENCES

Judicial Council of California, Task Force on Jury System Improvements, Final Report 47-52 (April 2004) (recommending a reduction in the number of peremptory challenges from twenty to twelve in capital felony trials, from ten to six in felony trials, and from six to three in misdemeanor and civil trials).

Council for Court Excellence, Juries for the Year 2000 and Beyound: Proposals to Improve the Jury Systems in Washington, DC (1998) (Recommendation 19 calls for the elimination or drastic reduction of peremptory challenges).

number of peremptory challenges, especially in capital criminal cases, where the number of challenges varies widely. Maryland, for example, reduced the number of peremptory challenges to reduce expenditures for juror fees and costs of jury administration. California is currently considering a proposal to reduce the number of peremptory challenges, both to improve public trust and confidence in the jury system and to reduce the administrative costs associated with jury operations. Other jurisdictions have adjusted the number of peremptory challenges in an effort to ensure parity between the parties (e.g., prosecution/defendant, plaintiff/defendant).

The debate over the use of peremptory challenges has existed for a substantial period of time. However, recent developments have contributed to new interest in proposals to reduce or eliminate peremptory challenges. Proponents of these ideas cite logistical and philosophical advantages. For example, some proponents favor reducing or eliminating peremptory challenges on the grounds that attorneys almost never have sufficient information about potential jurors to make intelligent or effective use of peremptory challenges. Moreover, peremptory challenges contribute to judicial unwillingness to remove jurors for cause. Finally, the use of jury consultants in selecting the jury tends to perpetuate the belief that wealthier litigants have an unfair advantage at trial, thus undermining public confidence in the justice system.

Other proponents argue that the peremptory challenges are inherently discriminatory, notwithstanding *Batson* procedures for countering these abuses. See § 3.6, *Batson* Enforcement. They cite the proliferation of appeals seeking to extend *Batson* beyond discrimination based on race or gender—for example, to ethnic background, religious belief, disability, and other characteristics—as evidence that peremptory challenges are used only to exclude jurors based on characteristics perceived as unsympathetic to the challenging party. They view peremptory challenges as fundamentally inconsistent with the goal of seating juries representative of the communities in which they are impaneled. It makes little sense, they argue, to ensure that the jury panel reflects the demographic characteristics of the jurisdiction while permitting the parties to handpick a jury that does not reflect these characteristics. Finally, some proponents argue that reducing or eliminating peremptory challenges will reduce the number of individuals summoned for jury duty, thus making more effective use of jurors' time and court resources.

Opponents of these proposals also raise compelling philosophical and practical reasons to support their position. They maintain that the traditional justification for peremptory challenges—ensuring an unbiased jury—continues to be valid. The opportunity to participate in the selection of the jury increases public confidence in the legitimacy of the verdict and the likelihood that the parties will be satisfied that they had their day in court. Opponents also question many of the benefits and legal grounds claimed by proponents of proposals to reduce or eliminate peremptory challenges. They argue, for example, that any efficiencies gained by reducing the number of individuals summoned for jury duty would be lost because of increases in the length and complexity of the jury selection process. Trial attorneys would need to engage in more intensive questioning of potential jurors to determine whether a challenge for cause is warranted. Opponents also claim that skilled attorneys use peremptory challenges very effectively to eliminate juror bias. Reducing or eliminating peremptory challenges, therefore, interferes with attorneys' legitimate trial strategies.

Finally, opponents have expressed three legally based concerns about reducing or eliminating peremptory challenges. Although they acknowledge the legal basis for representative jury panels, they point out that neither federal nor state law (constitutional or statutory) mandates that the juries from these panels be representative of the

Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi L. Rev. 809 (1997).

Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041 (1995) (proposing the elimination of peremptory strikes as inconsistent with the role of the jury as a reflection of community values and beliefs).

Albert W. Alshuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi L. Rev. 153, 163-211 (1989) (examines *Batson* and concludes that the Equal Protection Clause and peremptory challenges are incompatible).

STUDIES

Paula L. Hannaford-Agor & Nicole L. Waters, Examining Voir Dire in California (August 2005) (study examining the potential impact of a reduction in the number of peremptory challenges, available at http://www.courtinfo.ca.gov/jury/reference/documents/voir_dire_report.pdf).

communities from which they are drawn. Moreover, they caution that this proposal would prompt judges to lower the standard for granting a challenge for cause, muddling the distinction between challenges for cause and peremptory strikes. They also warn that post-verdict investigations of jurors—and corresponding appeals based on post-verdict discovery of juror bias—are likely to increase.

Advantages

1. Reducing or eliminating peremptory challenges limits the opportunities for trial attorneys to exercise discriminatory peremptory challenges in an impermissible fashion.

2. Reducing or eliminating peremptory challenges enhances the representativeness of the jury.

3. Reducing or eliminating peremptory challenges makes more efficient use of the individuals summoned for jury service, increasing juror satisfaction and reducing the administrative costs associated with calling extra people.

4. Reducing or eliminating peremptory challenges may reduce the use of jury consultants by some litigants, thus reducing the appearance that wealthy litigants have an unfair advantage.

Disadvantages

1. Reducing or eliminating peremptory challenges limits attorneys' ability to remove jurors suspected of bias from the jury panel.

2. Reducing or eliminating peremptory challenges would lengthen the voir dire process by prompting attorneys to engage in more intensive questioning of jurors to determine if they should challenge for cause.

3. Reducing or eliminating peremptory challenges would prompt judges to lower the threshold for granting motions to strike for cause, creating uncertainty and disparities among jurisdictions as to what constitutes grounds to support a strike for cause.

4. Reducing or eliminating peremptory challenges prevents the parties from participating fully in jury selection, undermining the appearance of a fair trial and public confidence in the verdict.

Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447 (1996) (comprehensive study analyzing the reasons proffered after a *Batson* challenge for use of peremptory challenges and concluding that the majority of peremptory strikes could be sustained as a strike for cause).

Hans Zeisel & Shari S. Diamond, *Effect of Peremptory Challenges on Jury and Verdict*, 30 Stan. L. Rev. 491 (1978) (examining the effectiveness of voir dire in actually achieving an unbiased jury).

Shari S. Diamond & Hans Zeisel, *A Courtroom Experiment on Jury Selection and Decision-Making*, 1 Personality and Soc. Psychol. Bull. 276 (1974) (study finding a difference in the acquittal rates of actual juries as compared to rates of mock juries composed of peremptorily challenged jurors).

§ 3.8 Routine Use of Anonymous Juries

Technique

As a matter of routine practice, the court withholds the names, addresses, and other identifying information about jurors and their families from the parties, their counsel, the public, and the media. This technique can be used for either civil or criminal trials.

Issues

- Does anonymity affect the jurors' honesty during voir dire?
- Does anonymity affect jurors' commitment to personal beliefs?
- What effect does anonymity have on juror deliberations and verdicts?
- Do anonymous juries feel less responsible for their verdicts or take their duties less seriously?
- Do anonymous juries deprive criminal defendants of the presumption of innocence?
- Do anonymous juries deprive criminal defendants of the right to an impartial jury?
- Do anonymous juries unconstitutionally interfere with public and media access to judicial proceedings under the First Amendment?

Procedures

The term "anonymous jury" describes a wide variety of court practices and degrees of anonymity. The greatest degree is achieved when only the court has access to identifying information about jurors; no information is provided to the lawyers or parties, much less to the public or press, and the restrictions on access to juror information extend indefinitely. A less severe variation occurs when the court and counsel have access to identifying information, but not the parties, the public, or the press. Still less restrictive is affording access to juror information to counsel and the parties, but not the public or press, again indefinitely. At the least restrictive end of the continuum are cases in which the court, counsel, and parties have access before and during trial, but the public and press are not given access until sometime after the verdict is announced.

Many courts have used anonymous juries for cases in which disclosure of the jurors' identities places them at risk of physical harm or intimidation. However, this selective use of anonymous juries has a potential prejudicial effect, especially in criminal trials, insofar that jurors may perceive the defendant to be an unusually dangerous individual. Routine use of anonymous juries, in contrast, does not carry this stigma.

To impanel an anonymous jury, the court assigns numbers to all persons called for jury service. This number functions as the juror's identification number for the entire term of the jury service. The summons for jury service instructs each member of the jury panel to report to court and to identify him- or herself using the assigned number. Alternatively, the court assigns the juror identification number when the jury panel member first reports for jury service. All references to the juror (e.g., in jury questionnaires, voir dire, and trial

proceedings) that are accessible to the parties, their counsel, or the public or media are made according to this identification number. Although identifying information about individual jurors is kept confidential, it is important that the jury management system keep accurate records to verify service for employers and for future summoning purposes.

When used routinely, this technique relieves jurors' suspicions that criminal defendants are particularly dangerous, thus eliminating potential prejudice. The judge explains to the members of the jury panel that this technique is a routine practice of the court adopted to protect their privacy from intrusions by anyone with an interest in the case, including parties, counsel, or the media. The judge instructs to prospective jurors that following their release from jury service, they are free to disclose their identities, but for the duration of any court proceedings they should refrain from doing so. See also § 7.1, Advice Regarding Post-Verdict Conversations.

The court discloses a juror's name to the parties or their counsel only on a showing that the juror's identity is likely to lead to evidence sufficient to impeach the verdict or sustain a challenge for cause. The parties of their counsel must also demonstrate that disclosure of the juror's name is needed to provide the court with adequate information to rule on a motion for a new trial or a motion to excuse the juror. The standards established in federal cases for granting posttrial interviews or hearings (e.g., requiring a preliminary showing of juror misconduct) might serve as a basis for developing standards for disclosing a juror's name. For cases in which the media request post-verdict access to jurors, the court discloses a juror's name only if the juror consents to the disclosure.

California is the only jurisdiction known to have implemented anonymity procedures statewide. Jurors are identified only by their juror number during trial, and identifying information about jurors is sealed at the completion of the trial. Access to that information may only be released after a showing of good cause or with the jurors' consent.

AUTHORITY

18 U.S.C. 3432 (Supp. 1996) (authorizing the use of anonymous juries in capital cases to protect the life or safety of the jurors and their families).

Cal. Civ. Proc. Code § 237 (2005) (establishing procedures to seal the names and identifying information of jurors in criminal proceedings at the completion of the trial).

Hamer v. United States, 259 F.2d 274 (9th Cir 1958) (holding that use of an anonymous jury did not deprive the defendant of his Sixth Amendment rights since voir dire was sufficient to ensure the selection of an impartial jury).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 11(H) (discouraging the use of anonymous juries except in compelling circumstances).

G. Thomas Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock: The Continued Evolution of Jury Reform*, Judges' J. 10, 12-14 (Fall 2004).

Supreme Court of Arizona, Supplemental Report of the Jury Practices and Procedures Committee Concerning Juror Anonymity (March 2003) (recommending that jurors not be identified by name when polling the jury).

Advantages

1. Anonymous juries increase jurors' willingness to respond honestly to voir dire questions, thus enhancing the likelihood of selecting an impartial jury.

2. Anonymous juries relieve jurors' fears of retaliation for potentially unpopular verdicts, thus improving the quality of jury deliberations and the fairness of verdicts.

3. Anonymous juries safeguard jurors from intimidation during trials.

4. Anonymous juries may reduce the need to sequester juries.

Disadvantages

1. Anonymous juries increase jurors' suspicions that particular parties, especially criminal defendants, are dangerous.

2. Anonymous juries may feel less responsible for their verdicts.

3. Anonymous jury systems complicate jury administration.

4. Excessive post-verdict restrictions on access to jurors' names prevent trial counsel and independent researchers from engaging in legitimate self-education and jury research.

Judicious Use of Juror Anonymity, 86 JUDICATURE 180 (2003) (editorial advising courts to use anonymous juries only in the limited types of circumstances for which that technique was developed).

Paula L. Hannaford-Agor, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001) (discussing the implications of various techniques, including anonymous juries, to protect juror privacy).

J. CLARK KELSO, REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT, 33-36 (Judicial Council of California, 1996) (recommending that the California legislature proscribe anonymous juries in all cases).

Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996) (arguing that routine withholding of jurors' names and other identifying information does not violate the First or Sixth Amendments).

RELATED APPENDIX

Appendix 2: Suggested Procedures for the Management of Anonymous Juries.

§ 3.9 Nondesignation of Alternates and Jurors

Technique

Both jurors and alternates selected from the jury panel sit in the jury box and hear the entire trial. Jurors and alternates are not informed of their status until all parties have presented their evidence and closing arguments and the judge has given final instructions. The jurors are then identified and begin deliberations while the alternates are released from the jury service.

An alternative method is to select a "jury," the size of which is equal to the total number of jurors and alternates that would ordinarily be selected, without making any distinctions between jurors and alternates. Jurors and alternates are selected randomly after both parties have presented their evidence and closing arguments and the judge has given final instructions.

In either case, the persons serving on the jury do not know until the end of the trial who will be selected to deliberate, resulting in greater attentiveness to the trial proceedings by all of them.

Issues

- Should alternates know from the beginning of the trial that they are so designated?
- Is it deceptive to designate jurors and alternates without informing them of their status?
- Does this technique cause resentment by alternates that might affect their willingness to serve as jurors in subsequent trials?
- Are alternates more attentive during the trial proceedings if they are not informed that they will not be included in deliberations?

Procedures

There are two separate methods associated with this technique. Under the first method, the jurors and alternates are designated by the trial attorneys during voir dire. For example, a common practice in Wisconsin for designating the alternate is to use the last picked juror who survives peremptory challenges. Their status as either jurors or alternates is not revealed until the jury is ready to deliberate, however. In that method, the attorneys can plan their trial strategy around their knowledge of the juror and alternate composition. Immediately before deliberations, the judge dismisses the alternate, and the remaining jurors retire to deliberate.

Under the second method, the trial judge and attorneys make no distinction between the jurors and alternates until the end of the trial. The number of "jurors" hearing the evidence is equal to the total number of jurors and alternates that would normally be selected for the trial. After both parties have rested, the deliberating jurors are selected in one of two ways. Alternates can be selected "by lot"—that is, jurors in excess of the maximum number permitted to deliberate are excused randomly by drawing their names or jury identification numbers. Alternatively, the court permits the trial attorneys to exercise a limited number of additional peremptory challenges immediately before final instructions.

A third option in civil trials only is to permit all all seated jurors and alternates to deliberate. See § 3.10, Variable Jury Size/No Alternate Jurors.

The trial judge and attorneys should consider how jurors are likely to interpret the choice of selection procedures for designating jurors and alternates as well as how the trial judge explains and justifies this process.

Advantages

1. Jurors take jury service more seriously and are more attentive to the trial proceedings when they believe that they will be required to deliberate after both parties present their case.

2. Alternates do not perceive themselves as second-class citizens as a result of their status.

3. When the designation of jurors and alternates is made by random drawing after both parties have rested, all jurors are given an equal opportunity to serve.

4. When the designation of jurors and alternates is made by the exercise of additional peremptory strikes, the attorneys have the opportunity to dismiss a juror who has not paid attention during the trial or who has shown some other type of bias that may affect his or her ability to deliberate fairly.

Disadvantages

1. Jurors may feel dissatisfaction, frustration, or resentment for being dismissed before deliberations after having paid close attention during the trial proceedings.

2. Keeping the designation of jurors and alternates a secret may cause them to feel betrayed, possibly affecting how the jurors who ultimately deliberate view the trial judge and attorneys.

3. When the designation of jurors is made by the exercise of additional peremptory strikes, jurors may feel apprehensive or self-conscious throughout the trial knowing that they may be excused before deliberations. Alternates are more likely to take the strike personally than they would had it occurred at the beginning of the trial. Other jurors, hoping to be excused from deliberations, may intentionally fail to pay attention or purposefully demonstrate bias during the trial proceedings.

4. The opportunity to strike alternates using additional peremptory challenges may prompt the trial attorneys to continue to investigate jurors after the trial has commenced, creating an additional source of tension throughout the trial. This opportunity also could affect the timing of objections to the selection process.

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 11(G)(2) (the status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberations).

Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in Verdict: Assissing the Civil Jury System 341, 354-55 (Robert E. Litan ed., 1993) (describing techniques involving alternate jurors and jury sizes).

§ 3.10 Variable Jury Size/No Alternate Jurors

Technique

A jury is selected that is larger than a given minimum jury size. If a juror is excused during the trial, the jury size is reduced. All remaining jurors deliberate. A minimum jury size is set by law, below which the jury is no longer considered viable. This technique is recommended only for civil trials.

Issue

- Does variable jury size affect the verdict or degree of proof required by the parties?

Procedures

Rather than selecting a given number of jurors plus a number of alternates, the court impanels a jury that is equal in size to the jurors plus the alternates. All are sworn as trial jurors. If a juror must be excused during the trial, the trial proceeds with the smaller jury. A minimum jury size is established by statute or court rule to ensure that the jury does not fall below the constitutionally proscribed number of jurors. This technique is routinely used in civil trials in federal court and in Massachusetts.

Theoretically, an increase in the jury size would increase the difficulty in obtaining convictions in criminal cases because the evidence might have to be more persuasive to convince a larger number of jurors. Consequently, this technique is recommended only for civil trials.

AUTHORITY

FED. R. CIV. PROC. Rule 48 (1996) (providing for juries consisting of six to twelve jurors and no alternates).

Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a criminal conviction rendered by a jury consisting of fewer than six persons constitutes a denial of due process).

Advantages

1. All persons selected are active jurors. The jury is a unit from the beginning of the trial.

2. The same level of scrutiny is applied to the selection of all the jurors.

Disadvantage

In criminal trials, the difficulty in obtaining convictions increases as the number of jurors increases because of the higher standard of proof.

§ 3.11 "Struck" Versus "Strike-and-Replace" Method of Jury Selection

Technique

The traditional "strike-and-replace" method of jury selection involves the questioning of a small group of venire members, usually in groups of six to eight at a time, physically replacing those who are struck for cause and by peremptory challenge with others on the panel until a jury is formed. Rather than follow this method, many courts are turning to the "struck" jury system. This system requires the questioning and participation of the whole voir dire panel, followed by peremptory challenges made out of the presence of the prospective jurors.

Issues

- What effect does the jury selection method have on the amount of time needed to impanel a jury?
- Under the strike-and-replace method, are counsel permitted to exercise peremptory challenges against prospective jurors if they have previously waived the opportunity to do so (strike-back option)?
- Under the strike-and-replace method, are counsel required to exercise all of their peremptory challenges?
- What is the legal effect of waiving one's peremptory challenges?
- Which method of jury selection is most efficient?
- Is either method more effective for identifying prospective jurors who should be removed for cause?
- What do prospective jurors think about these methods?

Procedure

Though there are diverse methods of selecting a jury, the "strike-and-replace" or "jury-box" method and the "struck" method are the most popular. Under the "strike-and-replace" method, up to eighteen prospective jurors are randomly selected from the venire. After the court administers the oath to these individuals and seats them in or in front of the jury box, they are examined by the court or counsel. Challenges for cause follow, and those challenged are replaced by other members of the venire, again selected randomly. These jurors are similarly questioned and challenged until all in the jury box or sitting in front of the jury box are cause free. Trial counsel then exercise their peremptory challenges, and those challenged are replaced with prospective jurors from the front of the jury box until either all peremptory challenges are exhausted or the parties waive their remaining challenges. If peremptory challenges are exhausted, and there remains a larger-than-necessary number of jurors on the panel, those who will be impaneled may be selected in the order in which they were selected or may be selected at random.

Some judges permit attorneys to "strike back" under the "strike-and-replace" method. That is, attorneys may exercise their peremptory challenges against any prospective juror in the jury box at any time. Other judges restrict the use of peremptory challenges only to those jurors in the group that was just questioned. If the attorneys choose to waive any of their peremptory challenges, any jurors not seated in the jury box are excused. A study of voir dire in California found that attorneys on average used only half of their peremptory challenges under this system.

Under the "struck" system of juror selection, the oath is administered to every member of the jury panel. The panel is prescreened for cause and is reduced to the number of jurors and alternates to be seated, plus the number of peremptory challenges available to the parties. All panel members are then questioned together, after which follow-up questions are asked to individual jurors. At the end of the questioning, the parties take turns using their peremptory strikes from a list of the panel, out of hearing from the jurors. Those struck from the list are then asked to leave together, rather than asking each to leave individually, and neither they nor the remaining jurors are aware of which party struck which person. If a party opts not to use all of its peremptory challenges, the jury and alternates are selected either in the order in which they were selected or at random from those remaining. The jury is then sworn. This method permits all prospective jurors to participate in questioning, making the experience more educational and personally meaningful to jurors, as well as preserving their dignity by not calling attention to which jurors were struck by whom.

Under the "blind-strike" variation of the "struck" method, the parties make their peremptory challenges simultaneously against a list of the potential jurors, without knowing who the other party will strike. Those jurors not stricken by either side compose the jury and alternates. In the case of duplicate names being struck, some jurisdictions require that counsel immediately request another juror to be struck to preserve the issue for appeal.

A 2005 decision by the federal Ninth Circuit Court of Appeals held that, under the struck method, waiving one's peremptory challenges is the functional equivalent of exercising those challenges against an identified prospective juror. By implication, a waiver of a peremptory challenge may be subject to a *Batson* challenge. The same would be true of the strike-and-replace method if the attorneys are aware of the identity of the next juror to be selected from the venire.

AUTHORITY

U.S. v. Esparza-Gonzales, No. 04-10267 (9th Cir. Filed Sept. 6, 2005) (holding that under the "struck" jury system, waiving a peremptory challenge is the functional equivalent of exercising a peremptory challenge insofar that the waiver supports a prima-facie case of intentional discrimination for the purpose of a *Batson* challenge).

United States v. Warren, 25 F.3d 890, 894 (9th Cir. 1994) (holding that the use of the "blind-strike" method does not interfere with a defendant's full use of his or her peremptory challenges, even when both parties strike the same juror).

United States v. Broxton, 926 F.2d 1180, 1182 (D.C. Cir. 1991) (holding that use of a "struck" jury system does not constitute an abuse of the trial court's discretion as long as "the method chosen allows the [party] to make his peremptory challenges without embarrassment and does not intimidate him from exercising them"), *cert. denied*, 111 S. Ct. 1118 (1991).

United States v. Blouin, 666 F.2d 796 (2nd Cir. 1981) (holding that the "jury-box" method, while it has its flaws in comparison to the "struck" method, is still a valid option despite the fact that the defendant had not had the opportunity to question several jurors before making his last strikes).

Ariz. R. Crim. Proc., Rule 18.5(b) (authorizing judges in criminal voir dire proceedings to employ the "struck" method).

Advantages

1. The "struck" method of jury selection allows parties to question and compare all perspective jurors before using their peremptory challenges, enabling them to concentrate on the composition of the jury as a whole rather than on individual jurors. In theory, this leads to a less biased jury. This also puts less pressure on counsel to question each juror exhaustively or to reserve peremptory challenges to venire members who may show up later in the questioning.

2. Use of the "struck" method makes it possible to remedy *Batson* violations without having to set aside the entire voir dire. Because the parties must make their strikes out of the presence of the jurors, the judge can disallow a strike and changes can be made without the jury being aware of the change. Under the "strike-and-replace" method, a pattern establishing a *Batson* violation is not apparent until at least two or three peremptory challenges are made in front of the jury. By that time, the venire must be replaced, causing substantial delays in some courts.

3. There is greater juror participation under the "struck" method, because even those who are not impaneled are questioned. This should increase the jurors' overall satisfaction.

4. "Struck" jurors are spared the embarrassment of being singled out for replacement among the rest of the venire. Instead, peremptory strikes are made out of their presence, and they are excused as a group.

5. Because all potential jurors are questioned together, the "struck" system avoids unnecessary repetition of questions and saves continuity and time in the process.

Disadvantages

1. It is more difficult for attorneys to keep track of prospective juror responses and reactions to questions when they are dealing with a larger group (using the "struck" method) as opposed to when they only have to remember eight to eighteen at a time (using the "strike-and-replace" method).

2. If only a few peremptory challenges are routinely used by the parties, the "strike-and-replace" method may be less time-consuming than the "struck" method, since fewer veniremembers need to be questioned.

3. The "struck" system may give preference to those parties using all of their peremptory challenges, since its goal is to whittle down the venire into a jury that will be most favorable to one's party, rather than simply to eliminate biased jurors. Courts may wish to consider this in light of § 3.5, "Reducing or Eliminating Peremptory Challenges."

4. The "strike-and-replace" method is more familiar to most judges and lawyers than the "struck" method.

REFERENCES

Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York*, 10 St. John's J.L. Comm. 263, 278-80 (1995) (presenting the negative aspects of the "strike-and-replace" method in contrast with the benefits of the "struck" method of jury selection).

G. T. Munsterman et al., *The Best Method of Selecting Jurors*, 29 Judges J. 8 (1990) (diagramming both the "struck" and "strike-and-replace" systems of jury selection, and advocating the "struck" system over others).

§ 3.12. Short Trial or Summary Jury Trial

Technique

There are two different techniques in which courts seek to provide a process to resolve cases without the expense, time, and perhaps the delay involved in a normal trial process: the short trial and the summary jury trial.

The short trial usually involves lower-value cases where the costs of litigation may exceed claimed damages. A smaller jury (four to six jurors) is impaneled, and special rules are agreed upon to speed the trial. These include stipulations on the admission of evidence and evidence summaries, waiver of some or all evidentiary rules, strict time limits and limits on witnesses, and usually a waiver of appellate rights unless there is some unusual legal issue involved.

The summary jury trial is usually employed in larger, complex cases, which are difficult to settle. The idea is to "try the case" in one to three days and to reach a verdict, which often induces the parties to settle. Normally, two to three days are used for voir dire, opening statements, closing arguments, and abbreviated instructions. Rules of evidence are normally waived so that summaries of testimony, summary documents, and shortened versions of testimony can be used. Each side has strict time limits on their presentations. The result is nonbinding and nonappealable. The trial judge delegates this to a special master or magistrate judge and is not informed of the outcome.

Issues

- In the short trial should both parties have to agree to the process?
- In the short trial is it permissible to condition the process on waiver of appellate rights?
- Should the judge be able to order the parties to undergo the extra expense of a summary jury trial?
- Does the summary jury trial unreasonably require a party to disclose its trial strategy before the real trial?

Procedure

Short Trial. The short-trial program has been created by several courts as an inexpensive and efficient way for lower-value cases to bypass mandatory arbitration or to obtain the benefits of a jury trial without the normal time, expense, and delay of a civil jury case. Within the past decade at least three courts—Maricopa County Superior Court (Phoenix), the Clark County District Court (Las Vegas), and the 8th Judicial District of New York State—have developed this process as an alternative to mandatory arbitration programs.

In the Maricopa County Superior Court, the short-trial program is used for cases of less than $50,000. A four-person jury is selected from a panel of ten persons, and the trial is limited to one day. The attorneys stipulate in advance to the admissibility of evidence and the number of witnesses. The jurors are given jury instructions and a notebook with the trial evidence (e.g., documents, reports) at the beginning of trial. Three of the four jurors

must agree on the verdict, which is binding on the parties. The litigants are responsible for the juror fees and other expenses associated with the short trial. The short-trial programs in Clark County and the 8th Judicial District of New York are similar in most respects.

Summary Jury Trial. The concept for a summary jury trial was initiated in 1980 by Judge Thomas Lambros of Cleveland, Ohio. He correctly perceived this process as a useful settlement tool, observing that once parties saw how a jury was likely to decide the case they would be more inclined to settle. The power to require a summary jury trial comes from the inherent power of the court to determine how a case shall proceed. On a state level, this power is often described in a statute. The Judicial Reform Act of 1990 specifically authorized summary jury trials. Because usually a special master or magistrate judge is used to conduct the proceeding, consideration of the fairness of imposing the expenses on the parties and protecting against unreasonable expense are the standards to be used in determining whether to require a summary jury trial. Most cases that merit this treatment are large and complex, so there is seldom an issue of reasonableness because of the projected savings if the case is settled as a result. Most parties readily agree to the process, often suggesting it themselves.

AUTHORITY

Nev. Short Trial Rules, Short Trial Rules, Forms and Directions (available at http://www.co.clark.nv.us/district_court/short_trial.htm).

N.Y. State Sup. Ct., 8th Jud. Dist. Summary Jury Trial Program, Program Manual, (available at http://www.nycourts.gov/courts/8jd/sjt.shtml).

REFERENCE

G. Thomas Munsterman, *A Cost-Free Civil Jury Trial?*, 18(1) Ct. Manager 35 (2003).

Because it is done for settlement purposes, the verdict is nonbinding and all proceedings, including testimony, are privileged as settlement negotiations and cannot be admitted as evidence in any proceeding. Of course, it is nonappealable. Representatives of parties with settlement authority are required to attend, and usually a nonlawyer officer is also required to be present. The trial is closed to the public as a confidential settlement process.

The most effective process is when each side has the time to present the essentials of their case, so two to more likely three days are reserved for the process, with the time evenly divided between the parties.

A jury is picked from the usual venire of the jurisdiction, with voir dire typical of the jurisdiction employed. Openings and closings, while limited in time, should be long enough for the parties' cases to be presented. Instructions are usually quite attenuated, addressing only the basic legal issues. Those accustomed to jury research understand how to draft such shortened versions. Rules of evidence are usually waived to allow evidentiary summaries, summaries of documentary evidence, and attorney summaries of evidence. Evidence is limited to what was produced during discovery. Videotaped testimony from discovery is often used, and key witnesses are occasionally presented live on selected subjects within the time limits allowed. Many techniques are used in cases where expert testimony is important to the outcome, and usually the reports are admitted. Wide discretion is used by the judge and the parties to design a process that will be convincing and realistic given the particulars of the case.

The verdict is part of the confidential nature of the proceeding and usually should not be conveyed to the trial judge. Sometimes a damages verdict is required even though no liability is found. The one conducting the proceedings is authorized to follow up and conduct settlement discussions after the verdict.

Advantages: Short Trial

1. Greatly expands opportunities for a jury trial in lower-value cases consistent with the damages at issue.

2. Parties believe they have had their "day in court."

3. Can perhaps shorten time to trial.

4. Frees courts for other, more significant litigation.

Disadvantage: Short Trial

Shortness may advantage one party with a "simple story" over a party whose case may require more detail to present.

Advantages: Summary Jury Trial

1. Summary jury trials greatly enhance the prospect of settlement once parties hear each other's cases directly and see the outcome with a local jury.

2. Attorneys are more prepared for trial if settlement does not occur, and less trial time is taken for presentation of evidence with this enhanced focus on what is important.

3. Attorneys conduct more advanced preparation of witnesses and exhibits, and fewer pretrial proceedings are required.

4. Attorneys in many large cases are well prepared for this procedure because many have conducted jury research exercises, which use the same techniques and evidence.

5. Surprise at trial is unlikely, thus furthering the purpose of the procedural rules.

Disadvantages: Summary Jury Trial

1. This involves extra expense for the parties, as well as attendance by party representatives.

2. Some may believe they must prematurely expose their trial tactics and strategy during the summary trial procedure because winning will enhance their settlement posture.

3. Does not provide any precedent as results are confidential and cannot be used in any proceeding.

AUTHORITY

NEV. SHORT TRIAL RULES, Short Trial Rules, Forms and Directions (available at http://www.co.clark.nv.us/district_court/short_trial.htm).

N.Y. STATE SUP CT., 8TH JUD. DIST. SUMMARY JURY TRIAL PROGRAM, Program Manual, (available at http://www.nycourts.gov/courts/8jd/sjt.shtml).

REFERENCES

Molly McDonough, *Summary Trial Blues*, 90 A.B.A.J 18 (Oct. 2004)

G. Thomas Munsterman, *A Cost-Free Civil Jury Trial?*, 18(1) CT. MANAGER 35 (2003).

Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990).

Chapter 4

Pretrial Management

Some readers may argue that the topic of this chapter, pretrial management, is out-of-place in a book on jury trial innovations, particularly insofar that the goal of many pretrial procedures is to encourage a nontrial disposition (plea agreements, settlements). The main distinction between the innovations discussed in this chapter and the in-court innovations discussed in chapter 5 is simply that their effective implementation requires considerably more preparation time for the judge and attorneys. As a general rule, they are more appropriate in longer and more complex trials. Although the trial judge does not necessarily need the attorneys' consent to these innovations, many of them require the attorneys' participation for informed decision making.

In terms of substance, we have not seen a lot of change in these innovations over the past decade. However, our work on jury trial innovations with trial judges in Massachusetts taught us one critical key to successful implementation—namely, the importance of early and frequent communication between the trial judge and attorneys. The ability of trial participants to engage in pretrial discussions will depend greatly on local court culture and the form of calendaring employed in each court. Typically, in a master-calendar system, cases are assigned to a judge for trial only a short time (e.g., less than two weeks) before trial. Most of the innovations described in this chapter, however, will require several weeks to prepare. Even in an individual-calendar system, in which cases are assigned to individual judges for pretrial management at filing, the local judicial style may postpone discussions about trial management issues until shortly before trial. In either system, judges and attorneys should recognize the amount of preparation needed for these innovations and plan accordingly.

§ 4.1 Pretrial Limits on Each Party's Time at Trial

Technique

The parties agree on overall time limits to be allocated for conducting direct and cross-examination, reading depositions, showing exhibits, and presenting computer simulations or other evidentiary demonstrations as each party sees fit.

Issues

- At what point should time limits be established? Before discovery? After discovery, but before trial?
- What activities by the trial attorneys should be subject to time limits?
- Do time limitations put pro se parties or parties whose counsel have little trial experience at a comparative disadvantage?
- Can the court determine, in advance of trial, a fair and reasonable amount of time required to present a case?
- Who monitors the amount of time each party expends at trial?

AUTHORITY

MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081 (7th Cir. 1983) (upholding a twenty-six-day time limit for each party to present its case in chief, despite original estimates by the defendant that the time would take eight to nine months).

Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987) (affirming the discretion of the trial court to set reasonable time limits).

United States v. Reaves, 636 F. Supp. 1575 (E.D., Ky. 1986) (admonishing the trial court to tailor mandatory time limits to each specific case to avoid arbitrary limits).

SCM Corp. v. Xerox Corp., 77 F.R.D. 20 (D. Conn. 1977) (recommending aggregate limits to permit counsel the greatest possible flexibility and discretion in presenting the case).

FED. R. CIV. PROC. Rule 16(c)(15) (authorizing time limits on evidentiary presentations).

FED. R. EVID. Rule 403 (authorizing the exclusion of otherwise relevant evidence in the interest of efficient trial management).

FED. R. EVID. Rule 611(a) (mandating judicial oversight and control of evidentiary presentations for the purpose of trial economy).

ARIZ. R. CIV. PROC. Rule 16(h) (authorizing time limits on trial proceedings).

Procedures

At the pretrial conference, the court and trial attorneys agree on overall time limits for presenting each side's case at trial. Each side may distribute its allocated time to conducting voir dire, presenting opening or closing arguments, performing direct or cross-examination, reading depositions, showing exhibits, and presenting computer simulations or other evidentiary demonstrations as each party sees fit.

If the attorneys are unable to agree on time limitations, the trial court imposes reasonable overall time limits based on the number and complexity of issues, the respective evidentiary burdens of the parties, the nature of proof to be offered, and the feasibility of shortening the trial through stipulations, preadmission of exhibits, and other techniques. Judicial time limits on trial proceedings generally are reviewed under an abuse-of-discretion standard.

Generally, the court clerk monitors the amount of time expended by the parties and periodically advises the trial attorneys of the amount of time each has remaining. Some judges report using a time clock prominently displayed on the edge of the bench. Activities subject to time limitations may include opening and closing arguments, direct and cross-examination of witnesses, and trial objections, including sidebar discussions. Objections or motions raised while the trial is in recess (e.g., at the beginning or end of each day, lunch, or other trial recesses) are not subject to the time restrictions, which provides incentives for lawyers to keep the trial moving without lengthy delays. The judge firmly enforces the time limits at trial, but may extend them for good cause shown.

Judges who have used overall time limits (as opposed to specific time limits on witness testimony or other aspects of trial proceedings) report that they encourage better preparation by the trial attorneys. As a result, the trial attorneys conduct opening and closing arguments in a more direct fashion, use greater selectivity in their choice

of witnesses, and present less cumulative and peripheral evidence at trial. Juror comprehension and interest increase from these improved, more focused presentations.

On motion by either party, the judge may advise the jury of the time limits to prevent jurors from making unwarranted inferences from a party's failure to call all possible witnesses.

Advantages

1. Time limits force counsel to assess their available evidence in advance of trial and determine the most effective and efficient method of presenting it.

2. Better-prepared evidentiary presentations improve jurors' comprehension of the evidence and interest in the trial proceedings.

3. Compared to specific limits on the number of, or time for, direct and cross-examination of lay witnesses and expert witnesses, overall time limits avoid micromanagement by the judge and thus reserve discretion to the trial attorneys, who have much greater familiarity with the case, about how best to use the time allotted.

4. Overall time limits reduce the opportunity for abuse or manipulation by opposing counsel associated with less comprehensive time limits or rules. For example, a "cross can't exceed direct" rule operates to the disadvantage of the lawyer cross-examining an important witness whose direct testimony was brief and conclusory. Similarly, a rule stating that "plaintiff's case is limited to X hours or days" may invite cross-examiners to eat up the plaintiff's time, or vice versa for a defendant's limit.

5. Time limits allocate courtroom time, a scarce public resource, among all litigants waiting to have their cases tried.

Disadvantages

1. Setting pretrial time limits requires knowledge about the amount of time necessary to present certain types of evidence.

2. Pro se litigants and attorneys with less litigation experience are at a comparative disadvantage and may jeopardize their clients' interests by failing to use their allotted time effectively.

3. Setting pretrial time limits also requires reasonable familiarity with the issues and evidence of the particular case. Judges with little time to become acquainted with their cases before trial may find it difficult to set such limits.

REFERENCES

American Bar Association, Principle 12(A) ("The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.").

Federal Judicial Center, Manual for Complex Litigation, Fourth §§ Fourth 147-49 (2004) (§12.35 Judicial Control/Time Limits).

Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 Marq. L. Rev. 295, 326-327 (1995) (recommending time limits as an appropriate method of balancing judicial interests in efficiency and fairness).

William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 578 (1991) ("Jurors do not have an unlimited attention span. Their capacity to absorb, retain, and effectively use information (especially on unfamiliar subjects) is finite.").

STUDIES

Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 Ariz. L. Rev. 663 (1993) (examining the economic justifications for imposing time limits on parties).

Administrative Office of the U.S. Courts, Civil Justice Expense and Delay Reduction Plans, Pilot Courts and Early Implementation Districts, Appendix II (1992) (reporting on early results from reform initiatives).

§ 4.2 Pretrial Admission of Exhibits and Deposition Testimony

Technique

During the pretrial conference, the trial attorneys apprise the court of all exhibits and deposition testimony to be introduced. After the judge rules on any objections to the evidence, exhibits and depositions admitted at pretrial are deemed admitted from the time the trial commences. The trial attorneys may make reference to this evidence at any point in the trial, including during opening statements.

Issues

- Does pretrial admission of exhibits and deposition testimony, and the corresponding reduction in evidentiary objections, result in a faster, more efficient trial?
- What is the most convenient fashion of memorializing the court's pretrial rulings (e.g., handwritten on the face of each document, an appendix to the pretrial order, dictated onto a tape for later transcription by a law clerk or secretary)?

Procedures

In preparing for the pretrial conference, the trial attorneys exchange lists of the exhibits and deposition testimony they intend to introduce at trial. At the pretrial conference, the attorneys come prepared either to stipulate to the admissibility of the exhibit or deposition testimony offered by other parties or to state their objections to its admissibility. To the extent possible given the nature of the evidence, the judge rules on the objections at the pretrial conference. The judge may use his or her authority to sanction parties that make frivolous or vexatious objections.

Exhibits and depositions admitted at pretrial are deemed admitted from the time that trial commences. The trial attorneys may make reference to this evidence at any point in the trial, including during opening statements. This technique avoids the risk of confusing or boring jurors with lengthy presentations of foundational evidence and reduces the amount of juror "downtime" while the judge considers evidentiary objections.

Advantages

1. Pretrial admission of exhibit and deposition evidence eliminates the need to respond to technical evidentiary objections, thus conserving valuable court and juror time.

2. Pretrial admission of evidence avoids the risk of confusing or boring jurors with lengthy evidentiary presentations offered solely to establish a foundation for admissibility.

3. Pretrial rulings on the admissibility of exhibit and deposition testimony narrow the issues and enable the trial counsel to plan more effectively for trial.

4. Pretrial rulings also provide the trial attorneys with the opportunity to overcome some evidentiary objections by eliminating inadmissible evidence, obtaining alternative sources of proof, or presenting necessary foundation evidence.

Disadvantage

This technique requires a great deal of pretrial time by the court and counsel to consider and rule on technical evidentiary objections. The benefits of pretrial admission may be wasted if trial developments cause the evidence, or objections thereto, to be mooted or withdrawn.

AUTHORITY

FED. R. CIV. PROC. Rule 16(c)(3) (1996) (encouraging pretrial stipulations in the interest of trial economy).

LOCAL CIV. RULES (U.S. E.D. N.D.) Rule 24.03 (1996) (setting forth procedures for evidentiary stipulations and their effects on subsequent trial matters).

LOCAL RULES U.S. BANKR. CT. (E.D. Va.) Rule 111(B) (1996) (setting forth procedures for admission of prestipulated evidence).

REFERENCES

FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, Fourth §§ 11.64 (2004).

Gus J. Solomon, *Techniques for Shortening Trials*, 65 F.R.D. 485, 491 (1975) (address delivered before the Ninth Judicial District Conference in Reno, Nevada, Aug. 2, 1974, describing several procedural matters, including pretrial admission, that can be disposed of during the pretrial conference).

§ 4.3 Reordering the Sequence of Expert Testimony

Technique

In cases that are heavily dependent on expert testimony, the judge and attorneys reorder the sequence of proof so that opposing experts offer their testimony consecutively rather than at different stages throughout the trial. Alternatively, opposing experts can offer joint testimony at trial or at an experts' conference during which the experts engage in a structured conversation before the jury in an effort to identify points on which they agree or disagree and the basis for their conclusions. This technique can be used in conjunction with others, such as conducting juror tutorials or permitting the jury to submit questions to the expert witnesses. See also § 4. 5, Jury Tutorials, and § 5.7, Juror Submission of Questions to Witnesses.

Issue

- Does reordering the sequence of expert testimony place the defense at a comparative disadvantage (e.g., by structuring the order of proof around the plaintiff's or prosecutor's theory of the case)?

Procedures

Opposing expert witnesses typically appear during the plaintiff's and defendant's respective stage of the trial to present their conclusions and reasoning, without truly joining issue with the reasoning and explanation offered by other experts. Jurors thus find it difficult to determine the extent of real difference between the experts and the degree to which each could persuasively defend his or her own conclusions in a dialogue with the other. Reordering the sequence in which opposing experts offer their testimony provides the jury with an opportunity to evaluate how expert opinions hold up in a true exchange with opposing experts. As a practical matter, expert testimony is often taken out of sequence at the request of trial counsel to accommodate the schedules of expert witnesses. Thus, doing so to facilitate juror comprehension is not a dramatic departure from routine practice.

Advantages

1. Jurors receive a clearer understanding of the nature and extent of differences between experts and the soundness of their views.

2. By gaining increased understanding of the expert testimony, jurors feel more confident of their ability to deal with technical issues rather than abdicating their decisional authority to the party's experts.

Disadvantages

1. Such procedures place additional managerial burdens on judges.

2. Some increase in cost of experts to parties is likely to result.

3. Reordering the sequence of expert testimony may disrupt the trial strategy of counsel, especially defense counsel.

AUTHORITY

FED. R. EVID. Rule 611(a) (1996) (mandating judicial oversight and control of evidentiary presentations for the purpose of trial economy).

REFERENCES

Confronting the New Challenges of Scientific Evidence, 108 HARV L. REV. 1481, 1589-93 (1995) (discussing methods of addressing problems associated with complex, scientific evidence).

Curtis E. von Kann, *Reinventing the Jury Trial*, LEGAL TIMES, Jan. 2, 1995, at 20 (describing a hypothetical medical malpractice case using innovations to present expert testimony).

Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended*, 138 F.R.D. 631, 640 (1992) (speech delivered to the U.S. Eighth Circuit Judicial Conference, Colorado Springs, Colorado, July 10, 1991, proposing improvements in procedures relating to expert testimony rather than amending Rule 702).

§ 4.4 Appointing Court Experts

Technique

According to federal rules of procedure and most corresponding state rules, the judge has the authority to appoint experts to offer testimony or serve in a variety of trial and pretrial functions.

Issues

- Under what circumstances should the court appoint an expert?
- What tasks should the court ask the expert to perform?
- How should the judge identify qualified experts? What criteria should the judge use to evaluate and select an expert?
- How are court-appointed experts compensated?
- Does discovery by the parties differ in any significant respect for court-appointed experts versus party-retained experts? Are there any differences in trial procedures for court-appointed witnesses (e.g., regarding examination of the witness)?
- Is the court's sponsorship of the appointed expert revealed to the jury?

Procedures

Courts may consider appointing an expert in extraordinary circumstances in which the traditional adversarial system and parties' experts have not provided a basis for a reasoned and principled disposition. Such cases often involve evidence that is particularly difficult to comprehend or testimony by credible experts who find little basis for agreement. Cases in which there is a compelling public interest in the accurate resolution of a factual issue may also involve an absence of testimony on one side of an issue. Experts also may be appointed to offer testimony on behalf of an indigent criminal defendant.

An appointed expert may perform a variety of functions beyond offering testimony on the issues in dispute. For example, appointed experts also may address a narrow inquiry in a pretrial hearing or educate the judge and jury about underlying issues on which the parties' experts testify. See also § 4.5, Jury Tutorials. The appointed expert should be assigned specific duties on the record, in the presence of the parties on in a written order.

In cases presenting especially difficult issues, the court may appoint more than one expert and have the appointed experts work together as a panel. Among the duties assigned to such a panel may be the identification and evaluation of claims, defenses, and scientific issues that arise in the litigation. In some instances, the work of a panel has been supervised by a special master.

The expert should be appointed well in advance of trial to enable him or her to offer effective service without delaying the trial. This typically requires early identification of disputed issues of expert testimony. Parties, through their attorneys, should be involved in the selection and instruction of appointed experts. Parties should be encouraged to nominate candidates for appointment and to agree on a suitable candidate (although

often such encouragement will be unavailing). The judge also may recruit candidates for appointment by contacting colleges, universities, and professional organizations. The American Association for the Advancement of Science has a demonstration program to assist judges in locating highly qualified, independent scientific and technical experts to serve as court-appointed experts. In cases involving unsettled scientific or technical questions, however, judges may consider limiting the role of a court-appointed expert to providing the judge and jury with a neutral, objective assessment of the respective strengths and weaknesses of the parties' evidence.

The court should make clear its anticipated form of communication with the expert. Ex parte communication on issues other than ministerial matters should be undertaken only with the permission of the parties or on the record. Depositions of the appointed expert should be conducted under an order setting forth proper areas of inquiry and preferably in the presence of a judicial official. Typically, the appointed expert will present findings in a written report. Parties should be given an opportunity to review and respond to the report. The appointed expert may also present findings by testimony at trial or in a pretrial hearing.

When the appointed expert testifies before a jury, the court must determine whether to disclose to the jury that the expert was appointed by the court. If the court decides to disguise the court appointment, the court may direct the party who is favored by the expert's findings to call the expert without indicating the court's sponsorship of the appointed experts. Each party should have an opportunity to question the appointed expert concerning his or her findings.

Typically, parties should pay the cost of the appointed expert. The judge should require the parties to pay a designated amount into a court account at the outset, and the court then makes arrangements to compensate the expert from these funds.

Few federal judges oppose appointment of experts in principle, and more than four out of five judges indicate that court-appointed experts are likely to be helpful in at least some circumstances. But only one in five has ever appointed an expert in a civil case. Appointments are made in extraordinary circumstances in which the dispute turns on evidence that is not readily comprehensible and the traditional adversary process has failed to produce information needed for resolving a highly technical dispute. There is little empirical information about state court utilization of court-appointed experts, although the practice of appointing expert witnesses appears to be fairly rare.

AUTHORITY

FED R. EVID. Rule 706 (1996) (describing procedures for the appointment of court experts).

18 U.S.C. § 3006A(e) (1993) (authorizing the court to retain expert witnesses for indigent defendants when necessary to ensure adequate representation).

Reilly v. United States, 863 F.2d 149, 154-61 (1st Cir. 1988) (describing the appropriate role of a court-retained "technical advisor" in federal court).

REFERENCES

American Association for the Advancement of Science, Court Appointed Scientific Experts (CASE), located at http://www.aaas.org/spp/case/case.htm (a service program to assist judges in locating highly qualified, independent scientific and technical experts to serve as court-appointed experts).

Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L. J. 995 (1994) (reports on a study of federal district court judges' experiences with appointment of experts under Rule 706 of the Federal Rules of Evidence).

Advantages

1. Appointed experts provide the courts with a source of information and expertise that is independent of the parties' control and interests.

2. Appointed experts may respond to issues that are specifically tailored to address the concerns of the court.

3. Appointment of an expert (and perhaps the threat of such an appointment) may improve the quality of the testimony offered by the parties' experts.

Disadvantages

1. Appointment of an expert diminishes the parties' control over presentation of information.

2. Appointment of an expert is likely to increase costs and may delay the proceedings.

3. Appointed experts may venture beyond their proper duties and address ultimate issues that are within the domain of the judge or jury.

4. Jurors and judges may disregard competent testimony by parties' experts and consider testimony only by the appointed expert.

5. Some scientific and technical questions have not been studied sufficiently for an expert to make any reliable conclusions about disputed facts. A court-appointed expert will have no greater or more objective insight than the disputing parties' experts.

Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1211 (survey of problems with expert testimony and recommendation for greater use of court-appointed experts).

Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and State Courts § B6 706[01] (1993) (cases and commentary relevant to appointment of experts).

STUDIES

Nancy J. Brekke, Peter J. Enko, Gail Clavet & Eric Seelan, *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony*, 15 Law & Hum Behav. 451 (1991) (study finding that juries did not accord more weight to nonadversarial expert testimony, nor did nonadversarial expert testimony negatively affect evaluations of trial fairness or judge compentence).

B. L. Cutler, H. R. Dexter & Steven D. Penrod, *Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence*, 20 J. Applied Soc. Psychol. 1197 (1990).

§ 4.5 Jury Tutorials

Technique

For cases involving highly technical or complicated issues that require understanding of unfamiliar terminology or concepts or that depend heavily on expert testimony, the trial attorneys or opposing experts conduct a "tutorial" to help the jurors better understand the evidence. The tutorial presentation is considered a portion of the opening statement to the jury.

Issues

- Are trial attorneys capable of presenting a neutral, nonadversarial tutorial for the jury?
- Should the tutorial be conducted by a court-appointed expert rather than the trial attorneys or opposing experts?
- Should the tutorial experts be the same experts who will testify at trial?

Procedures

Jurors presented with unfamiliar terminology or complex concepts for the first time often find if difficult to digest this new information and apply it simultaneously to their evaluation of expert testimony. Juror tutorials introduce new information and new concepts to the jurors, providing them with a sufficient understanding of basic materials to evaluate the import of expert testimony at trial. The tutorial is conducted jointly by the parties as part of the opening statement.

To implement this technique, the judge and attorneys agree on an appropriate format for the juror tutorial. The tutorial should provide a basic explanation of unfamiliar terms and concepts. In addition, the judge and attorneys can make a joint presentation of undisputed issues that would otherwise be offered as expert testimony by both parties.

The juror tutorial should be relatively informal, with material presented as in a classroom lecture. Although the tutorial is made a part of the trial record, the judge should instruct the jury that the material presented in the tutorial is merely background information, not evidence. If expert witnesses conduct the tutorial, they need not be sworn. The format for the tutorial should provide an opportunity for the jurors to ask clarifying questions about the material presented.

One of the earliest known uses of this technique was by federal appellate judge Pamela Ann Rymer (9th Cir.), when she was a U.S. District Court judge. In a 1984 computer software patent case, she found herself unfamiliar with the terms and references of the software's application to the computer. She asked the parties to convene a tutorial for herself, the deputy clerk, the court reporter, and the law clerk. The one-day tutorial, conducted on a Saturday, was informal and off the record with ample opportunities for questions. She found it so useful that she asked that it be repeated in the opening statements to the jury. The experts agreed on which topics each would cover. The presentation stopped short of the claims in the case but did end up with an explanation of how the computer program, which was the subject of the case, operated. A variation on this technique was the development of a video tutorial on issues related to patent litigation in the federal courts.

Advantages

1. An early explanation of basic terms and concepts enables jurors to better understand the evidence when it is presented at trial.

2. All expert witnesses can present their testimony in a more direct and focused fashion, without having to explain basic terms and concepts as part of their testimony.

3. Background information is presented to the jury only once, at the beginning of the trial, rather than several times during the trial.

4. The tutorial presentation is less formal and adversarial than in-court testimony, which enhances juror comprehension.

Disadvantages

1. Juror tutorials require additional time and effort by the judge to preview the presentation and limit it to uncontested matters.

2. Preparation of a juror tutorial can require a significant time commitment by the judge and trial attorneys.

3. Tutorial presenters may find it difficult to constrain themselves to the agreed-upon material, prompting interruptions and objections that destroy the advantage of a nonadversarial presentation.

REFERENCE AND STUDY

Interview with Hon. Pamela Ann Rymer (U.S.C.A. 9th Cir.) (notes on file with the National Center for State Courts, Williamsburg, Virginia).

§ 4.6 Modifying Daily Schedules

Technique

In longer trials, the judge schedules trial testimony for certain hours of the day or days of the week and requires juror attendance at the courthouse only during those times.

Issues

- What effect does this modification have on the length of the trial proceedings?
- What effect does this modification have on the ability of the judge to respond to trial-scheduling matters in a spontaneous or flexible manner?

Procedures

During the pretrial conference, the judge sets out the daily trial schedule with established periods during which the jury need not be present. The schedule includes specific periods during the day, either before jurors report for service or after they are excused for the day, in which the court hears trial motions. To enable the court to respond to trial motions without disruption to the daily schedule, the court may require the trial attorneys to file all trial motions in writing. The court then rules on motions the following day or the day following receipt of the respondent's written reply.

Advantages

1. A modified daily trial schedule reduces the amount of jury "down-time" during regular trial periods.
2. An established trial schedule provides jurors with advance notice about the days and times they will have available for conducting personal affairs (e.g., doctors' appointments).
3. This technique increases the efficiency of trial procedures by requiring the judge and attorneys to anticipate and correctly estimate time needed to conduct matters that do not involve the jury.
4. This technique also provides opportunities for the judge and attorneys to attend to personal and business matters that do not involve the case at trial.

Disadvantages

1. Modified trial schedules may increase the number of days for some trials.
2. This technique reduces (somewhat) the flexibility of the judge to respond immediately to trial motions.
3. The schedules of the judge and attorneys may become out of sync with those of their colleagues.

§ 4.7 Juror Notebooks

Technique

In lengthy trials and trials of complex cases, jurors are supplied with three-ring notebooks for keeping documents and other information about the case.

Issues

- In which types of cases are juror notebooks appropriate?
- Will the jurors' use of the notebooks distract them during the trial?
- What kinds of information should the notebooks contain?
- Who prepares the notebooks? Who pays for the costs associated with juror notebooks?
- What kind of supervision should the judge provide over the preparation and use of the notebooks?
- What exhibits should be copied for inclusion in the notebooks? Should only the relevant portion of an exhibit be used? Should it be highlighted?
- When important exhibits are admitted during the trial, should copies be added to those the jurors already have?

Procedures

At a pretrial conference in a complex case or in a case in which a protracted trial is anticipated, the judge and trial attorneys jointly decide whether juror notebooks would assist the jurors. Notebooks generally are not appropriate in routine civil cases as managing a notebook can actually add an unnecessary level of complexity to the jurors' task. If notebooks are favored, the judge and attorneys identify the categories of documents and information to be included and assign responsibility for preparing the notebooks. Regardless of who assembles the notebooks, the judge closely supervises their preparation to ensure that they help jurors without overloading them with excessive quantities of material. Before the notebooks are copied, the attorneys stipulate to the contents of the final version or, absent such a stipulation, the judge approves the notebooks.

Suggestions for notebook contents include:

- paper for taking notes (see § 5.6, "Juror Notetaking");
- preliminary jury instructions (see § 5.9, "Preinstructing the Jury");
- a short statement of the parties' claims and defenses;

- a list of witnesses by name, including identifying information and phonetic spellings when helpful;
- photographs of key witnesses;
- an index of exhibits;
- copies of key exhibits;
- a glossary of technical terms;
- a seating chart for the courtroom that identifies all trial participants (see § 4.11, Place Cards or Seating Charts); and
- final jury instructions (see § 6.5, Written or Recorded Instructions for Jurors).

Additional documents that are distributed to the jurors during the trial should be notebook ready. Jurors should be given an opportunity to insert them in their notebooks at the time they are distributed to avoid noise and distraction. Preliminary jury instructions should be removed, discarded, and replaced by the final jury instructions before the latter are read to the jury by the court.

During overnight recesses in the trial, a court employee secures the notebooks and returns them to jurors when they reconvene. Jurors are permitted to take their notebooks with them to the jury room during recesses and for deliberations.

Advantages

1. Juror notebooks assist jurors to organize, understand, and recall large amounts of information during lengthy and complex trials.
2. Multipurpose juror notebooks reduce juror stress in lengthy trials.

Disadvantage

Preparation of juror notebooks requires additional time, effort, and expense.

AUTHORITY

Ariz. R. Civ Proc. Rule 47(g) (1996) (authorizing the use of juror notebooks and describing their contents).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 13(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.").

American Bar Association, Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases 34-37 (1989).

John V. Singleton, *Jury Trial: History and Preservation*, 32 Trial Law Guide 273, 279 (1988).

§ 4.8 Bifurcation or Trifurcation of Trial Procedures

Technique

Trials are bifurcated or trifurcated to permit jurors to decide issues from a single cause of action in logical segments (e.g., liability, compensatory damages, punitive damages) without becoming distracted or confused by issues relevant to other segments.

Issues

- What is the difference between bifurcation and severance?
- What kinds of issues lend themselves to bifurcation?
- Does bifurcation violate due-process rights or the Seventh Amendment right to trial by jury?
- How should alternate jurors be utilized in bifurcation trials?

AUTHORITY

FED. R. CIV. PROC. Rule 42(b) (1996) (authorizing severance of claims in jury trials).

In re Benedictin Litigation, Hoffman v. Merrel Dow Pharmaceuticals, Inc., 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (holding that trifurcation was neither an abuse of discretion nor a violation of due process or Seventh Amendment rights to a jury trial).

REFERENCES

AMERICAN BAR ASSOCIATION, PRINCIPLES ON JURIES AND JURY TRIALS, Principle 13(H) (discouraging bifurcated trial proceedings).

CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2388-2390 (West 1995 and Supp. 1996) (describing the application of FRCP Rule 42(b) in federal courts).

Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505 (1995) (arguing that bifurcation withholds from jurors evidence necessary to render a fair verdict, denigrating the role of the jury and the decision-making abilities of jurors).

Procedures

Bifurcation under Federal Rules of Civil Procedure Rule 42(b) and corresponding state rules differs from severance of an action under FRCP Rule 21. Bifurcation results in separate proceedings on different issues within one cause of action. Severance, on the other hand, divides claims into more than one cause of action, such as the severance of an unrelated counterclaim from the original lawsuit.

The distinction has a number of practical consequences relating to ability to appeal a result in the first proceeding. The judgment in the first segment of a bifurcated trial or proceeding generally cannot be appealed unless it resolves the cause of action as a whole (e.g., finding of no liability in a liability/damages bifurcation). At the conclusion of the case, the trial court's decision relating to bifurcation can be appealed, but will be set aside only upon a clear showing of abuse of discretion. In cases involving severance, however, the results of each trial are separate because each constitutes its own cause of action.

Similar differences exist with respect to the jurisdiction of the court and the court's ability to transfer all or part of an action. The trial court retains its jurisdiction over all segments of the bifurcated trial. When the court severs a single cause of action into separate actions, however, the trial court must have an independent jurisdictional basis for each of the severed actions. In a bifurcated action, one of the bifurcated parts cannot be transferred to another court without transferring the whole case of action. In contrast, severed causes of action may be transferred to other courts.

One common method of bifurcating trials is to separate distinct elements of the cause of action. In a negligence action, for example, counsel first present evidence of liability and the jury renders its verdict on that element alone. If liability is found, counsel then present their evidence regarding damages and the jury renders a verdict on that element. If the same jury is used for both segments of the trial, alternate jurors should be permitted to observe, but not participate in, the deliberations of the first segment. See § 6.7, Permitting Alternates to Observe Deliberations.

Because a determination of damages is often the more complicated and contentious segment of the trial, many courts have experimented with "reverse bifurcation," especially in mass-tort cases. Conducting the damages segment of the trial first often provides opportunities for settlement on liability issues. Another common method of bifurcation is to separate the presentation of evidence, holding two or more trials on different issues. This procedure is most commonly employed when issues are factually distinct and/or dispositive of the balance of the case (e.g., bifurcation of the affirmative defense of statute of limitations or lack of insurance coverage).

The trial court also has the discretion to conduct each of the bifurcated trials before a different jury, although its ability to do so is limited by the Seventh Amendment's guarantee of a right to a jury trial. Although some overlap in evidence is permitted, a trial court cannot bifurcate an action in such a way that two juries consider essentially the same factual issues. The legal and factual issues can also be bifurcated to conduct separate bench trials on the nonjury issues, unless by doing so the court infringes on the jury's ability to determine the factual issues of the case. Examples of bifurcated bench trials include interpretations of an insurance contract, equitable recession, and defenses based upon the statute of limitations.

Although motions for bifurcation usually are brought before the pretrial conference, they can be brought at any time before trial. However, an untimely motion for bifurcation may result in the party waiving its right to seek bifurcation. If the objective is to save possible expensive or intrusive discovery, the motion should be brought as early as possible. The moving party must show that there is little significant overlap in the issue or risk of denial of bifurcation either on Seventh Amendment grounds or for failure to promote judicial economy. The moving party also must demonstrate that bifurcation will result in a fair and impartial trial. Many courts require a "compelling" justification for bifurcation.

Douglas L. Colbert, *The Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L. J. 499 (1993) (arguing that bifurcation is prejudicial in Section 1983 cases insofar that it does not afford the plaintiffs an opportunity to overcome the jury's pro-police bias).

Albert P. Bedecarré, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B. C. ENVTL. AFF. L. REV. 123 (1989) (arguing that excessive separation of issues within claims risks undue prejudice to parties without substantial savings in court efficiency).

Judith W. Pendell, *Enhancing Juror Effectiveness: An Insurer's Perspective*, 52 LAW & CONTEMP. PROBS. 311, 315-17 (1989) (examining empirical support for claims that jurors in unitary trials are more likely to interpret causation evidence in favor of plaintiffs than jurors in bifurcated trials).

Commercial and Federal Litigation Section of the New York State Bar Association, *The Mini-Trial: Bifurcation as an Efficient Device to Promote the Resolution of Civil Cases*, 53 ALB. L. REV. 19 (1988) (examining bifurcation as an intermediate device for resolving disputes for which summary judgment is inappropriate).

Advantages

1. Bifurcation may prevent jury confusion of issues, particularly when allegations of "bad faith" have been joined to insurance-coverage claims. For example, bifurcation can avoid prejudice from the admission of evidence of settlement offers by the insurer or settlement demands by the plaintiff that may be construed as admissions of liability or concessions or caps on damages.

2. Bifurcation may permit both parties to postpone and possibly avoid costly or intrusive discovery.

3. Bifurcation may avoid the time and expense of litigating certain issues altogether. At least one empirical study has shown that separting the liability and damages segments of trials decreases the length of the trial proceedings by 20 percent.

4. The time required for jury service may be shortened substantially, thereby reducing the adverse effects of jury service. In some instances, jurors may find bifurcated service less onerous, because their time away from their personal and occupational obligations is broken into segments.

Disadvantages

1. Issues that initially appear separate and distinct may ultimately prove so factually interrelated that bifurcation results in loss of time, retrial of many of the same issues tried in the first proceeding, and a risk of inconsistent verdicts.

2. Bifurcation may require counsel and their witnesses to gear up for trial twice, thereby increasing costs.

3. Lay and expert witnesses may be substantially inconvenienced by having to appear on two or more separate occasions in two or more proceedings.

4. Inconvenience to jurors may increase by having them return to hear successive segments of the proceeding. Depending on the length of delay between trial segments and the complexity of the case, it may be necessary to refresh the jurors' recollections about some aspects of the earlier segments.

5. The evidence presented in different segments of bifurcated trials can dramatically favor one side or the other—in some cases predetermining the ultimate outcome of the trial in ways that would not occur if all the elements of the action were tried in the same proceeding.

Susan E. Bitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 Sw. L. J. 743 (1982) (favoring bifurcation procedures as a practical tool for evaluating class-certification status for class-action suits).

Verla S. Neslund, Comment, *The Bifurcated Trial: Is It Used More Than It Is Useful?* 31 Emory L. J. 441 (1982) (examining mandatory bifurcation for criminal trials in which an insanity defense is raised).

Philip Corboy, *Will Split Trial Solve Court Delay? A Negative Response*, 52 Ill. B. J. 1004 (1964) (an early article arguing against bifurcated trials).

STUDIES

Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wisc. L. Rev. 297 (finding that juries in bifurcated trials that ruled for the plaintiff awarded higher damage awards than juries in non-bifurcated trials).

Hans Zeisel & Thomas Callahan, *Split Trials and Time Savings: A Statistical Analysis*, 76 Harv. L. Rev. 1606 (1963) (concluding that bifurcation of personal-injury cases into separable liability and damages issues saves approximately 20 percent of trial time).

§ 4.9 Computer Simulations

Technique

Counsel present evidence to the jury in the form of a computer-generated simulation (sometimes called "animations" or "reconstructions") for illustrative or substantive purposes.

Issues

- Does the simulation fairly depict that which it purports to depict?
- If it portrays a scientific theory, is that theory admissible under governing law? Has it been accurately incorporated into a reliable mathematical model (and thus into a reliable simulation)?
- How complete are the underlying data that are incorporated into the simulation?
- How much of the simulation is based on assumptions of fact? Are they reasonable? Is the formula valid? Has it been applied accurately?
- Is the simulation based on hearsay? If so, is the hearsay admissible? Or may an expert rely upon it in any event (e.g., Fed. R. Evid. 703)?
- Were the data entered accurately? How simple or complex is the mathematical manipulation of data?
- Were the data collected routinely or for litigation? Are they fairly presented?
- Have they been unfairly "massaged"?
- Was the data processing done routinely or for litigation? Is the program sold commercially? If any programming was done, is it error free?
- Is the simulation independently verifiable?
- Is the computer simulation unfairly prejudicial under the circumstances?
- Should the simulation go back to the jury room? Can it be furnished in a format that the jurors can use and not alter?

Procedures

When the trial attorneys plan to introduce a computer simulation as evidence, they disclose this plan to opposing parties before trial to permit adequate review without delaying the trial. Computer simulations must be disclosed under Federal Rule of Civil Procedure 26(a)(2)(B) and many corresponding state rules when offered in conjunction with an expert. They are an appropriate subject for discovery and for pretrial orders of the

court. A simulation should not, in any event, be played for the jury before the opposing party has had an opportunity to review it.

A monitor or monitors of sufficient size should be provided to permit the jury, court, and counsel to see the simulation simultaneously when played at trial. At the court's discretion, a simulation may be used in opening or closing arguments.

Issues of admissibility of computer simulations should be addressed either before trial or in a manner that does not unduly delay the proceedings before the jury. If the court rules that any part, but not all, of the simulation is admissible, the proponent has the responsibility of editing it to excise the inadmissible matter. If the excludable matter is audio, the volume may simply be turned off at the appropriate time.

The simulation can be stopped on a single image at any point during the presentation to facilitate viewing or explanatory testimony. In addition, the court may require testimony from the stand either before, during, or after the simulation is shown. Concerns about the potential of a simulation to confuse or mislead can be addressed in a limiting instruction identifying the purpose for which the evidence is being offered (e.g., to illustrate a litigation theory); the principal underlying assumptions (e.g., that it is based on one party's version of events); and any salient differences between the exhibit and the facts in issue (e.g., the portrayal is not to scale or omits certain variables).

AUTHORITY

The admissibility of computer-generated simulations is generally a function of applicable evidence law.

REFERENCES

American Bar Association & Enigineering Animation, Inc., Computer Animation in the Courtroom: A Primer (1996) (CD-ROM tutorial developed by the Lawyers Conference of the Judicial Division).

Jordan S. Gruber, Electronic Evidence (1995) (treatise on the use of electronic evidence).

Gregory P. Joseph, Modern Visual Evidence (1984 and Supp. 1996) (comprehensive treatise on the preparation and presentation of demonstrative evidence in trial proceedings).

Advantages

1. Simulations encapsulate information efficiently, effectively, and understandably.

2. Simulations replace or supplement lengthy verbal descriptions with something a lay person can easily comprehend.

3. Simulations save trial time and help eliminate confusion about concepts that are difficult to observe or understand.

Disadvantage

Simulations simplify reality—mathematical models cannot take account of everything—creating a risk of unfair distortion.

§ 4.10 Deposition Summaries

Technique

The trial judge encourages or requires the parties to prepare summaries of pretrial depositions that are read to the jury as a narrative rather than in the question-and-answer format.

Issues

- Should deposition summaries be mandatory for depositions over three hours (or 150 pages) or some other arbitrary limit?
- Do deposition summaries shift work from the court to the parties?
- Do deposition summaries save time or do they create more work for the parties with little chance for a more efficient and effective presentation to the jury?
- Is anything more boring for a juror than to listen to a lawyer and his legal assistant read an unedited 400-page deposition?
- Is it possible for jurors to assimilate information that is presented in the least lively manner?
- Should the civil justice system be more interested in the rights of the parties to try the case in the manner they select or should jury comprehension be the overriding goal?

Procedures

Trial counsel jointly prepare the deposition summary in a manner similar to the regular designation of deposition testimony. The party proffering the testimony first prepares the summary and the opposing party then adds a narrative to the summary based upon that party's perspective of the deposition. If either side believes a summary is wrong or misleading, objections are resolved by the judge. Copies are provided to the jurors before the summaries are read. The copies are retrieved immediately after the summary is read.

The practice of requiring litigants to prepare deposition summaries is not widely accepted by U.S. courts. Procedural rules in several jurisdictions make note of discretionary use of deposition summaries, although this practice still represents a small minority position.

AUTHORITY

FED. R. EVID. Rule 1006 (1996) (authorizing the use of deposition summaries).

RULES 29TH JUD. DIST. CT. (St. Charles, La.) Rule VII(B) (1996) (requiring the parties to prepare summaries of all depositions for submission before the pretrial conference).

RULES U.S. DIST. CT. (E.D. Va.) Local Rule 21(G) (1996) (authorizing deposition summaries in bench trials).

RULES U.S. BANKR. CT. (E.D. Va.) Local Rule 406(F) (1996) (authorizing deposition summaries in bench trials).

REFERENCES

AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 13(I) ("Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.").

ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12: REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES 88-90 (1994) (recommending an amendment to the Arizona Rules of Civil Procedure authorizing use of deposition summaries at trial).

William W Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1730 n.177 (1992).

Advantages

1. Deposition summaries save the jury and the court time during both trial proceedings and motions hearings.

2. Deposition summaries aid juror comprehension of "witness" testimony.

3. The use of deposition summaries avoids the tedium associated with reading full depositions at trial—a practice that can drive the most committed jurors to distraction.

4. Significant trial time can be saved by limiting the deposition summaries to a precise page limit.

STUDY

American Bar Association, Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases 37-38 (1989) (reporting unanimous negative juror responses to depositions being read at trial).

Disadvantages

1. Parties can abuse deposition summaries, especially those of particularly knowledgeable witnesses, by using them as mini-opening statements or even closing arguments.

2. This practice shifts work from the courts to litigants by requiring them to spend substantial time summarizing depositions.

3. Disputes over the contents of deposition summaries are sometimes more time-consuming and difficult to resolve than ruling on the admissibility of deposition questions and answers.

§ 4.11 Place Cards or Seating Charts

Technique

In short cases or cases with multiple attorneys or parties, the court distributes place cards or name tags to assist jurors in identifying pertinent individuals. Seating charts, identifying the parties, the trial attorneys, and other relevant individuals, are given to jurors at the beginning of trial.

Issues

- Who is responsible for making place cards and seating charts?
- For what types of cases are these devices advisable?

Procedures

In short trials or trials in which there are multiple attorneys, parties, and witnesses, place cards or name tags help jurors identify and distinguish the various individuals appearing in the courtroom. Before trial, counsel furnish the court with the names of all parties, witnesses, and attorneys who will participate in the trial. This technique should not be used for criminal trials in which the identification of the defendant is a disputed issue. A seating chart may be placed in the juror notebooks before trial. See § 4.7, Juror Notebooks.

Court staff prepare the place cards or name tags. Existing computer software for this purpose is available for easy printing on heavy bond or light cardboard paper. When using such software, however, court staff should use caution with the size and style of lettering. Some software packages tailor the font size and style to the length of the name. Thus, long names appear very small and short names very large.

Advantage

Place cards or name tags help jurors recognize and distinguish parties, lawyers, and witnesses.

Disadvantage

Place cards or name tags will prejudice criminal defendants for cases in which identification is a contested issue at trial.

Chapter 5

Trial Procedures

The innovations in this chapter reflect the most significant shift in judicial and legal thinking about the role of the jury in the American courtroom in this country's history. As Vicki Smith explained in chapter 1, these in-court innovations are premised on the concept of the active jury—that is, jurors who are recognized as intelligent, thinking adults who deserve to be treated with respect and given adequate and everyday tools with which to decide the difficult cases they undertake. Tools such as being permitted to take notes and ask questions, after all, are routinely available and encouraged for citizens in virtually every other complex problem-solving task they might undertake in other aspects of their lives. In 1997 this was a novel, even revolutionary, concept. It is considerably more widespread today, and perhaps is even the norm in most courtrooms around the country.

Given the slow pace of legal reform in this country, this is a simply astounding occurrence due, in large part, to key judicial leaders around the country who were persuaded by their courtroom experience and empirical evidence that traditional procedures were not serving jurors well. They were willing to try new techniques, make adaptations where necessary, and assure their colleagues through discussion, judicial and legal education, and policy making that jurors and the justice system were better served as a result. Jurors responded enthusiastically and have even kept reform efforts alive in some jurisdictions through citizen-based advocacy.

In the 1997 edition, and here, we have tried to maintain a balanced and intellectually honest treatment about the purported advantages and disadvantages of these innovations. Probably the major change in this edition is that we now know a lot more about many of these in-court innovations through empirical research, especially juror note taking, juror questions, and juror discussions before deliberations. Indeed, the past decade has seen the greatest increase in research on jury decision making since Harry Kalven and Hans Ziesel published their groundbreaking treatise *The American Jury* in 1966. The narratives for each innovation reflect this new understanding, with the result that some are now strongly favored innovations while others are disfavored. In the latter category are innovations such as videotaped trials that emphasize the traditional passive juror model of juror decision making. Although the introduction of this information interjects a normative flavor to this chapter, we believe that it presents the innovations themselves in a more realistic and empirically supported way.

§ 5.1 Videotaped Trials for Absent Jurors

Technique

During lengthy trials in which there is high risk of losing jurors because of illness or emergencies, the trial proceedings are videotaped, and the judge requires jurors who are absent to view the segments of the trial that they missed.

Issues

- Does juror viewing of the videotape take place on an honor system? Or should court staff act as proctors?
- At what point should jurors view the trial proceedings that they missed? As soon as they return? At the end of trial?
- Can jurors keep copies of tapes?
- What is the effect of viewing testimony or evidence out of the sequence in which it was presented at trial?
- What is the effect of viewing video testimony versus live testimony?

Procedures

Lengthy trials (e.g., those anticipated to last several weeks or more) often require the court to impanel several alternates on the jury to replace jurors that may be excused because of illness or personal emergencies. Rather than dismissing jurors who will be absent only temporarily, the court can require jurors to view a videotape of the trial proceedings. This system eliminates the need for multiple alternates and conserves court resources.

The court purchases or rents video equipment and hires or trains personnel to operate the equipment during trial. Jurisdictions that prohibit cameras in the courtroom may need to obtain consent to implement this technique. During the trial, the judge sets aside a specific time each week for jurors to watch the trial proceedings that they missed. These time periods can include those times established for motion arguments and other trial matters for which jurors would not otherwise be present. See also § 4.6, Modifying Daily Schedules.

To ensure that jurors actually watch the videotape, the judge assigns court personnel to monitor the jurors during the viewing. Court personnel also have responsibility for editing out or fast-forwarding through sidebar conferences, references to inadmissible evidence, and other aspects of the trial proceedings that the jury was not intended to see or consider.

Advantages

1. Videotaping the trial proceedings eliminates the need for the court to suspend trial proceedings to accommodate juror absences due to temporary illness or emergencies.

2. Videotaping the trial proceedings reduces the need for large numbers of alternates in the jury pool.

Disadvantages

1. The costs of purchasing or renting video equipment and hiring or training personnel to operate the equipment may exceed the costs of keeping extra alternates on the jury panel.

2. Ensuring that jurors actually watch the videotapes requires active monitoring by court personnel.

§ 5.2 Jurors View Videotaped Trial Rather Than Live Testimony

Technique

The entire trial is videotaped outside of the jury's presence. The court then edits the videotape to eliminate sidebar conferences, references to inadmissible evidence, and trial motions. An impaneled jury then views the edited videotape and renders its verdict.

Issues

* Who is responsible for setting up video equipment and taping trial proceedings? Can these costs be passed directly to the parties?

* What is the effect of viewing video testimony versus live testimony?

* What effect does placing jurors in a completely passive role (as viewers) have on verdicts? On juror satisfaction with jury service?

* Does the production quality of the videotape affect jurors' perception of the trial?

Procedures

At the pretrial conference, the judge assigns a "taping deadline," rather than a trial date, for the case. The trial attorneys videotape the witness testimony in a deposition format, raising objections to questions during direct or cross-examination as if at trial. After an attorney makes an objection, the witness answers the question.

The judge later rules on the objection and edits the videotape accordingly. Therefore, if the judge sustains an objection, the judge deletes the examining counsel's question, the opposing counsel's objection, and the witness's answer. If the judge overrules the objection, the judge deletes only the objection.

The trial attorneys provide two copies of the videotape to the court—one reserved as a master videotape and one to be edited for viewing by the jury. They are permitted to file written briefs to support or oppose specific evidentiary objections.

The court establishes a "dual docket" system, one for live and one for videotaped trials. After the videotape editing is complete, the jury is impaneled using conventional selection methods. The jury views the edited videotape trial and renders its verdict accordingly.

This technique was first used in Ohio and Pennsylvania in the early 1970s. Although it was evaluated favorably at that time, few courts implemented this technique. Both jurisdictions appear to have abandoned the technique over time, perhaps because of increased emphasis on "active" jury techniques.

AUTHORITY

Ohio R. Civ Proc. Rule 40 (1996) (authorizing videotaped trials).

Ohio R. Superintendence for Ct. of Com. Pls. Rule 10(E) (1996) (describing the citation format to be used when referencing videotaped trials).

Ohio R. Superintendence for Ct. of Com. Pls. Rule 12(B) (1996) (authorizing videotaped trials and establishing procedures for conducting such trials).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 13(I) ("Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.").

Fredric N. Tulsky, Pa. *Courts May Tell Jurors: "Let's Go to the Videotape,"* Nat'l L. J. 36 (March 16, 1987) (reporting on the Pennsylvania implementation of videotaped trials).

Marshall J. Hartman, *Second Thoughts on Videotaped Trials*, 61 Judicature 256 (1978) (examining potential problems arising from the use of videotaped trials).

James L. McCrystal, *Videotaped Trials: A Primer*, 61 Judicature 250 (1978) (describing the Ohio system).

Thomas J. Murray, Jr., *Videotaped Depositions: The Ohio Experience*, 61 Judicature 258 (1978) (describing modifications to the Ohio rules of superintendence to permit videotaped trials).

Advantages

1. The dual-docket system reduces the need to preassign trial dates.

2. Prerecorded video trials reduce the likelihood of last-minute trial postponements or delays because witnesses are tardy or unavailable. They also alleviate scheduling problems, especially for expert witnesses.

3. Removing the uncertainty inherent with live witness testimony makes the parties better able to evaluate their cases for settlement purposes.

4. Inadmissible evidence and testimony are more easily and more thoroughly excluded from the videotape than from the live trial, thus eliminating the need for admonitions to the jury to disregard inadmissible evidence and the corresponding risk that the jury will not follow the judge's limiting instructions.

5. Audio and visual controls on the video monitor can be adjusted to ensure that all jurors can hear and see evidence and testimony clearly.

Disadvantages

1. Taping and editing videotaped trials may be excessively expensive for parties, particularly to achieve the level of production quality needed to hold jurors' attention. For example, many jurors may be accustomed to high-quality video technology through cable and commercial television.

2. Videotaped trials also envision a very passive (viewer-only) role for jurors that may increase juror dissatisfaction and prevent opportunities for juror education.

3. Opportunities for more interactive jury innovations will be difficult to use (e.g., juror questions to witnesses).

STUDY

James L. McCrystal & Ann B. Maschari, *In Video Veritas: The Jury No Longer Need Disregard the Prerecorded Taped Trial,* 22 JUDGES' J. 40 (Summer 1983) (empirical study of the cost savings associated with videotaped trials).

§ 5.3 Projection of Real-Time Transcription

Technique

The use of computer-aided transcription permits hearing-impaired jurors, attorneys, and parties to view witness testimony and statements of counsel and the court displayed in real time on video monitors. The availability of a written transcription also aids jurors during deliberations. Some trials use real-time transcription, but do not project it unless as attorney wants to use it to compare cross-examination with direct examination, or with a document for emphasis.

Issues

- Is the "computer-integrated courtroom" or "total-access courtroom" required under the Americans with Disabilities Act (ADA)? See also § 2-6, ADA Compliance.
- Should judges, attorneys, and all jurors be supplied with monitors?
- Will the system include real-time video projection of the witness with a captioned translation or only lines of printed testimony?
- Can parties object to the transcriptions they consider to be incorrect?
- Would jurors have access to the computer transcript in deliberations? Would computer-aided memory be given equal weight in deliberations? What instructions would then be required?
- Will the captioning be available for videotaped depositions or other videotaped evidence?

Procedures

To implement this technique, the court must have access to the proper technology and be staffed with court reporters who are trained and certified on real-time transcription. Existing technology makes it possible to provide jurors either with "closed-caption" images of witness, counsel, and court statements or with printed lines of text only. The technology operates by translating shorthand symbols that are typed by the court reporter. Consequently, a single symbol may be interpreted as several different words. If the technology does not recognize a symbol, it will not translate it at all but will print an unreadable series of letters.

Providing video monitors for the judge and attorneys gives them the opportunity to correct or insert the proper terms during the trial. Before the trial, the attorneys can also provide the court reporter with any terminology specific to the case, such as names, dates, medical or specialized terminology, or unusual terms. These terms are then entered into the computer's internal dictionary to enhance the accuracy of the transcription.

The real-time transcription equipment simultaneously projects the testimony on video screens and creates a hard-copy, written transcript as the official trial record, subject to correction for misinterpreted transcription symbols. If jurors are given access to the transcript during deliberations, only the corrected transcript is made available to them.

Advantages

1. Computer-aided transcription permits hearing-impaired individuals to follow court proceedings, thus moving the court closer to the accessible justice system mandated by the ADA.

2. Real-time transcription simultaneously creates the written transcript, permitting the judge and trial attorneys to refer to prior testimony when handling objections or motions, preparing for cross-examination or closing arguments, and confronting witnesses with earlier testimony or prior inconsistent statements.

3. Real-time transcription may facilitate media coverage of a trial in jurisdictions where cameras are prohibited.

4. Real-time transcription and the availability of written transcripts during deliberations alleviates jurors' frustration when questions arise about the substance of witness testimony.

Disadvantages

1. Monitors distract the jury's attention from the witness stand, causing jurors to miss witnesses' demeanors.

2. The purchase and installation costs associated with this technology can be prohibitively expensive.

3. Real-time transcription requires a higher degree of precision by court reporters.

4. There is a four- to five-word delay from speech to the computer screen.

5. Jurors who rely exclusively on the real-time transcription (e.g., hearing-impaired jurors) may not fully understand the translated statements because of misinterpreted transcription symbols.

REFERENCES

Kristi Bleyer, Kathryn S. McCarty & Erica Wood, Into the Jury Box: A Disability Accommodation Guide for State Courts 33 (1994) (available at the ABA Web site).

American Bar Association and National Judicial College, Court Related Needs of the Elderly and Persons with Disabilities 56-57 (1991).

§ 5.4 Dual Juries

Technique

The court impanels two (or more) juries for cases involving multiple parties, defendants, or claims arising out of the same cause of action. This technique reduces the number and complexity of issues that any one jury must decide while promoting judicial economy by presenting otherwise duplicative evidence in a single trial.

Issues

- What is the threshold number of defendants or criminal counts in a single case that would warrant dual juries?
- What kind of resources and facilities (e.g., jury deliberation rooms, courtroom space, etc.) must the court have available to accommodate multiple juries?
- What impact does excusing one jury and retaining another—for example, to hear evidence relevant to only one defendant or criminal count—have on the decision making of the excused jury?
- What happens if the juries render inconsistent verdicts?
- What kind of jury instructions, if any, correct for references by counsel to inadmissible evidence?

Procedures

For cases involving multiple defendants, dual juries permit the presentation of otherwise duplicative testimony and evidence and reduce the complexity of questions to be asked of any one jury. In addition, using dual juries in multiple-defendant criminal cases reduces the risk that a single jury will incorrectly consider evidence that is admissible against one defendant but inadmissible against another. The use of dual juries involves a number of logistical considerations. In particular, court facilities (e.g., separate jury deliberation rooms, courtrooms, jury boxes) should be sufficiently large to accommodate the needs of two or more juries.

In practice, multiple juries are generally impaneled separately. Opening and closing statements are presented to the juries separately. Jury instructions for each jury are developed separately and do not make reference to facts or law presented only to the other jury. Juries deliberate separately and deliver separate verdicts.

In cases involving antagonistic defenses by multiple defendants, both juries hear the prosecution's case but hear the defendants' respective cases separately. When the dual jury is used in cases involving out-of-court statements by codefendants, each jury is removed during introduction of the codefendant's out-of-court statement against that codefendant.

The major problem associated with these trials is a variation on the *Bruton* error problem—namely, preventing evidence that is admissible against one party, but inadmissible against another, from being presented accidentally to the wrong jury during a joint trial. A secondary problem is an increased risk of inconsistent verdicts, although this risk is no greater in dual jury trials than in completely separate trials.

This technique is used only infrequently in criminal trials. There are no known cases in which it was used in a civil trial.

Advantages

1. Dual juries promote economy by reducing duplication of testimony and evidence.

2. Dual juries reduce the number and complexity of issues that any one jury is asked to decide.

3. Dual juries reduce the risk that a jury will incorrectly consider evidence or testimony introduced for another purpose (e.g., against a different defendant, relevant to a different criminal count, etc.).

4. Dual juries reduce the emotional burden for victims of crime who would have had to testify twice.

Disadvantages

1. Dual juries require larger court facilities to accommodate the greater numbers of jurors.

2. Dual juries present multiple logistical problems, including ensuring that a jury hears only admissible evidence relevant to the claims or issues it is asked to decide.

AUTHORITY

U.S. v. Bruton, 391 U.S. 123 (1968) (overturning the conviction of a defendant on grounds that the court's admonition to the jury that it disregard the confession of an accomplice, which was impermissibly introduced against the defendant at trial, violated the defendant's Sixth Amendment right to cross-examine witnesses against him).

United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972) (holding that the impaneling of two juries in a two-defendant criminal case did not violate the defendants' constitutional, statutory, or procedural rights).

REFERENCES

James G. Apple, Paula L. Hannaford-Agor & G. Thomas Munsterman, A Manual for Cooperation Between State and Federal Courts (Federal Judicial Center, 1996) (discussing the logistical obstacles to joint state-federal trials in mass-tort cases).

Alex A. Gaynes, *Two Juries/One Trial: Panacea of Judicial Economy or Personification of Murphy's Law*, 5 Am J. Trial Advoc. 283 (1981) (examining the problems that arise during the use of a dual jury in *U.S. v. Patrick and Thomas Hanigan*, CR-79-206-TUC-RMB [U.S. District Court, Phoenix, Ariz.]).

§ 5.5 Juror Discussions of Evidence During the Trial

Technique

Jurors are instructed at the outset of the trial that they may discuss the evidence among themselves during the trial, but only in the jury room and only when all of them are present. They are cautioned that discussion is appropriate only as long as they keep open minds on all issues until they have heard all of the evidence, all instructions on the law, and all arguments of counsel.

Issues

- Will juror discussions contribute materially to juror comprehension or recall and improve the quality of deliberations and verdict?
- Will discussions of the evidence before hearing all of the evidence, legal instructions, and arguments encourage the jury to make premature judgments about specific aspects of the case?
- Should specific noncourtroom time be set aside to accommodate juror discussion?

AUTHORITY

Ariz. R. Civ. Proc. Rule 39(f) (1996) (permitting juror discussion in civil cases).

Ind. R. Ct. Jury R. Rule 20(8) (2006) (permitting juror discussion in both civil and criminal cases).

Meggs v. Fair, 621 F.2d 460 (1st Cir. 1980) (holding that there is no constitutional requirement that the jury be instructed not to discuss the evidence before final submission).

United States v. Klee, 494 F.2d 394 (9th Cir. 1974) (holding that an instruction permitting jurors to discuss evidence was not per se reversible error, but should be evaluated under the harmless-error rule).

Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945) (holding that instructions permitting jurors to discuss evidence during trial constitute reversible error), *cert. denied*, 325 U.S. 863 (1945).

REFERENCE

American Bar Association, Principles of Juries and Jury Trials, Principle 13(F) (permitting juror discussions in civil trials).

Procedures

As part of the preliminary jury instructions, the judge instructs the jurors that they may discuss the evidence among themselves in the jury room during breaks in the trial. Jurors are cautioned, however, that they may not discuss the case with any other person until after the verdict and should avoid forming opinions about the outcome of the case until they have heard everything. The judge reminds the jurors from time to time, as necessary, of the importance of keeping an open mind on ultimate issues until jury deliberations begin.

If violations of the court's admonitions and conditions occur, the judge, with the aid of counsel, takes immediate corrective action regarding individual jurors or the jury as a whole.

Since December 1995, jurors in trials of civil cases in Arizona have been instructed that, subject to certain limitations, they may discuss the evidence in the jury room as the trial proceeds. Due to the high level of interest in this technique by both the legal and the academic communities, this technique has been extensively studied. Those studies have found that juror discussions do not encourage jurors to prejudge the evidence, as some critics feared. For purposes of juror comprehension, however, the technique is best employed in longer, more complex trials. In shorter trials, jurors rarely have the opportunity to engage in meaningful discussions before final deliberations begin. Indiana and Colorado recently adopted this technique by court rule, and a handful of judges across the country use the procedure in civil cases, generally with consent of counsel. In other jurisdictions, judges generally continue to instruct in accordance with the traditional admonition.

Empirical studies of this technique found that juror comprehension is improved only in larger, more complex cases. There was little effect in shorter trials. No study has found that juror discussion encourages prejudgment or otherwise prejudices the parties.

Advantages

1. Juror discussions about the evidence can improve juror comprehension by permitting jurors to sift through and mentally organize the evidence into a coherent picture during the trial.

2. Juror discussions about the evidence may improve juror recollection of evidence and testimony by emphasizing and clarifying important points during the trial.

3. Juror discussions about the evidence may increase juror satisfaction by permitting an outlet for jurors to express their impressions of the case before retiring for deliberations.

4. Juror discussions about the evidence may promote greater cohesion among the jurors, reducing the amount of time needed for deliberations.

5. Jurors find it difficult to adhere to admonitions about not discussing evidence. Permission to engage in such discussions bridges the gap between the court's admonitions and jurors' activities.

Disadvantages

1. Juror discussions of the evidence may facilitate or encourage the formation or expression of premature judgments about an evidentiary issue or the result of the case.

2. An aggressive, overpowering juror might dominate discussions and have undue influence on the views of others.

3. Allowing juror discussions before deliberations may detract from the ideal of the juror as a neutral decision maker.

4. The quality of deliberations may decline as jurors become more familiar with each other's views.

5. Sanctioned and structured discussions might produce a narrower and more confined set of final deliberations.

6. Juror stress might increase because of the conflicts produced by prior discussions.

STUDIES

Shari S. Diamond et al., *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 U. OF ARIZONA LAW REV. 1 (2003) (empirical study of juror discussions in fifty civil trials in Pima County, Arizona).

Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359 (2000) (empirical study of juror discussions in 168 civil trials in Arizona).

Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J. L. REFORM 349 (1999) (findings from surveys of judges, lawyers, litigants, and jurors about the advantages and disadvantages of juror discussions).

B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1261-68 (1993) (discussing the legal support for this technique and proposing jury instructions).

William W Schwarzer, *Reforming the Jury Trial*, 1990 132 F.R.D. 575, 593-94 (1991) (discussing the practical and theoretical problems associated with a blanket prohibition on juror discussions about the evidence in complex litigation).

§ 5.6 Juror Notetaking

Technique

Jurors are permitted to take notes for use during the trial and during deliberations.

Issues

- Should notetaking be limited to longer and more complex trials?
- Are juror notes destroyed after the trial? May jurors keep their notes?
- Are jurors permitted to take their notes home with them during the trial? If so, do the notes need to be kept secured to avoid theft or loss?
- How much time do jurors need to organize and review their notes during the trial?
- Who is responsible for providing jurors with writing materials?

Procedures

Notes serve as a useful memory aid for the evidence presented during trial and make it easier for jurors to follow and comprehend the issues and arguments in complex litigation. Studies of this widespread technique indicate that the jury is better informed about the evidence and the proper application of law during its deliberations. In most jurisdictions, the trial judge has discretion to permit jurors to take notes. However, if the jurisdiction does not, by statute or court rule, expressly permit jurors to take notes, all parties should consent to juror notetaking before trial. Only a small handful of states expressly prohibit notetaking, and then only in criminal trials.

If juror notetaking is permitted, the court furnishes notepads and writing utensils. The judge instructs the jury about court policy about whether jurors may retain their notes when court is in recess and whether jurors may discuss their notes when court is in recess and whether jurors may discuss their notes during the trial. See § 5.5, Juror Discussions About Evidence During the Trial. The trial judge also instructs the jury about the purpose of juror notetaking. Such instructions can include the following:

- Juror notetaking is permitted, but not required.
- Notetaking should not distract the jury's attention from the trial proceedings.
- Jurors' notes are confidential.
- Notes are for the private use of jurors and will not become an official document or part of the trial record.
- Jurors should use their notes to refresh their memory of evidence presented at trial, but notes should not be relied upon as definitive fact.

AUTHORITY

Ariz. R. Civ. Proc. Rule 39 (1996).

Ariz R. Crim. Proc. Rule 18.6(d) (authorizing juror notetaking and describing relevant procedures and policies).

Esaw v. Friedman, 586 A.2d 1 164 (Ct. 1991) (holding that jurors' notes are for the confidential use of the jurors and should not be preserved for appeal).

REFERENCE

American Bar Association, Principles for Juries and Jury Trials, Principle 13(A) (strongly encouraging juror notetaking).

Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Notetaking and Question Asking*, 79 Judicature 256 (1996) (discussing prior research on notetaking, including limitations in methodology).

STUDIES

Irwin A. Horowitz & Lynne Forster Lee, *The Effects of Note-taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial*, 25 L. & Hum. Behav. 373 (2001).

Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 Law & Hum. Behav. 121 (1994) (study results disproving many disadvantages associated with juror notetaking, but failing to verify its advantages).

- Notes have no greater weight than memory.
- In deliberations, note-aided and non-aided memory are of equal significance.
- Jurors should not be influenced by another juror's notes.

Advantages

1. Empirical research demonstrates that notetaking aids memory for both factual and conceptual items.
2. Notetaking encourages more active participation in jury deliberations, leading to a more thorough discussion by the jurors of the issues confronting them.
3. Juror notes help the jury reconstruct the presented evidence more efficiently during deliberations, which decreases deliberation time.
4. The process of notetaking keeps jurors alert and interested in the trial, increasing juror satisfaction with jury service.
5. Notetaking increases jurors' confidence that their deliberations correctly apply the jury instructions.
6. The availability of jurors' notes reduces the number of requests for court reporters to read back portions of the trial transcript.

Disadvantage

Jurors who take notes may participate more effectively in jury deliberations than those who do not.

David L. Rosehan, Sara L. Eisner & Robert J. Robinson, *Notetaking Can Aid Juror Recall,* 18 Law & Hum. Behav. 53 (1994) (study results show that jurors who took notes had superior recall and were more continually attentive to trials compared to jurors who did not take notes).

American Judicature Society, Toward More Active Juries: Taking Notes and Asking Questions (1991) (empirical study finding no evidence of prejudice to either party as a result of notetaking by jurors).

RELATED APPENDIX

Appendix 3: Arizona Rules of Civil Procedure Rule 39 (1996)

§ 5.7 Jurors' Submission of Questions for Witnesses

Technique

The judge permits the jurors to submit clarifying questions to witnesses through the trial judge. This technique is especially appropriate for situations in which the witness testimony is complex or confusing for the jury. The decision of whether to permit juror questions to witnesses generally lies within the discretion of the judge, although the trial attorneys retain the right to object to the scope or content of specific jury questions.

Issues

- Under what authority may jurors direct questions for witnesses?
- How should the judge screen for irrelevant or prejudicial juror questions?
- What significance will jurors attach to the fact that some of their questions are posed to witnesses and others are not?
- Does permitting jurors to ask questions of witnesses increase juror comprehension or reduce juror confusion concerning the substance of the witness's testimony?
- Does permitting jurors to ask questions of witnesses increase the length of the trial proceedings?

AUTHORITY

Ohio v. Fisher, 789 N.E.2d 222 (Ohio 2003) (finding that the vast majority of state courts permit juror questions).

Minnesota v. Costello, 646 N.W.2d 204 (Minn. 2002) (prohibiting juror questions in criminal trials on grounds that the practice might cause jurors to prejudge the evidence and might shift the burden of proof).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 13(C) (encouraging juror questions in civil trials and considering the practice in criminal trials).

Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Notetaking and Question Asking*, 79 Judicature 256 (1996) (describing the empirical research and limitations in methodology).

Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, 1 CBA Report 12 (Feb. 1987) (a trial judge's assessment of permitting jurors to ask questions of witnesses).

STUDIES

Shari S. Diamond, Mary R. Rose & Beth Murphy, *Jurors' Unanswered Questions*, Ct. Rev. 20 (Spring 2004) (finding that jurors rarely complain when their questions to witnesses are unanswered).

Procedures

At the beginning of the trial, the judge explains to the jurors that if witness testimony is confusing or complicated, they may submit clarifying questions in writing to the witnesses through the judge. Jurors need not sign or otherwise identify themselves as the authors of the questions. The judge reviews any juror questions with the attorneys out of the presence of the jury and rules on any objections made by the attorneys as to content. The judge may instruct the witness that he or she should confine the answers to the scope of the question. The trial judge also may instruct the trial attorneys to refrain from renewing in the presence of the jury any objections that were previously overruled.

The judge explains to the jury that evidentiary rules may prohibit certain questions from being asked of the witnesses and that the jurors should attach no significance to the fact that some of their questions were asked of the witnesses while others were not. The judge then reads those questions that have survived objections or permits the attorneys to do so. After the witness answers the question, the trial attorneys may again examine the witness.

This technique has received substantial legal and scholarly attention over the past decade. Judges and attorneys who have used this technique report that the vast majority of juror questions are serious, concise, and relevant to the trial proceedings. Studies of juror questions find that jurors on average submit three or fewer questions per trial, and approximately three-quarters of juror questions are subsequently posed to witnesses in one form or another. There is no evidence that permitting jurors to pose questions to the witnesses has any significant effect on the deliberative role of the jury. Likewise, the fact

that irrelevant or prejudicial questions are not posed to witnesses does not appear to affect the jurors' judgment in any significant manner. Like juror notetaking, only a small handful of jurisdictions expressly prohibit juror questions.

Advantages

1. The nature of juror questions often alerts the trial judge and the attorneys when the jurors have misunderstood an important point of the evidence or testimony, thus giving them the opportunity to correct the misunderstanding with new witness testimony, closing arguments, or jury instructions on the issue.

2. Permitting jurors to ask questions increases the likelihood that the jury will understand the witness testimony and give it appropriate weight during deliberations.

3. Permitting jurors to ask questions helps keep them alert and engaged in the trial proceedings, thus increasing satisfaction with jury service.

Disadvantages

1. Permitting jurors to ask questions may confuse their role as neutral fact finders, assuming instead the role of advocates.

2. Jurors may interpret the trial judge's failure to ask a question as an indication that the witness's testimony should be discounted.

3. Jurors may be offended or angry if all of their questions are not answered.

4. Permitting jurors to ask questions of witnesses adds to the length of the trial proceedings.

Nicole L. Mott, *To Ask or Not to Ask, That Is the Question*, 78 Chi.-Kent L. Rev. 1099 (2003) (examining the types of questions most frequently asked by jurors).

Mary Dodge, Should Jurors Ask Questions in Criminal Cases? A Report Submitted to the Colorado Supreme Courts Jury System Committee (Fall 2002) (evaluating the use of juror questions in 239 criminal trials in Colorado District Courts).

Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 Law & Hum. Behav 121 (1994) (study findings support the hypothesis that jury questioning promotes juror understanding of facts and issues and that potential disadvantages of questions do not occur).

American Judicature Society, Toward More Active Juries: Taking Notes and Asking Questions (1991) (finding no prejudicial effect from permitting jurors to ask questions of witnesses).

§ 5.8 Shadow Juries

Technique

Individuals, selected to closely represent the actual jurors, are recruited to watch a trial for the purpose of evaluating the trial process. These individuals receive the same information as actual jurors and give daily feedback to attorneys or consultants. Shadow jurors also are called surrogate jurors and trial-monitoring response groups.

Issues

- Do shadow juries behave similarly to the actual jury?
- Do shadow juries give an unfair advantage to one side over the other?
- Does the fact that the shadow jurors know their decisions do not "count" distort their perceptions and opinions?
- Are shadow juries effective in short trials when there is limited time to change tactics or approaches?
- Should shadow-jury predictions about verdicts be used to assess settlement offers?

Procedures

Shadow juries should be similar to the actual jury in terms of demographics and attitudes. These individuals can be found by a recruiting facility or by phone surveys. Shadow juries usually consist of six individuals. The shadow jurors are seated in the spectator section of the courtroom and attend the entire trial. Some consultants have the jurors sit apart, and others seat them together. They are treated as if they were real jurors. For example, when jurors leave the courtroom, so do the shadow jurors. Similarly, shadow jurors are not allowed to discuss the case with anyone. Every night shadow jurors are contacted to review critical aspects of the case and give observations on the proceedings. On occasion, shadow juries are used to evaluate only the opening statements and the first key witnesses.

Usually shadow jurors are paid between $75 and $150 a day.

This procedure is controversial and seldom used. Some trial consultants are opposed to using shadow juries because of their potentially deceptive nature.

Advantages

1. Shadow-jury reactions are more realistic than mock juries because the shadow jurors hear live argument, witness testimony, and evidence.

2. Shadow juries provide attorneys with valuable feedback from the trial. They can identify confusing issues and misunderstandings, which the trial attorneys can then address the next day of trial. Attorneys can also see if their strategies are working as planned or if they need to make some technical changes.

3. Shadow juries can be used to evaluate whether to accept or to make a settlement offer.

4. Shadow juries can shed some light on the jurors' decision-making process.

Disadvantages

1. A shadow jury can have a disruptive effect on the real jurors. Discovering that a shadow jury is being used can have a negative effect on jurors' attitudes about the trial process. Jurors have been known to play games, trying to figure out who represents them on the shadow jury.

2. Information gained from shadow juries during trial has limited use. Often it is too late to change a strategy or create a new theme.

3. Although the shadow jury is similar to the real jury, the jurors have had different life experiences and process information differently, thus decreasing the reliability of their reactions.

4. Shadow juries may be prohibitively expensive, especially in longer trials.

5. Using shadow juries widens the gap between rich and poor litigants, giving the appearance that the justice system favors wealthy individuals.

REFERENCES

Walter F. Abbott, Surrogate Juries (1990) (comprehensive overview of the use of shadow juries, the empirical research concerning their reliability for predicting verdicts, and the methodology for employing this technique).

Jeffrey T. Frederick, The Psychology of the American Jury 317-18 (1987) (describing the practical methodology involved in impaneling a shadow jury).

STUDY

Donald E. Vinson, *The Shadow Jury: An Experiment in Litigation Science*, 68 A.B.A. J. 1242 (Oct. 1982) (in-depth description of the methodology and findings of an experiment in juror decision making using shadow juries).

§ 5.9 Preinstructing the Jury

Technique

The judge preinstructs the jury to improve its comprehension of both the evidence and the issues that are presented during the trial. The preinstructions are delivered verbally and in writing. They include the basic principles of law that will govern the trial as well as more traditional topics concerning the role and responsibilities of the jury.

Issues

- What topics should be included in the preinstructions?
- When should preinstructions be delivered?

Procedures

Preinstructions for the jury consist fundamentally of an introduction to the parties and their claims, a presentation of matters not in dispute, and guidance on the contested issues and the governing legal principles. When preinstructing the jury, the judge explains that these instructions are preliminary instructions only and subject to change. The jury will receive final instructions that are definitive after all the evidence has been presented. Preinstructions may be delivered to the jury either verbally or in writing or both. They may be distributed to the jury as an insert in each juror's notebook, if provided for the trial, for ready reference during the trial. See § 4.7, Juror Notebooks.

At the end of the plaintiff's case, the judge and trial attorneys may update the preinstructions to reflect changes in the claims presented during the plaintiff's case in chief. To avoid any prejudicial effect from such a modification, the judge and trial attorneys draft the preinstructions to reflect "blackletter law," albeit tailored to the case to avoid excess abstraction. Pattern instructions are a ready source of concise summaries of governing legal principles. See § 6.3, Improving Pattern Instructions. This synopsis of the law should cover all of the basic elements of the claims and defenses, explaining that some of the elements may be uncontested and emphasizing that the issues may change as the case unfolds. The instructions should *not* include any "verdict directing" type of instructions (e.g., "if you find these elements have been proven, then your verdict should be . . .").

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 6(C)(1) (encouraging preliminary instructions).

William W Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575, 583-84 (1990) (discussing the legal authority and practical and theoretical justifications for preinstructions).

Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law,* 14 Law & Hum. Behav. 235 (1990) (discussing the advantages and disadvantages associated with preinstructions).

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, 437-42 (1985) (describing the results of experimentation in the timing of jury instructions by three federal district court judges in fourteen trials and observing that no survey respondent noted any negative effects on the jury).

Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication,* 1975 B.Y.U. L. Rev. 601, 620-23 (recommending jury instruction before and after the presentation of evidence, with interim instructions as needed to address unforeseen issues that arise during trial).

STUDIES

American Bar Association, Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases (1989) (based on the

Advantages

1. Preinstruction helps the jury identify, recall, and evaluate the pertinent evidence.

2. Preinstruction enhances jurors' ability to remember information presented at trial and to link the evidence to relevant issues.

3. Preinstruction helps jurors identify personal prejudices that must be put aside.

4. Preinstruction helps jurors assess the credibility of or reasonable inferences from the evidence at the time the evidence is received.

Disadvantages

1. Preinstruction compels the judge to expend greater time at an early stage when he or she may be less than fully informed about the disputed issues that will arise at trial.

2. Preparation of preinstructions is a contentious process given that trial counsel generally prefer instructions that anticipate all possible contingencies that might arise during trial.

findings of a study of juror decision making in complex litigation, recommending clear, plain-English instructions at the beginning and end of cases).

Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409 (1989) (study findings revealed that preliminary instructions help jurors follow legal guidelines in decision making and increase juror satisfaction).

SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 144-46 (1988) (reporting study findings that jurors' adherence to judges' instructions hinges in part on the placement of instructions within the trial proceedings).

Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof and the Timing of Judicial Instructions on Mock Juror Verdicts*, 37 J. PERSONALITY AND SOC. PSYCHOL. 1877 (1979) (study finding that jurors who were given preinstructions in criminal trials were significantly less likely to view the defendant as guilty of the crime than jurors who received instructions after presentation of the evidence or who received no instructions).

Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW & HUM. BEHAV. 163 (1977) (study findings revealed that presenting instructions at the beginning and end of the trial gave jurors a greater opportunity to focus their attention on relevant evidence and to remember it).

§ 5.10 Interim Commentary

Technique

At periodic intervals during trial, attorneys explain to the jury the significance of evidence or testimony about to be presented with respect to how it supports the theory of the case. Opposing counsel has the opportunity to respond to interim commentary. This technique is especially helpful in lengthy or complex litigation.

Issues

- When opposing counsel responds to interim commentary, does the response time count against that party's allocated time for interim commentary?

- Do traditional rules of procedure governing opening and closing argument apply to interim commentary?

- Before presenting interim commentary, must counsel give notice to the court, opposing counsel, or both? Must counsel obtain the consent of the court, opposing counsel, or both?

Procedures

At the beginning of the trial, each party is allocated a specific amount of time in which to present opening arguments and interim commentary as it sees fit during the trial. See also § 4.1, Pretrial Limits on Each Party's Time at Trial. An alternative procedure is to allocate a few minutes for each party to present interim commentary at prescheduled times or days during the trial.

The trial attorneys use this time to explain to the jury the subject matter of the evidence or testimony they are about to hear and how it relates to their theory of the case. Opposing counsel has the opportunity to respond with the interim commentary about their cross-examination or other evidence on the subject to be presented. This technique permits counsel to frame the context of their cases in manageable segments that jurors can easily assimilate.

Advantages

1. Mini-opening statements and interim commentary increase juror comprehension by periodically permitting jurors to place the evidence in the context of the theory of the case.

2. Interim commentary buttresses limiting instructions by the judge regarding the purpose of offered evidence.

3. Interim commentary permits the trial attorneys to organize, clarify, emphasize, contextualize, and explain evidence.

4. Interim commentary keeps jurors focused on the evidence, thus preventing them from making premature judgments.

Disadvantages

1. Jurors may focus on the attorneys' commentary rather than the evidence.

2. Jurors may pay less attention to the evidence, relying on the trial attorneys to explain it to them.

REFERENCES

B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1249-50 (1993) (discussing justifications for preinstructing the jury).

New York State Bar Association, Committee on Federal Courts, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549, 557-58 (1988) (describing the application of permitting counsel to make interim commentary in *Westmoreland v. CBS*).

Patrick E. Higginbotham, *Juries and the Complex Case: Observations About the Current Debate*, in THE AMERICAN CIVIL JURY 78 (1987) (advocating the use of interim commentary in lengthy trials).

§ 5.11 Plain English at Trial

Technique

The judge, court staff, and trial attorneys use plain English when communicating with the jury.

Issues

- To what extent can juror satisfaction be enhanced by removing the verbal mystique and incomprehensible discourse typically used during the trial?
- Apart from jury instructions, what opportunities exist for the judge and trial attorneys to make their communications to the jury more understandable?
- What are the appropriate limits for encouraging plain English, recognizing that the trial attorneys should have some freedom to use (or not use) any style of communication that reflects their preferred trial strategies?

Procedures

A strong correlation exists between juror satisfaction with jury service and how well jurors understood the proceedings in which they participated and their role within those proceedings. To maximize jurors' understanding, the judge, court staff, and trial attorneys use plain English in their communications with the jury throughout the trial. For example, the judge should avoid "legalese" vocabulary—replacing, or at least explaining, terms such as "plaintiff," "cause of action," or "indictment."

During voir dire, jurors may perceive the judge's questioning as an inquisition, perhaps even subject to penalties for incomplete responses. Thus, the nature of the questions should be assuring, comforting, and open-ended. The judge also should invite the jurors to ask any questions about the court's voir dire examination. If the trial attorneys conduct voir dire, they also should limit the use of legal jargon. See also § 3.1, Lawyer-Conducted Voir Dire.

Rulings on evidentiary objections and other exchanges between the judge and trial attorneys need be conducted in plain English only if it is appropriate for the jury to understand them. However, both the judge and trial counsel should be aware that the jury may feel deliberately excluded from understanding part of the trial process. Admonitions to the jury, such as to disregard evidence that has been stricken, also should be framed in plain language.

Advantage

Jurors who understand the trial proceedings are more likely to perform their duties well.

Disadvantages

1. Efforts to employ plain English can result in trial judges being too casual, diminishing the dignity of the court.

2. The quest for improved communications with the juror may encroach on the parties' strategic options as to how the case should be presented to the jury.

REFERENCES

Gregory E. Mize, *Thinking Outside the Jury Box: The D.C. Circuit Needs to Embrace Common Sense*, WASH. LAW. (Nov. 2005).

LANGUAGE*and*LAW.org (an online institute devoted to the study of language and the law available at http://www.languageandlaw.org/).

PETER TIERSMA, LEGAL LANGUAGE (1999) (discussing the development of legal language in England and the United States and related reform efforts).

Josepth Kimble, CLARITY (an international periodical reviewing efforts to simplify legal language, published by CLARITY, 74 South St., Dorking, Surrey RH4 2HD England).

JUDITH N. LEVI, LANGUAGE AND LAW: A BIBLIOGRAPHIC GUIDE TO SOCIAL SCIENCE RESEARCH IN THE U.S.A. (1994) (bibliographic compendium of linguistic research applicable to jury studies).

JUDITH N. LEVI & ANNE GRAFFAM WALKER, EDS., LANGUAGE IN THE JUDICIAL PROCESS (1990) (compendium of scholarly papers presented at the Conference on Language in the Judicial Process, July 1985).

Chapter 6

Jury Instructions and Deliberations

This chapter focuses on innovations related to the jury's task once all of the evidence has been presented and the jury begins its deliberations. They are a mix of suggestions for more comprehensible jury instructions, more meaningful guidance for juries about how to organize themselves for deliberations, and logistically practical tips for conducting deliberations and delivering the verdict.

In most instances, there have been few changes in the past decade, especially on the topic of plain-English jury instructions, but those that have been made have been noteworthy. While courts increasingly recognize the difficulty with drafting and delivering comprehensible jury instructions, only a handful of jurisdictions—notably, California, Delaware, Michigan, and Vermont—have tried to remedy the situation through wholesale changes to their states' civil and criminal pattern instructions. We are pleased that Peter Tiersma's very practical and user-friendly article on communicating with juries will soon be available to help judges draft jury instructions in individual cases.[1] We hope to see more of these efforts take root in the coming decade, including the development of objective measures to assess the impact that clearer instructions have both on the dynamics of jury deliberations and on jury verdicts themselves.

The relative lack of progress for plain-English jury instructions is due mainly to the fact that good drafting is an inordinately time-consuming and labor-intensive activity. Unlike some of the innovations discussed in the previous chapter, no great outcry has arisen against jurors being given the law in language they can easily understand and use. This is less the case for innovations that involve attempts by the trial judge to assist jurors once deliberations have commenced, even when the jurors themselves request that assistance. Some appellate decisions, for example, see a clear demarcation between the evidentiary portion of the trial, in which the trial judge has considerable discretion over trial procedures that assist jurors, and jury deliberations, in which virtually any judicial involvement is considered an abuse of discretion. The result of these decisions has stifled some otherwise promising innovations.

[1]. Peter M. Tiersma, Communicating with Juries: How to Draft More Understandable Jury Instructions (National Center for State Courts 2006).

§ 6.1 Jury Instructions Before Closing Arguments

Technique

The judge delivers instructions to the jury before, rather than after, closing arguments. A variation on this technique consists of the judge delivering substantive instruction to the jury before closing arguments, holding instructions on administrative matters until after closing arguments.

Issues

- Does providing final instructions before closing arguments enhance juror understanding about the legal framework in which they must make their decisions?
- Does providing final instructions enhance procedural fairness or increase the number of "legally correct" decisions?

Procedures

Traditionally, the judge issues final instructions after closing arguments by the trial attorneys. The Federal Rules of Civil Procedure and some state rules reflect this practice. Until they were amended in 1987, the Federal Rules required that the judge instruct the jury after counsel completed closing arguments. Today, the Federal Rules and many state codes are more flexible, permitting the judge to instruct the jury either before or after argument, or both. A substantial body of empirical research has established that closing arguments are more meaningful to jurors if they have heard the jury instructions beforehand.

The judge may instruct the jury on the law before closing arguments, leaving instructions on administrative matters and general guidance about deliberations until after the arguments. See § 6.4, Suggestions for Jurors on Conducting Deliberations. This alternative reminds the jurors of the earlier instructions and instructs them about procedures to follow during deliberations, including asking questions about the instructions or deliberations and reporting the verdict.

Advantages

1. Closing arguments are more meaningful within the legal framework provided by instructions and, as a result, may improve jurors' recollection of the evidence.

2. The trial attorneys know the exact wording of the instructions and can tailor their closing arguments accordingly.

3. The trial attorneys can include an explanation of the instructions in their closing arguments and demonstrate how the instructions should be applied to the facts of the case.

4. Jurors are less likely to be swayed inappropriately by closing arguments and are more likely to evaluate the evidence according to legally correct guidelines.

Disadvantages

1. Jurors will focus on the judge's instructions rather than on closing arguments.

2. Jurors will view the trial from the perspective of the trial judge and will fail to consider the perspectives articulated in closing arguments.

AUTHORITY

FED. R. CIV. PROC. Rule 51 (1996) (giving the trial court discretion to deliver jury instructions before or after closing arguments).

VA. R. CIV. PROC. Rule 3A:16 (requiring that final instructions be reduced to writing and delivered to the jury before closing arguments).

WIS. STAT. 805.13(4) (1994) (giving the trial court discretion to deliver jury instructions before or after closing arguments).

REFERENCE

William W Schwarzer, *Communication with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 755-59 (1981) (discussing the importance of timing and delivery of jury instructions).

§ 6.2 Plain-English Jury Instructions

AUTHORITY

Massachusetts v. DiBenedetto, 693 N.E.2d 1007 (1998) (holding that the trial court did not err when it used a blackboard during jury instructions to enumerate the elements of murder).

Mitchell v. Gonzales, 819 P.2d 872 (1991) (rejecting California pattern instruction on proximate cause due to unintelligibility to average juror).

REFERENCES

Peter M. Tiersma, Communicating with Juries: How to Draft More Understandable jury Instructions, (originally published in 10 Scribes J. Legal Writing 1 [2005-06]).

American Bar Association, Principles on Juries and Jury Trials, Principle 6(C) ("Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.").

Peter M. Tiersma, Legal Language 203-31 (1999) (discussing reforms to make jury instructions more comprehensible).

Michael J. Saks, *Judicial Nullification*, 68 Ind. L. J. 1281 (1993) (arguing that by failing to provide comprehensible jury instructions, judges effectively nullify the law).

J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 Neb. L. Rev. 71 (1990) (challenging the assumptions that juries would follow jury instructions even if they understood them).

American Bar Association, Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases 43-52 (1989) (discussing specific problems encountered by jurors in deciphering jury instructions).

Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77 (1988) (concluding that improvements in the comprehensibility of the jury instructions are unlikely without institutional changes in the incentives for judges and lawyers to draft plain-English instructions).

Technique

To foster more comprehensible, "plain-English" jury instructions, the judge and trial attorneys jointly prepare instructions with specific attention to the overall character and structure of the jury charge. The trial judge uses a conversational tone to deliver the charge. If the instructions are lengthy or complex, the use of "stretch breaks" and audiovisual aids also may increase the jurors' ability to understand and assimilate the charge. See also § 6.3, Improving Pattern Instructions.

Issues

- Are "plain-English" jury instructions more comprehensible to jurors?
- Can trial procedures be revised to encourage more time and attention to refining and clarifying the charge?
- To what extent should greater emphasis be given to the overall structure and composition of the charge?
- Does a multimedia presentation of the jury instructions improve jurors' comprehension of the issues and governing law?
- Do counsel have an opportunity (or responsibility) to include an explanation of the jury instructions in their closing arguments?

Procedures

Both anecdotal reports and empirical studies of jury behavior strongly support the contention that jurors take seriously their responsibility to apply the law. But a great deal of the jury's deliberation time is spent trying to understand the instructions, and the frustrations expressed by jurors indicate a need to improve the clarity and, thereby, the efficacy of those instructions. Indeed, numerous studies of juror comprehension have found that jury instructions are usually the most complex type of information jurors encounter during a typical trial.

To improve jury instructions, the court carefully considers the message that the jury charge is intended to communicate. Jury instructions are not intended to provide a crash course on governing legal principles so that duly educated jurors can engage in the same decision-making process as a well-trained judge. Rather, jury instructions should present the factual issues to be decided and those legal rules the jury must use in deciding such issues. Most instructions can be clarified by eliminating any unnecessary "legal education."

Before trial, the trial judge requires the parties to identify two types of issues: those that are purely factual ("Was the traffic light red or green?") and those that concern the application of relevant law ("Did the defendant breach his fiduciary duty?"). Based upon these submissions, the trial judge prepares a working list of the issues.

The judge's list of issues (facts and applicable law) serves as the basis for an outline of the jury instructions. In practical terms, the outline is a table of contents that guides the parties in preparing proposed jury instructions that address the same issues. In cases

covered by pattern instructions, the outline will indicate which pattern instructions will be given and in what sequence, allowing more time to consider any deviations that might be appropriate. See also § 6.3, Improving Pattern Instructions. The outline approach also will encourage the appellate courts to examine the propriety of the charge as a whole. Currently, appellate courts tend to consider only whether specific instructions correctly state the governing law and pay little attention to shortcomings in the comprehensibility of the charge as a whole. This procedure enables the trial judge to focus on the text of the individual proposed instructions.

Using a style manual for jury instructions can help the judge and attorneys draft instructions that:

- Avoid abstract statements of legal principles;
- Use language that is "case-specific" in terms of the parties and the evidence—e.g., "Mrs. Smith" and "the bus company" rather than "plaintiff" and "defendant";
- Organize the instructions according to a hierarchical checklist of the applicable legal tests and criteria, including descriptive headings and distinct subtopics to be addressed by the jury;
- Summarize text that is important for guiding the jury through the instructions, even though this text may have no substantive legal content;
- Include examples to illustrate the application of governing law;
- Include a table of suggested "jury-friendly" terms and expressions that might replace traditional legal jargon; and
- Use consistent terminology throughout the instructions.

The judge's use of a conversational tone and demeanor, written copies of instructions, modern communications technology (e.g., overhead projectors or video monitors), and appropriate visual aides (e.g., an outline of the charge, a summary of key points, or other graphic presentations) tends to improve juror comprehension. The judge also should encourage jurors to ask questions about the instructions before they begin deliberating. See § 6.6, Juror Questions About Instructions.

If closing arguments follow the jury instructions, the trial attorneys display the precise text of the jury instructions and discuss the evidence in terms of the instructions. See also § 6.1, Jury Instructions Before Closing Arguments.

Veda Charrow, *Some Guidelines for Clear, Legal Writing*, 8 U. BRIDGEPORT L. REV. 405 (1987) (practitioners' guide to drafting plain-English jury instructions).

Edward J. Imwinkelried and Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135 (1987) (providing a review of the literature and a practitioners' guide to problem terminology in jury instructions in criminal cases).

Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Research*, 65 NEB. L. REV. 520 (1986) (reviewing empirical studies related to jury decision making and their applicability in the redrafting of judicial pattern jury instructions).

AMIRAN ELWORK, BRUCE D. SALES & JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (comprehensive practitioners' guide for evaluating jury instructions for comprehensibility and for redrafting instructions).

William W Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 743-55 (1981) (critiquing the language and construction of jury instructions).

STUDIES

Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998) (finding that jurors routinely misunderstood jury instructions on basic legal principles).

Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (reporting increases in juror comprehension of jury instructions on the death penalty after redrafting in accordance with established linguistic principles).

Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. Crim. L. & Criminology 198 (1984) (study evaluating improvements in the comprehensibility of jury instructions defining "reasonable doubt," "criminal intent," and "limited use of evidence of prior conviction").

Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc. Rev. 153 (1982) (three studies demonstrating methods for improving the comprehensibility of jury instructions).

Robin Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. Crim. L. Criminology 68 (1980) (study examining the effects of providing or withholding jury instructions on jury decision making).

Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979) (identifying, and testing for reliability and validity, those linguistic features that interfere with jury comprehension).

Amiram Elwork, Bruce D. Sales & James J. Alfini, *Jurdic Decisions: In Ignorance of the Law or in Light of It?* 1 Law & Hum. Behav. 163 (1977) (study finding significant improvements in juror comprehension of pattern instructions after rewriting them to define or eliminate unfamiliar terminology; correct grammar; and improve organization).

Advantages

1. By preparing a working outline of disputed factual and legal issues, the judge and trial attorneys avoid the problem of jury charges that are a garbled patchwork of competing submissions by the opposing parties.

2. Greater attention to the overall structure and character of the charge minimizes redundancies, inconsistencies, and omissions in the instructions.

3. Upgrading the quality of jury instructions encourages jurors to consider all of the issues, rather than mistakenly looking to isolated instructions as hit-or-miss guidance on what they are supposed to do.

Disadvantages

1. Formulating an outline of issues to be addressed in jury instructions requires the judge to dedicate additional time becoming familiar with the case before trial.

2. An outline of disputed factual and legal issues is necessarily subject to change during the trial. Some judges may be reluctant to make adjustments to instructions.

3. Deviations from approved pattern instructions or other jury instructions that have survived prior appeals create more potential grounds for appeal.

§ 6.3 Improving Pattern Instructions

Technique

Drafting committees for pattern jury instructions reduce the texts to plain-English statements of core legal concepts. Infrequently applied qualifications or other details of governing rules are omitted from the base instructions with the understanding that the judge and trial attorneys can add them as needed. Using a "style manual" that incorporates well-grounded social-science research, field-testing draft pattern instructions, and having professional linguists conduct evaluations are additional techniques for improving comprehensibility of pattern instructions.

Issues

- From what areas of expertise should drafting committees draw in revising pattern instructions?
- How should proposed instructions be evaluated for improvements in comprehensibility? For adherence to existing law?
- What steps can drafting committees take to increase the likelihood that the use of redrafted pattern instructions will be approved by appellate courts?

Procedures

In preparing pattern instructions, drafting committees first identify the legal content to be expressed and then consult with linguistic experts to ensure that the text of the proposed instructions reflects "plain-English" translations of statutory language and case law. A "style manual" drawing on reliable social-science resources can be a valuable aid in this endeavor. The draft patterns are then field-tested on potential jurors to confirm empirically that they satisfy some minimum level of comprehensibility. The drafting committee may include commentary with the published instructions emphasizing that comprehensibility is every bit as important as accuracy.

A number of states have undertaken comprehensive efforts to improve their pattern instructions. Michigan's effort to rewrite its criminal instructions was one of the first. That effort began with a survey of judges to find out which instructions they thought were most troublesome. Jurors' understanding of the instructions was examined by assessing the differences in test scores between jurors who were given and those who were not given a particular instruction. The Michigan committee worked from three formats, presented simultaneously to facilitate comparison. The first format was the existing instruction. The second was the existing instruction with proposed redrafted language placed directly over the applicable current language. The second format was not simply a word-for-word adaptation, but could be a major restructuring of an instruction if the committee felt it was necessary. The third format was the redrafted instruction. The committee rewrote the two volumes of instructions, which with commentary now consist of three volumes.

Delaware used a slightly different approach to draft its civil jury instructions. The Delaware committee hired a professional linguist as editor and began an iterative process in which the committee drafted revised instructions, the editor then made suggestions

REFERENCES

Peter M. Tiersma, Communicating with Juries: How to Draft More Understandable Jury Instructions (2006) (originally published in Scribes J. Legal Writing 1 [2005-06]).

James D. Ward, *California Adopts "Plain-English" Civil Jury Instructions*, 76 Judicature 300 (2004) (reviewing the process and providing examples of revisions to the California civil jury instructions).

Peter M. Tiersma, Legal Language (1999) (discussing the development, characteristics, and current reform efforts related to legal language).

Robert E. Kehoe, Jr. Instructions for Contract Cases (1995) (chapter 5 and the appendices provide plain-English, well-referenced, and basic rules for writing understandable instructions).

Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions: Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J. L. Ref. 401 (1990).

Judicial Conference of the United States, Subcommittee on Pattern Instructions, Pattern Criminal Jury Instructions (1988) (appendix A provides guidance on drafting comprehensible jury instructions).

to improve their comprehensibility, and the committee reviewed the proposed changes to ensure that the legal accuracy of the instructions had not changed as a result of the stylistic edits. California and Vermont also followed this approach in rewriting their jury instructions. Examples of California's rewritten instructions are available at http://www.courtinfo.ca.gov/jury/.

The NCSC will soon publish a manual by Professor Peter M. Tiersma, Loyola Law School in Los Angeles, that provides practical advice to pattern instruction committees on how to draft understandable instructions.

Advantages

1. Plain-English pattern instructions provide a sound basis for drafting comprehensible jury instructions for specific cases.

2. Plain-English pattern instructions are sufficiently broad and encompassing to be used as preliminary jury instructions. See § 5.9, Preinstructing the Jury.

Disadvantages

1. Redrafting pattern instructions into plain English is a time-consuming task that requires substantial psycholinguistic expertise and testing of proposed instructions to achieve significant improvements in juror comprehension.

2. Appellate courts tend to undervalue comprehensibility in pattern instructions, making efforts to improve them subject to risk of being overturned on appeal.

Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135 (1987) (a practical guide to the application of psycholinguistic research).

Koenig, Kerr & Hoeck, *Michigan Standard Criminal Jury Instructions: Judges' Perspectives After Ten Years Use*, 4 COOLEY L. REV. 347 (1987).

Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520 (1986) (reviewing empirical studies related to jury decision making and their applicability in the redrafting of federal pattern jury instructions).

Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of Sample Pattern Instructions on Obscenity*, 59 TEMP. L. Q. 1159 (1986) (illustrating the application of social-science research to jury instructions).

Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (premier study exposing deficiencies in the comprehensibility of jury instructions and isolating linguistic features that cause comprehension problems).

§ 6.4 Suggestions for Jurors on Conducting Deliberations

Technique

The court provides jurors with suggested procedures for conducting deliberations, including how to use the jury instructions to reach a verdict and how to manage the deliberative process.

Issues

- Do suggestions on jury deliberations help jurors usefully organize the deliberative process?
- Do suggestions on jury deliberations assist jurors to render verdicts consistent with evidence presented at trial?
- Do suggestions on jury deliberations increase juror satisfaction with the deliberative process?
- Do suggestions on jury deliberations reduce the amount of time jurors spend deliberating?

Procedures

Jury deliberations are a unique American experience. What other contemporary activity requires a small, diverse group of citizens who have no previous relationship to arrive at a unanimous consensus on the solution to a complex problem? It should be no surprise then that many jurors report hesitation, confusion, and frustration as they organize themselves to begin deliberations. Athough the strength of the jury system depends on the independence of the jury from outside influences, there is nothing inherently illegitimate about judges providing jurors with suggestions about how the jury might organize itself to undertake deliberations.

Immediately before the jury retires to deliberate, the judge provides jurors with written and verbal suggestions on how to use the instructions in their deliberations and how to manage the deliberative process. For example, the judge may recommend that jurors consider only one claim or offense at a time and that they use the instructions as a guide to determine whether the parties introduced sufficient evidence to establish all the necessary legal elements for each claim or defense. The judge also provides suggestions on managing the deliberative process, such as selecting a presiding juror (if not previously selected), avoiding early public votes on the verdict, conducting small-group discussions that provide all jurors with an opportunity to present their opinions, allocating tasks (such as taking notes on deliberations) among jurors, and handling disagreement or deadlock.

The American Judicature Society has developed a small booklet titled *Behind Closed Doors: A Guide for Jury Deliberations* that provides useful suggestions for jurors in a question-and-answer format. See appendix 4. Several states have adapted these booklets to reflect local law and provide copies to judges for use by deliberating jurors. Other judges have incorporated the language of these booklets into their own closing instructions.

REFERENCES

American Judicature Society, Behind Closed Doors: A Resource Manual to Improve Jury Deliberations (1999) (manual for jurors with suggestions for conducting deliberations).

Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 Loyola L.A. L. Rev. 869 (1995) (describing a firsthand experience of a law professor deliberating as a juror).

Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 Yale L. J. 593 (1987) (observing differences in the participation rates between male and female jurors in deliberations).

Reid Hastie, Steven D. Penrod & Nancy Pennington, Inside the Jury (1983) (comprehensive examination of jury decision making and the dynamics of the deliberation process).

K. Phillip Taylor, Raymond W. Buchanan, Albert Pryor & David U. Strawn, *Avoiding the Legal Tower of Babel*, 19 Judges' J. 10 (Summer 1980) (application of process jury instructions in a Florida criminal case).

Advantages

1. Suggestions on deliberations inform jurors about the place of jury instructions in the deliberative process.

2. Suggestions on deliberations help jurors organize their deliberations in a systematic fashion without placing restraints (such as those associated with special-verdict forms or general verdicts with interrogatories) on the jury's decision-making discretion.

3. Suggestions on deliberations reduce the amount of time jurors spend in deliberations and decrease the likelihood of deadlock.

Disadvantages

1. Providing guidance to jurors about deliberations will be viewed by the parties and by the jurors themselves as an illegitimate attempt to influence the outcome of deliberations.

2. Existing jury instructions are sufficient. Additional jury instructions will be superfluous.

STUDIES

Norbert L. Kerr & Robert J. MacCown, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, in IN THE JURY BOX 209, 213-14, 229-30 (Lawrence S. Wrightsman, Saul M. Kassin & Cynthia E. Willis eds., 1987) (study finding that "secret polling" in close cases increased the likelihood of hung juries).

David U. Strawn, Raymond W. Buchanan, Albert Pryor & K. Phillip Taylor, *Reaching a Verdict, Step by Step*, 60 JUDICATURE 383 (1977) (recommending "process instructions" that advise jurors on a systematic method of conducting deliberations).

RELATED APPENDIX

Appendix 4: *Behind Closed Doors: A Guide for Jury Deliberations*

§ 6.5 Written or Recorded Instructions for Jurors

Technique

The judge provides jurors with written copies of the jury instructions before they are read by the judge. As an alternative, the judge records the verbal jury charge and provides jurors with the tape recording.

Issues

- Will jurors misinterpret written instructions or place undue emphasis on instructions?
- Do copies of written instructions increase juror comprehension?
- Do written instructions create a cultural or socioeconomic bias against jurors with less formal education or limited ability to read English?
- Who is responsible for the cost of providing copies of jury instructions?

Procedures

Jury instructions are generally the most complex type of information that jurors deal with in a typical jury trial. This is true in large part because jury instructions are designed as a form of written communication with the jury. In contrast, every other part of the jury trial—opening and closing arguments, direct and cross-examination of witnesses—is designed as oral communication, which is characterized by shorter sentences, active voice, and less complex syntax. Although many judges try to infuse their reading of the instructions with appropriate verbal inflections to keep jurors' attention and provide clarity, these attempts cannot compensate for the inherent verbal complexity of the information intended to be communicated. Permitting jurors to read along as the judge instructs the jury and to consult those instructions during deliberations aids comprehension by letting jurors digest this information in the format by which it was intended to be communicated.

The judge notifies the trial attorneys in advance of trial that jurors will be given written copies of instructions. For drafting purposes, the attorneys supply the judge with two sets of recommended jury instructions, one with relevant citations for consideration by the judge and one without citations for submission to the jury. If the judge or attorneys make any last-minute changes, the instructions should be reprinted and recopied to prevent confusion or bias (e.g., with strikeouts, underlining, or typographical errors). The judge should caution the jury that the instructions should be considered as a whole.

AUTHORITY

U.S. v. Massey, 89 F.3d 1433 (1996) (finding that the trial court did not err in providing only a tape recording of the jury instructions in lieu of written instructions).

Iowa R. Civ. P. Rule 196 (1996) (requiring jury instructions to be provided to jurors in writing except in small-claims cases [amounts in controversy less than $2,000] or with the consent of all parties).

Iowa R. Crim. P. Rule 18(5)(f) (1996) (extending the Iowa Rules of Civil Procedure concerning juries to criminal trials).

Tenn. R. Crim. P.30(c) (1996) (requiring written jury instructions in all criminal trials).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 14(B) ("Each juror should be provided with a written copy of instructions to use while the jury is being instructed and during deliberations.").

Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 Loyola L.A. L. Rev. 869 (1995) (a firsthand description of jury deliberations and suggestions for improved guidance by the court).

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

Advantages

1. Written instructions increase juror comprehension about the charge and reduce the number of questions by the jury about instructions during deliberations.

2. Written instructions prevent jurors from failing to consider critical elements of the legal claims or offenses.

3. Written instructions provide guidance for structuring the deliberative process.

4. Written instructions increase juror confidence in their verdict.

5. Written instructions reduce deliberation time.

6. Written instructions reduce the likelihood of disputes among jurors regarding the content and application of instructions.

7. Audio recordings of instructions help jurors who have difficulty with written text.

8. Audio recordings of instructions are less logistically cumbersome for courts that lack high-speed printers and copiers.

Disadvantages

1. Written instructions may place jurors with less formal education or limited ability to read English at a disadvantage during deliberations.

2. Written instructions require additional time and effort by the court and counsel.

3. Multiple copies of instructions increase the cost of conducting jury trials.

American Bar Association, Charting a Future for the Civil Jury System: Report from an American Bar Association/Brookings Symposium 24 (1992) (recommending that all jurors be provided copies of the final instructions).

STUDIES

American Bar Association, Special Committee on Jury Comprehension, *Jury Comprehension in Complex Cases* 51-52 (1989) (unanimous reports by jurors that written copies of instructions were helpful).

Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Hum. Behav. 409 (1989) (study found that written instructions reduce juror disagreements about instructions and found no support for contention that written instructions lengthen deliberations or place excessive demands on court resources).

New York State Bar Association, Committee on Federal Courts, *Improving Jury Comprehension in Complex Civil Litigation*, 62 St. John's L. Rev. 549, 564-65 (1988) (survey responses of lawyers and judges concerning written and recorded jury instructions).

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, 453-56 (1985) (study found mixed reactions by judges and lawyers to written instructions to jurors, but found increased favor for this practice for complex or lengthy instructions).

§ 6.6 Juror Questions About Instructions

Technique

In the final instructions to the jury, the judge gives clear guidance to the jury on the procedures for requesting clarification of instructions.

Issues

- Should the judge respond to all questions?
- What form should questions take and in what form should the judge respond?
- What type of cautionary instructions should the judge give to the jury about asking questions during deliberations?
- Should the judge consult with the parties before responding to all questions?

Procedures

As part of the final jury instructions, the trial judge advises the jury to submit in writing and in a sealed envelope through the bailiff any questions about the instructions arising during deliberations. Any questions submitted by the jury are then numbered, designated by time and date, and filed and marked as a court exhibit. The judge also permits the jurors to ask clarifying questions about the instructions before they retire to deliberate. This permits early clarification of questions while all parties are still present in the courtroom. Many judges report that providing written copies of the jury instructions to jurors substantially reduces the number of questions that arise during deliberations. See § 6.5, Written or Recorded Instructions for Jurors.

If questions arise during deliberations, the trial judge advises all counsel that the jury has submitted a question and directs that they assemble in the courtroom or by telephone to review it. The judge reads the question on the record and solicits comments from the attorneys regarding any appropriate response. In responding to questions by the jury, the judge advises the jury that instructions should be considered as a whole and that supplemental instructions should be viewed in light of previous instructions.

Whether the judge provides the jury with a specific response to its question is a matter within the sound discretion of the trial judge. Responses need not address more than the specific question asked by the jury. Nonetheless, the judge should respond to all questions, even if the response consists of a directive for the jury to continue its deliberations. When the question specifically asks for clarification about the jury instructions, a response that jurors should reread the instructions is rarely helpful and often results in frustration and anger by the jurors.

Responses to jury questions are delivered either in writing or to the jury in open court. The judge ensures that any additional instructions are not coercive or prejudicial to either party.

AUTHORITY

U.S. v. Bay, 820 F.2d 1511, 1514-15 (9th Cir. 1987) (holding that the trial court did not abuse its discretion by limiting the scope of its response to a jury question about the instructions to the definitions of "reasonable doubt").

U.S. v. Warren, 984 F.2d 325, 329-30 (9th Cir. 1993) (holding that the trial court's failure to issue supplemental instruction to clarify an apparent misunderstanding by the jury concerning the definition of *premeditated* was reversible error).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 15(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.").

B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind L. J. 1229, 1260-61 (1993) (surveying the literature on jury questions during deliberations).

Vincent J. O'Neill, Jr., *Famous Last Words: Responding to Requests and Questions of Deliberating Jurors in Criminal Cases*, 11 Crim. Just. J. 381 (1989) (summarizing rules and procedures on judges' responses to jury questions during deliberations).

Advantages

1. By carefully screening and reviewing juror questions with counsel and responding to all jury questions, the judge eliminates any potential taint to the jury deliberation process and ensures that supplemental instructions are accurate, clear, neutral, and nonprejudicial.

2. Jurors will take comfort from the fact that they are free to communicate with the judge for supplemental instructions if they find the original instructions confusing or inadequate to address concerns that develop during deliberations.

Disadvantage

Instructing the jury on the procedure to follow when asking questions may invite unnecessary questions.

STUDY

Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc. Rev. 153, 161 (1982) (discussing a study of questions asked by deliberating juries).

§ 6.7 Permitting Alternates to Observe Deliberations

Technique

With the consent of all parties, the judge permits alternates to retire with the jury and observe, but not actively participate in, deliberations. This technique facilitates deliberations in the event that a juror must be excused for illness or other good cause. See also § 3.9, Nondesignation of Alternates and Jurors.

Issues

- If present in the jury room during jury deliberations, will alternates actually refrain from participating in the discussions?
- How does the presence of a "nonparticipating" alternate affect jury deliberations?
- Does this practice raise any particular problems for criminal cases?
- Will alternates who are directed to observe jury deliberations resent that they are being held over with no active role to play?

Procedures

In those jurisdictions that permit the trial judge to replace a juror after deliberations have commenced, case law typically requires the jury to begin its deliberations again with the substituted juror (alternate) from the beginning. Alternates who have observed the jury's original deliberations are able to join in the discussion without requiring the jury to retrace all of the steps in its decision-making process in detail.

To implement this technique, the judge obtains the consent of the parties for alternates to observe the jury's deliberations. The judge then instructs the retiring jurors and alternates that the alternates may observe the jury's discussions, but may not vote on specific issues or otherwise participate in these discussions. If circumstances then require the judge to replace a juror (e.g., because of absence, illness, or other good cause), the judge instructs the "new jury" that it should begin its deliberations again from the beginning. If the number of jurors and alternates does not exceed the total number of jurors permitted under statute or court rules, counsel can stipulate and the judge can order that all jurors and alternates participate in deliberations. See § 3.10, Variable Jury Size/No Alternate Jurors.

As a matter of practice in southern California, counsel in civil cases regularly consent to alternates observing jury deliberations.

Advantages

1. Alternates who have observed jury deliberations are able to join in renewed deliberations without requiring the jury to go through its decision-making process in detail.

2. After being presented with all of the evidence, most alternates prefer to observe deliberations rather than be excluded or banished from the court altogether.

3. In bifurcated trials in which the same jury sits on all segments of the trial, having alternates observe the deliberations from the first segment facilitates their substitution in later segments.

Disadvantages

1. Even when not actively participating, alternates who are present for jury deliberations influence the jury's discussions through body language and other signals.

2. Many jurisdictions require the court to dismiss alternates after the jury retires to deliberate.

AUTHORITY

U.S. v. Olano, 113 S. Ct. 1770 (1993) (holding that in the absence of demonstrated prejudice, substitution of an alternate juror during deliberations is permissible).

California v. Collins, 17 Cal.3d 687 (1976) (prohibiting alternates from observing jury deliberations in the absence of consent by counsel).

REFERENCES

Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23 (b) and 24(c)*, 55 Fordham L. Rev. 861 (1987) (arguing that substitution of an alternate juror after submission to the jury is plain error under Rule 24(c)).

Valeree D. Marek, Comment, *The Silent Alternate Juror: A Violation of the Constitutional Right to Trial by Jury?* 58 Chi.-Kent L. Rev. 765 (1982) (reviewing the history of alternate juror observation of deliberations in the context of *Johnson v. Duckworth*, 650 F.2d. 122 (7th Cir. 1982)).

§ 6.8 Scheduling Jury Deliberations

Technique

The judge informs jurors, as part of the regular jury instructions, about what to expect during the deliberative process. When deliberations are expected to be especially lengthy or to require special arrangements (e.g., sequestration), the judge solicits juror input concerning scheduling decisions.

Issues

- Should jurors be permitted or required to deliberate beyond normal working hours?
- If extended hours are required, does the judge need the consent of the jurors?
- Who (among court staff) is responsible for arranging security (e.g., escorts to transportation), meals/refreshments, and communications with the judge when the jury deliberates into extended hours?
- How should the judge respond when the jury has a question after hours? Wait until the next court day? Hold a telephone conference call with attorneys? Allow the defendant to appear in court after hours?

AUTHORITY

U.S. v. Sanders, 641 F.2d 659, 662-63 (9th Cir. 1981) (holding that a magistrate's determination that the jury should continue to deliberate past working hours and into the weekend did not prejudice the defendant's right to a jury trial).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 15 (C)(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.").

Procedures

The court establishes routine policies to address questions such as the length of time jurors will be expected to deliberate each day, where deliberations will take place; when breaks will be scheduled; under what conditions jurors will be sequestered; what resources (e.g., dining) will be made available to jurors during extended hours; and how jurors may communicate with the court. The judge informs the jury of all relevant policies in the process of providing the regular jury instructions. The judge should consult with jurors to determine appropriate deliberation times given jurors' special needs (e.g., personal commitments, child-care obligations), especially if deliberations are expected to be lengthy.

Advantages

1. Advance notice to jurors about deliberation policies permits them, as well as court staff and litigants, to plan their schedules accordingly.
2. Advance notice to jurors about deliberation policies reduces juror anxiety that would otherwise result from uncertainty about deliberation scheduling.

Disadvantages

Court staff must be assigned to accommodate juror needs, including security, during extended deliberations.

§ 6.9 Scheduling Verdict Announcements

Technique

In notorious trials, the trial judge delays announcing the verdict. This delay provides court staff with the opportunity to plan for jury security, media conferences with litigants or jurors, crowd control and police response, and other considerations.

Issues

- If the jury reaches a verdict during extended hours, should the verdict announcement be delayed until the next day?
- How much delay is permissible between the jury's notice to the court that it has reached a decision and the verdict announcement in open court?

REFERENCE

Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loveland & G. Thomas Munsterman, Managing Notorious Trials 93-94 (National Center for State Courts, 1998) (providing a planning checklist for announcing the verdict in notorious cases).

Procedures

Notorious trials require additional planning by the court to prepare for media reaction and court security, including the post-verdict security of the jurors. After the verdict is returned, the judge sequesters the jury (or temporarily dismisses the jury) for a period of time sufficient to make necessary preparations for court security and media relations. During this delay, the judge may inform jurors about any special security considerations that may be appropriate under the circumstances.

In cases that are likely to provoke widespread public reaction, the court may consider scheduling the verdict announcement for a time at which crowd control is more easily managed. For example, in the second Rodney King trial, the court scheduled the verdict announcement for early Saturday morning to give police an opportunity to prepare for civil disturbances in the event of an unpopular verdict.

Advantages

1. A short delay before announcing the verdict gives court security and the media an opportunity to make adequate preparations.
2. During the delay, the jurors can be informed about any special security considerations that are appropriate under the circumstances.

Disadvantage

A delay before the verdict announcement gives jurors an opportunity to change their minds.

§ 6.10 Special Verdicts and Written Interrogatories to General Verdicts

Technique

The judge instructs jurors to return a "special verdict" or respond to written interrogatories to a general verdict that articulate answers to specific questions concerning disputed facts in the case and the jury's application of the law to those facts.

Issues

- In what types of cases are special verdicts or written interrogatories particularly useful or problematic?
- How specific should special verdicts be? For example, should the jury be required to decide only issues of fact (e.g., did the defendant fail to stop at the intersection?), leaving the judge to apply the controlling law to their findings? Or should the jury be asked broader questions mixing fact and law (e.g., was the defendant negligent?)?
- Do special verdicts deprive the jury of its legitimate role?
- Do special verdicts violate federal or state constitutional provisions guaranteeing the right to jury trials?
- Should the judge instruct the jury on the legal consequences of its answers to the specific verdict questions?

Procedures

When rendering general verdicts, juries merely provide a bottom-line and impenetrable resolution to the case. Requiring jurors to articulate the specific conclusions at which they arrived during their deliberations provides the judge and trial attorneys with a written record that allows them to determine whether the jury has applied the governing law to the facts correctly. This technique is useful for cases in which the governing law is particularly complicated, counterintuitive, or otherwise difficult to apply. In addition, special verdicts or written interrogatories are useful for determining whether a specific issue was fully litigated for the purposes of collateral estoppel in future cases.

To implement this technique, the judge and trial attorneys prepare a special-verdict form with specific questions pertinent to each of the disputed factual or applied legal issues in the case. A useful method of organizing the special-verdict questions is to follow the general organization of the jury instructions. See § 6.2, Plain-English Jury Instructions. The judge then instructs the jury to provide written answers to each question when returning its verdict. The instructions should clarify which questions require unanimous answers.

AUTHORITY

Federal Rules of Civil Procedure Rule 49 (1996) (authorizing special verdicts and written interrogatories to general verdicts).

McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1310 (2d Cir. 1993) (holding that the trial court has a duty to reconcile the jury's answers on a special-verdict form with any reasonable theory consistent with the evidence presented at trial).

Constilla v. Aluminum Co. of America, 826 F.2d 1444, 1446 n.3 (5th Cir. 1987) (vacating a jury verdict on grounds that the jury's answers to written interrogatories were irreconcilably inconsistent as to manufacturer liability and award of compensatory and punitive damages).

State v. Hart, 477 N.W.2d 732, 739 (Minn. App. 1991) (holding that "either/or" language in jury instructions may infringe on a defendant's right to a unanimous verdict and that separate jury instructions and verdict forms for each criminal court are a preferable method for addressing multiple charges or lesser-included offenses in jury instructions).

Advantages

1. Special verdicts and written interrogatories to general verdicts record the precise findings of the jury, thus permitting more meaningful review of jury verdicts by trial and appellate courts, as well as more effective use of issue preclusion (collateral estoppel) in future cases that raise common issues.

2. Special verdicts focus the jury's attention on the pivotal issues in the case, potentially making the deliberations more efficient and the result more accurate.

3. Special verdicts can reserve the task of law application to the trial judge, thus decreasing the risk of jury confusion or error.

4. Special verdicts reduce the risk of jury nullification, compromised verdicts, and verdicts resulting from prejudice or emotion.

5. Special verdicts can localize error, or demonstrate the error was harmless, and thus avoid the necessity for retrial of the entire case.

6. When there are reasons to doubt the jurors' willingness to apply a "technical" or counterintuitive rule of law, a special verdict can be used to obtain a fact determination from the jury that the judge can then apply in the context of the rule.

Disadvantages

1. Special verdicts constrain the jury's prerogatives and its ability to dispense a "people's justice."

2. Special verdicts and written interrogatories to general verdicts risk inconsistent or contradictory answers, and thus increase the probability of a new trial.

3. By multiplying the number of points on which the jurors must agree, special verdicts increase the risk of hung juries.

4. A substantial amount of time often must be spent drafting special questions that are not ambiguous or incomprehensible.

5. Special verdicts increase the grounds upon which appeals can be made.

Binder v. Long Island Lighting Co., 57 F.3d 193, 199 (2d Cir. 1995) (case in which district judge, over objection of plaintiff and without prior notice to counsel, submitted supplemental interrogatories to the jury after they returned a general verdict for plaintiff, and the court rules that "there is no authority upholding the submission of fact-specific interrogatories to a jury after a general verdict has been returned, and we note our disapproval of this procedure absent extraordinary circumstances").

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 15(A) (discussing circumstances that might warrant special-verdict forms and drafting procedures).

Elizabeth A. Faulkner, Comment, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 Ariz. St. L. J. 297, 316-20 (1989) (two case studies of the use of special verdicts in complex, commercial litigation).

David U. Strawn, Raymond W. Buchanan, Bert Pryor & K. Phillip Taylor, *Reaching a Verdict, Step by Step*, 60 Judicature 383 (1977).

Advantages cont.

7. Written instructions and legal definitions can be combined with the special-verdict form to further assist jurors.

8. In multiparty cases, special verdicts can prevent prejudicial spillover from one defendant to another by requiring the jury to delineate the acts of each defendant.

9. Special verdicts document the unanimous decision of the jury and avoid verdicts based on agreements among minorities on different facts that combine to produce the illusion of unanimity.

10. Written interrogatories accompanying a general verdict can test the reliability of the general verdict against the underlying factual findings.

Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15 (1964) (advocating greater use of special verdicts to distinguish factual from legal disputes and, thus, preserve the separate roles of judge and jury).

Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L. J. 483 (1964) (criticizing the drafters' failure to provide guidelines or standards to trial judges for choosing between general verdicts, special verdicts, and written interrogatories in civil jury cases).

STUDY

Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1 (1990) (discussing the relative advantages and disadvantages of special verdicts in light of a study of their impact on juror decision making).

§ 6.11 "Reclosing": A Dialogue with the Jury at Impasse

Technique

When deliberating jurors report an apparent impasse, the judge offers the assistance of the judge and trial attorneys through a dialogue with the jury, followed by further proceedings as the court deems appropriate.

Issues

- Should the trial judge ever invite deliberating jurors to disclose issues or questions that they are debating? If so, when? In writing or orally? In open court?
- How should the judge phrase his or her invitation to dialogue?
- How does the judge decide which, if any, issues disclosed by the jurors warrant further proceedings?
- What further proceedings are appropriate? Additional instructions? Reclosing by counsel? More evidence? Some combination of these?
- How should the jury be instructed after such further proceedings and before returning to deliberations?

Procedures

After receiving word from a deliberating jury that the jurors feel they are approaching or are at an impasse, the judge consults with the trial attorneys before deciding whether to offer any assistance to the jurors. If the judge decides to ask the jurors if the judge and counsel might be of help, the judge offers in writing or orally in open court a noncoercive invitation to the jurors to list the issues of fact or law that divide them.

If the jury responds, the judge discusses the response with the attorneys before deciding whether and how further proceedings could be productive. Options include providing new or clarifying instructions, additional closing arguments by the attorneys, reopening the trial for more evidence, or a combination of these procedures.

Following any additional proceedings, the jury returns to deliberate with the customary admonitions about deliberations. If the jurors request still more help, the supplemental request receives the same serious consideration. If the jurors report deadlock without asking for more assistance, the usual procedures for confirming a hopeless deadlock and deciding upon a mistrial are followed.

AUTHORITY

Ariz. R. Cit. Proc. Rule 39(h).

Ind. R. Ct. Jury R., Rule 28 ("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.").

U.S. v. Yarborough, 400 F.3d 17 (D.C. Cir. 2005) (holding that the trial judge's invitation for the jury to identify issues resulting in deadlock was unduly coercive and thus reversible error).

U.S. v. Ayeni, 362 U.S. App. D.C. 488, 374 F.3d 1313 (2004) (overturning defendant's conviction on grounds that the trial court abused its discretion by permitting supplemental argument after the jury had begun deliberations).

Massachusetts v. Gomez, 770 N.E.2d 477 (Mass. App. Ct. 2002) (affirming an interlocatory order prohibiting the trial judge from inviting jurors to identify issues resulting in deadlock).

Withers v. Ringlein, 745 F. Supp. 1271, 1274 (E.D. Mich. 1990) (finding the court's inherent power to be sufficient to authorize additional assistance to the jury after deliberations had commenced).

Advantages

1. Assisting deliberating jurors who request help will improve the chances of a verdict and avoid needless mistrials.

2. This procedure enhances the truth-seeking and educational aspects of the trial.

3. Jurors who are allowed to define the issues that divide them, to ask their unanswered questions, and to receive an appropriate response will more likely reach an accurate verdict, or know they have done their best to do so, and will be more satisfied with their effort.

4. At any point in the dialogue or additional proceedings, the judge may, after appropriate inquiry, declare a mistrial due to deadlock.

Disadvantages

1. The technique amounts to an unwarranted invasion into the privacy and confidentiality of jury deliberations.

2. The invitation by the judge to list issues may have a coercive effect.

3. Some jurors' issues or questions may not find their way onto the list returned to the judge.

4. The trial will be protracted as a result of the dialogue and any ensuing supplemental proceedings.

REFERENCES

Gregory E. Mize, *Thinking Outside the Jury Box: The D.C. Circuit Needs to Embrace Common Sense*, Wash. Law. (Nov. 2005).

American Bar Association, Principles for Juries and Jury Trials, Principle 16 ("Deliberating jurors should be offered assistance when an apparent impasse is reported.").

Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12: Report of the Arizona 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. 1229, 1269-77 (1993) (describing techniques for communicating with juries at or near impasse to improve the likelihood of a verdict).

RELATED APPENDIX

Appendix 3: Arizona Rules of Civil Procedure Rule 39 (2005)

Chapter 7

Post-Verdict Considerations

It seems somewhat oxymoronic to devote an entire chapter (albeit a short one) to innovations intended to assist jurors after they have rendered their verdict. In truth, many of these innovations are designed less for jurors and more to help judges, lawyers, researchers, and policymakers continue to improve the justice system to function fairly and efficiently for all trial participants. The trial lasts a long time in jurors' memories, usually as a positive experience, but not always. Juror exit questionnaires, post-verdict interviews with lawyers and researchers, and informal meetings between the judge and jurors all offer essential feedback to courts and court policymakers about whether they are meeting jurors' needs and the needs of justice. Some jurisdictions advise judges to be extremely cautious about meeting with jurors, especially out of the presence of the trial attorneys, largely out of concern that jurors may impart information about their deliberations that might affect the judge's objectivity in related post-verdict proceedings.

What is new in this edition relates primarily to juror stress, especially in high-profile trials or trials involving difficult or particularly gruesome evidence. In the first edition, section 7.3 dealt with this topic by encouraging judges to conduct juror debriefings themselves. While the concept of juror debriefing is laudable, few judges have the requisite training or experience to conduct these debriefings themselves. This section has been revised to reflect the need for qualified professionals in this role.

§ 7.1 Advice Regarding Post-Verdict Conversations

Technique

The trial judge provides information to jurors about engaging in post-verdict conversations, including their right to refrain from discussing the case with parties or their attorneys, the media, and researchers.

Issues

- Do post-verdict discussions of the case by jurors increase attempts by the parties to impeach jury verdicts?
- Does the fact that jurors may discuss the trial publicly in post-verdict conversations tend to chill the deliberative process?
- Does judicial advice about post-verdict conversations excessively influence jurors?

AUTHORITY

FED. R. EVID. Rule 606(b) (1996) (limiting juror testimony concerning verdicts to statements about extraneous information or outside influences that may have affected the jury's deliberations).

United States v. Giraldi, 858 F. Supp. 85 (Tex. 1994) (establishing procedures for the court to inform jurors of media interest in conducting interviews with jurors and to advise jurors of their rights to grant or deny interviews with the media).

REFERENCES

AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 18 ("Courts should give jurors legally permissible post-verdict advice and information.").

Nancy S. Marder, "Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors," 82 IOWA L. REV. 465 (1997) (analyzing press reports of juror interviews appearing in major newspapers between 1980 and 1995).

Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL L. REV. 295 (arguing for greater judicial oversight of post-verdict media interviews with jurors).

Procedures

Post-verdict admonitions are delivered by the judge before dismissing the jury. The judge informs jurors that they are no longer prohibited from discussion of the case with outside parties, but that they retain the right not to discuss the case with anyone if they so choose. As part of this advice, the judge may inform jurors about the requirements of Federal Rules of Evidence Rule 606(b) and corresponding state statutes regarding inquiries into the validity of jury verdicts. He or she may also ask jurors to respect the deliberative process and the candor of their fellow jurors.

The judge informs jurors about any constraints that he or she will impose on the parties or their attorneys regarding their future contact with jurors. For example, some state and federal jurisdictions bar post-verdict contact with jurors by attorneys or the parties without the consent of the trial court for good cause shown. The judge can allow a party's representative or jury researcher to contact the jurors with their consent. The judge reassures jurors that the court will continue to be available to protect them from posttrial harassment and instructs them how to contact the court in case they wish to invoke its protection.

Advantages

1. Judicial advice regarding post-verdict conversations protects jurors from posttrial harassment by the parties, their attorneys, and the media.

2. Judicial advice regarding post-verdict conversations protects jurors' privacy rights.

3. Judicial advice regarding post-verdict conversations protects the confidentiality and inviolability of the deliberative process.

4. Judicial advice regarding post-verdict conversations may deter frivolous attempts to impeach jury verdicts.

Disadvantages

1. Judicial advice regarding post-verdict conversations may prevent the parties from investigating possible juror misconduct or interfering with the ability of attorneys to solicit feedback about their trial performance.

2. Judicial advice regarding post-verdict conversations may discourage jurors from speaking with media or researchers, making it difficult to conduct legitimate inquiries into juror decision making either generally or concerning a specific case.

Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?* 66 N.C. L. Rev. 509 (1988) (proposing amended language to FRE 606(b) and a uniform rule to govern posttrial juror interviews in federal trials).

Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983) (urging trial judges to place greater emphasis on moral persuasion to discourage jurors from discussing their deliberations).

RELATED APPENDIX

Appendix 5: Suggested Concluding Jury Admonition

§ 7.2 Informal Meetings Between the Judge and Jury

Technique

The judge meets informally with the jurors after the verdict to offer personal thanks for their participation. This technique offers the judge the opportunity to answer general questions from jurors about trial or posttrial procedures (e.g., evidentiary or sentencing issues). The judge may also solicit feedback from the jurors about their reactions to jury service and any suggestions for improving jury administration and management.

Issues

- When and where should the trial judge conduct informal meetings with the jurors?
- Should the parties or their attorneys attend this meeting? Should court staff?
- What precautions should the judge take to avoid violations of judicial ethics (e.g., commenting on the verdict) when meeting with jurors?
- What is the judge's responsibility if he or she becomes aware of jury misconduct?
- Should judges refrain from these meetings if some or all of the jurors will be retained for additional trials?

AUTHORITY

Arizona Judicial Ethics Advisory Committee Opinion 01-01 (October 15, 2001) (discussing restrictions on the ability of trial judges to speak personally with discharged juries).

Harris v. U.S., 738 A.2d 269 (D.C. App. 1999) (finding that a trial judge's ex parte communication with jurors after the verdict had been entered, but while the judge still retained responsibility for sentencing, was improper).

Model Code of Judicial Conduct Canon 3(B)(9) (1992) (prohibiting judges from making comments that might reasonably affect the outcome or substantially interfere with judicial proceedings).

Model Code of Judicial Conduct Canon 3(B)(10) (1992) (prohibiting judges from commenting on a jury's verdict in a form other than a court order or formal opinion).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 18(A) (encouraging judges to engage in post-verdict discussions with jurors).

Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loveland & G. Thomas Munsterman, Managing Notorious Trials 96-97 (National Center for State Courts, 1998) (describing various approaches and styles of post-verdict meetings between the judge and jury).

Procedures

After formally excusing the jury from service, the trial judge invites any jurors who are interested to meet with the judge informally. The judge generally meets with the jurors in the jury deliberation room; however, the courtroom (after the parties, attorneys, and spectators have left) or the judge's chambers (if space permits) are acceptable alternatives. Typically, the parties and their attorneys are not invited to participate in these meetings, although some judges favor their participation in the interest of the attorneys' education. See also § 7.4, Post-Verdict Interviews by Attorneys and Researchers. The ABA *Principles for Juries and Jury Trials* encourages participation by the attorneys.

At the beginning of the meeting, the judge should thank the jurors for their participation in the trial. He or she may explain that judges are not permitted to comment on the verdict, but are permitted to answer general questions about the trial process. Informal meetings with jurors also provide an opportunity for the judge to ask about the jurors' perception of jury service and to solicit their suggestions for improving jury administration and management. For example, the judge can ask whether there were specific parts of jury service that they found particularly confusing or irritating. The judge should caution jurors against disclosing details of their deliberations, particularly for criminal cases in which the judge may have substantive proceedings in the future (e.g., sentencing hearings).

Trial judges who have used this technique report that they learn a great deal from jurors during these meetings, and almost never find themselves in detailed discussions about the jury's deliberative process or in situations that might permit a new trial. Jurors generally stay for these meetings and appreciate the personal touch from the judge.

Advantages

1. Informal meetings with the trial judge provide a sense of closure to the jury experience.

2. Informal meetings with the trial judge communicate to jurors that the court values the jurors' participation in the trial and reinforce the importance of jury service as a civic responsibility.

3. Informal meetings with the trial judge provide an opportunity for jurors to ask questions about the trial process, especially questions not answered during jury orientation.

4. Informal meetings with jurors provide an opportunity for the judge to engage in public education about the legal and judicial system.

5. Informal meetings with jurors provide an opportunity for judges to learn about jury conditions and jurors' concerns about jury service.

Disadvantages

1. Informal meetings with jurors run the risk that the trial judge will comment inadvertently on the verdict or will otherwise violate judicial ethics.

2. Informal meetings with jurors run the risk that the trial judge will become aware of juror misconduct.

3. Informal meetings with jurors take additional time.

4. Some judges are uncomfortable meeting with jurors in an informal setting.

§ 7.3 Debriefing Sessions to Alleviate Juror Stress

Technique

For trials in which jurors are likely to experience severe emotional distress, the court employs a professional psychologist or social worker to "debrief" the jurors following the verdict. This technique is particularly appropriate for trials in which the evidence or testimony is especially gruesome, the trial provokes a great deal of media attention, or the trial is exceptionally lengthy or requires extraordinary measures (e.g., sequestration).

Issues

- What kinds of cases require professional debriefing?
- Under what authority do courts call for professional assistance?
- What training and expertise should the people who conduct juror debriefings have?
- How do courts locate or train these individuals?
- Who is responsible for the costs of juror debriefings?
- Should a professional psychologist or social worker be available to jurors during deliberations? Should debriefing sessions be offered to alternates?
- Should the jurors be informed that a post-verdict debriefing is available before they retire to deliberate?
- Do post-verdict debriefings affect the validity of the verdict?
- Does the doctor-patient privilege apply to debriefings conducted by professional psychologists, psychiatrists, or social workers?
- Who should attend the debriefing sessions? The judge? Court personnel? Attorneys?

Procedures

Some types of trials are highly stressful events for jurors that can provoke serious stress-related symptoms for significant periods of time after the trial has concluded. In those instances, the court should consider whether a professional debriefing session would help jurors cope with their emotional reactions and readjust to their regular lives. The debriefing consists of a short group session in which the jurors have an opportunity to explore and better understand their emotional reaction to the trial and to jury service. The debriefings also include a description of the symptoms commonly associated with juror stress (e.g., nightmares, depression, insomnia) and make recommendations to the jurors about appropriate stress-management techniques.

The debriefing session typically is held after the jury returns its verdict and is released from service by the trial judge. At that time, the judge explains that he or she

REFERENCES

THROUGH THE EYES OF THE JUROR: A MANUAL FOR JUROR STRESS (National Center for State Courts, 1998).

TIMOTHY R. MURPHY, PAULA L. HANNAFORD, GENEVRA K. LOVELAND & G. THOMAS MUNSTERMAN, MANAGING NOTORIOUS TRIALS 97-98 (National Center for State Courts, 1998) (discussing post-verdict trauma).

Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L. J. 1333 (1993) (describing the trial experience from the juror's perspective and recommending post-verdict counseling for jurors in some trials).

Thomas L. Hafemeister & W. Larry Ventis, *Juror Stress: What Burden Have We Placed on Our Juries?* 56 TEX B. J. 586 (1993) (describing the psychological and physiological effects of jury service in notorious cases).

STUDIES

DAWN M. RUBIO, W. LARRY VENTIS & PAULA L. HANNAFORD, EVALUATION OF THE JURY DEBRIEFING PROGRAM OF KING COUNTY (August 2000) (evaluating and making recommendations on program operations).

James E. Kelly, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97 (1994) (reporting that jurors in murder trials exhibited significantly higher symptoms of stress than jurors in other types of trials).

recognizes that the jurors have been under a great deal of stress and invites any jurors that are interested to attend a short debriefing session. Alternates, regardless of whether they participated in the deliberations, may also be invited to participate in debriefings. In some cases, the trial judge participates. If the jury returns its verdict late in the day, the debriefing session may be held the following day.

A professional psychologist, psychiatrist, or social worker with expertise in post-traumatic stress disorder (PTSD) generally conducts the debriefing. The court can inquire at local mental-health centers, nearby medical schools, or other community or regional resources for information about qualified professionals. The court is responsible for the costs of debriefing, although many professionals will conduct debriefings on a pro bono basis. Unless he or she has proper training, the judge should not attempt to conduct these debriefings.

Advantages

1. Jury debriefings reduce the post-verdict stress associated with jury service in emotionally trying cases.

2. Jury debriefings provide closure to the experience of jury service.

3. Jury debriefings safeguard the mental health of jurors, thus promoting public confidence in the judicial system.

4. Jury debriefings enhance juror satisfaction with the judicial process.

Disadvantages

1. Informing jurors that a post-verdict debriefing is available may cause or increase juror stress.

2. Informing jurors that a post-verdict debriefing is available may influence the verdict.

Stanley M. Kaplan & Carolyn Winget, *Occupational Hazards of Jury Duty*, 20 Bull. Am. Acad. Psychiatry & L. 325 (1992) (describing the sources of juror stress in criminal trials and the incidence of symptomatic expression in jurors).

RELATED APPENDICES

Appendix 6: Tips for Coping After Jury Duty (brochure distributed by the Superior Court of Arizona, Maricopa County)

§ 7.4 Post-Verdict Interviews by Attorneys and Researchers

Technique

After the jury returns its verdict, the attorneys or researchers conduct interviews with the jurors. In jurisdictions that permit attorney interviews, this technique provides attorneys with an opportunity to improve their advocacy skills with constructive feedback about their trial-practice techniques. Interviews conducted by researchers provide valuable insight into juror decision making.

Issues

- Where should juror interviews take place?
- If consent of the court is necessary to conduct posttrial interviews, should the court supervise interviews? Should the court place any restrictions on the scope of the interviews?
- Who should be present during interviews?
- Should posttrial juror interviews be conducted as individual or group interviews?
- Who should conduct posttrial interviews?
- How long after the trial should posttrial interviews be conducted?
- What topics should be covered?

AUTHORITY

Cal. Civ. Proc. § 206 (Deering 1996) (establishing procedures for post-verdict contact with jurors by the attorneys and parties in criminal cases).

Del. Prof. Cond. R. 3. 10 (1995) (prohibiting post-verdict contact with jurors by the trial attorneys).

U.S. Dist. Ct. (N.D. Ind.) Local Rule 47.2 (1996) (prohibiting post-verdict contact with jurors by the trial attorneys except by leave of court and for good cause shown).

REFERENCES

American Bar Association, Principles for Juries and Jury Trials, Principle 18(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.").

Elissa Krauss & Beth Bonora, ed., *Jurywork: Systematic Techniques* (1995) (chapter 13 provides a comprehensive overview of post-verdict interview techniques).

Howard Varinsky & Laura Nomikos, *Post-Verdict Interviews: Understanding Jury Decision Making*, 26 Trial 64 (Feb. 1990) (proposing methodology for conducing post-verdict jury interviews).

Procedures

Much of our contemporary understanding about juror decision making, including many of the innovations described in this book, was learned from interviews and surveys with former jurors. They provide an invaluable source of information for improving trial practices and making jury service more effective and satisfactory for all concerned. In many jurisdictions, the names of former jurors are a matter of public record and addresses are easily obtained through the Internet or other search tools. In some jurisdictions, courts prohibit or limit post-verdict interviews by attorneys or researchers to prevent frivolous efforts to impeach jury verdicts and to protect juror privacy and the inviolability of the deliberative process. Other jurisdictions require prior consent of the judge as an ethical or statutory limitation on posttrial contacts by attorneys. In these jurisdictions, post-verdict interviews are often held at the courthouse and arranged by the court.

The person who contacts the former juror to request an interview should inform the juror of his or her right to refuse to participate in the interview. See also § 7.1, Advice Regarding Post-Verdict Conversations. Juror interviews may be conducted as telephone interviews, as one-on-one in-person interviews, or as group interviews. The person conducting the interview should be well acquainted with both sides of the trial presentation. Jurors may be more candid and forthcoming with "neutral" interviewers, rather than the trial attorneys themselves.

Advantages

1. Posttrial juror interviews permit trial attorneys to learn the relative strengths and weaknesses of trial strategies.

2. Posttrial juror interviews permit trial attorneys to receive a fair evaluation of their communication and presentation skills.

3. Posttrial juror interviews permit jury researchers to develop and test emerging theories about juror decision making in real, as opposed to simulated, situations.

4. Jurors often appreciate the opportunity to share their insights and experiences from the trial during posttrial interviews.

5. Posttrial juror interviews often confirm for jurors that their service was an important and valuable contribution to the judicial process.

Disadvantage

Posttrial juror interviews may infringe on jurors' privacy rights or jeopardize the inviolability of the deliberative process.

§ 7.5 Juror Exit Questionnaires

Technique

The court uses exit questionnaires to monitor juror reaction to jury service and to identify areas of juror dissatisfaction.

Issues

- Who is responsible for distributing exit questionnaires?
- At what point should jurors receive exit questionnaires?
- Who is responsible for tabulating exit questionnaires?
- How often should exit questionnaires be administered?
- Which jurors should receive exit questionnaires? Only sworn jurors? All persons called for voir dire? All jurors or a random sample?
- What questions should be asked of jurors? How should they be phrased?

REFERENCES

G. Thomas Munsterman, *Jury System Management* (National Center for State Courts, 1996).

Brookings Institution, Charting a Future for the Civil Jury System: A Report from an American Bar Association/ Brookings Symposium 30 (1992).

RELATED APPENDIX

Appendix 7: Sample Jury Exit Questionnaire

Procedures

The court selects a distribution system for exit questionnaires and follows it consistently. It may not be necessary to administer exit questionnaires daily, but they should be distributed frequently enough to determine juror attitudes toward jury service during periods of high and low jury use. The court should administer exit questionnaires to a representative sample of persons called for jury service, including those individuals who do not serve as jurors (e.g., alternates, members of the jury panel who are not selected as jurors, and individuals who are subsequently excused from jury service). Use of pretested questions that require fixed (not open-ended) answers avoids biased or ambiguous questions. Pretested questions also facilitate comparison of jurors' responses with responses collected in other courts.

Advantages

1. Consistent and regular use of juror exit questionnaires provides courts with a baseline juror evaluation, as well as a perspective on trends in juror attitudes over time.

2. Juror exit questionnaires identify problem areas (e.g., excessive "downtime" for jurors, uncomfortable waiting rooms, etc.) to help courts improve juror satisfaction and the efficiency of jury administration.

Disadvantages

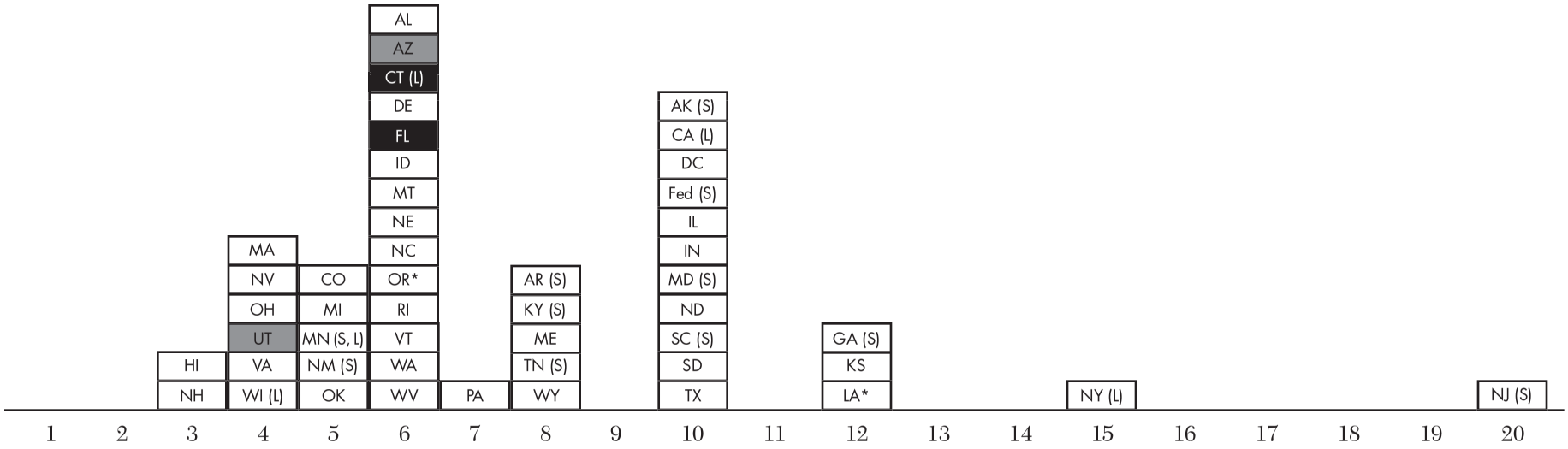
1. Juror exit questionnaires require additional expenditures for copying and personnel time.

2. Accurate analysis of jurors' responses may require expertise that is not routinely available through court personnel.

Appendix 1

Number of Peremptory Challenges by State and Case Type

Peremptory Challenges
Felonies / Non-Capital



* = Nonunanimous

= 12 person jury
= 8 person jury
= 6 person jury

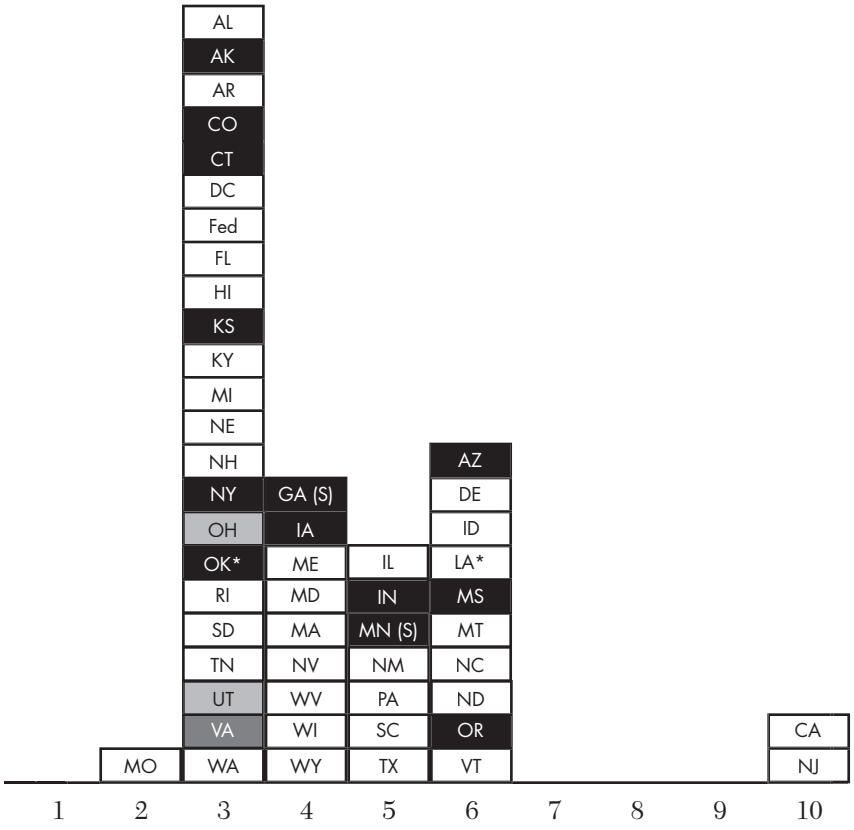
(S) = State has fewer peremptory challenges than Defendant: Number permitted to the State

AK = 6
AR = 6
GA = 6
KY = 5
MD = 5
MN = 3
NM = 3
NJ = 12
SC = 5
TN = 4
WV = 2
Fed = 6

(L) = Number of peremptory challenges increased for life sentence cases

CA = 20
CT = 15
MN = 15
NY = 20
WI = 6

Peremptory Challenges
Civil



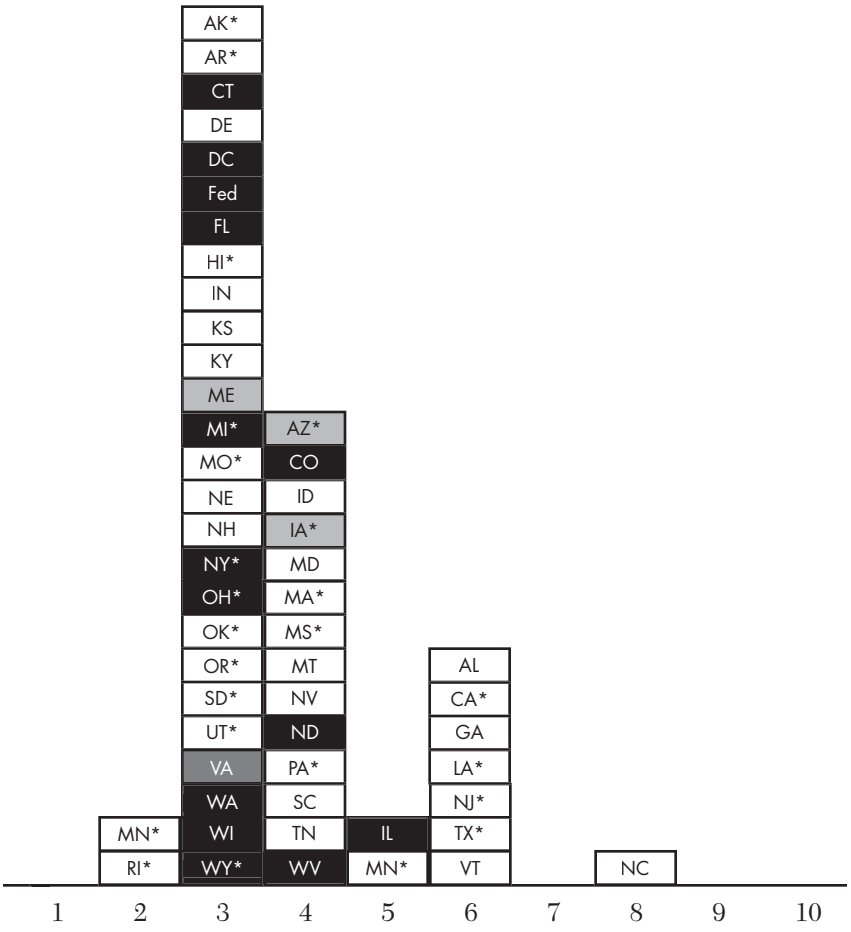
* = Nonunanimous

= 12 person jury
= 8 person jury
= 7 person jury
= 6 person jury

(S) = State has fewer peremptory challenges than Defendant: Number permitted to the State

GA = 2
MN = 3

Peremptory Challenges
Civil



* = Nonunanimous

= 12 person jury
= 6 person jury
= 7 person jury
= 8 person jury

Appendix 2

Suggested Procedures for the Management of Anonymous Juries

From Jury Committee of the Ninth Circuit,
A Manual on Jury Trial Procedures, Appendix 8 (1993)

Anonymous Jury Panels

Anonymous jury panels often become desirable for two reasons. First, due to the nature of the case, the physical security of the jurors becomes a consideration and second, the court may wish the jurors to be protected from an invasion of their privacy from undue publicity.

Often both justifications for anonymity simultaneously apply. Anonymity may also be particularly warranted where the threat of jury tampering is a concern. For example, where the defendants have a prior conviction for jury tampering or where jury tampering is charged in the indictment.

The authority to order an anonymous jury is contained in 27 § 1863 (b) (7) which allows a provision for anonymity to be included in the district's jury selection plan.

The following will outline the method used in the Southern District of New York to derive an anonymous jury. This system is most effective when integrated with the management principles discussed above (e.g., juror questionnaire). The system under discussion provides for all but absolute anonymity meaning that no individual, including the judge and other jurors, will know the name, address, employer's identity, etc., of any given juror. The sole exception to the above will be the jury payroll clerk who will maintain the corresponding records as will be explained below. The jury administrator/clerk should have access to the records routinely. At first blush the above may seem to exceed plausible bounds, but in fact, considerable flexibility is provided by available variations as will be explained. It is generally recognized, however, that the above in practice has worked to the advantage of all parties.

Procedures for Processing of Anonymous Jurors

Assuming 100 anonymous jurors are required:

(A) The anonymous jurors are selected as they come in the door, i.e., the first 100 people in the door are the anonymous panel. (This methods avoid having to publicly call names from the wheel. See also Qualifying, Summoning and Excusing Jurors, Administrative Office of the United States Courts, p. 46.)

(B) Three sets of numbered cards (001 to 100) are prepared and used as follows:

1. One card is given to the juror as his/her identifying card as they come in the door.

2. One card is stapled to the summons as it is handed in by the juror at the door.

3. One set, included with the panel sheet, is sent to the courtroom. (The panel sheet does not include the jurors' names.)

(C) After the summonses are collected and cards are stapled to the summonses, they are alphabetized and secured.

(D) After the jury is selected, the numbered cards of those jurors who were not selected are matched with the corresponding summons.

(E) These summonses are in turn matched with the original wheel cards (the cards with the juror's name on it) and these are returned to the wheel for further use.

(F) The summonses and wheel cards of the anonymous jurors are matched and secured.

Payroll and Attendance

All pertinent papers including name and address forms, mileage sheets, etc., are forwarded to the payroll clerk who maintains a separate and secure record. Attendance is kept by the jury assembly room clerk and courtroom deputy using numbers only, which is in turn transmitted to the payroll clerk who knows the jurors names. The payroll clerk may maintain a separate manual payroll wherein he/she types the checks. Alternatively, a check produced by a computer should have only the anonymous juror's number on it with the address of the courthouse used in lieu of the anonymous juror's address. In this instance the payroll clerk matches the numbered check with the secured records and types in the juror's name manually and then hand delivers the check to the juror at the courthouse. The distribution may be done with the assistance of the Marshal's Service. It is assumed that differences among the various districts may obtain regarding payroll processing and the required degree of security and method of processing should be ascertained by the court beforehand. Further, it will be necessary to determine the degree of security required for the various records after the trial is completed.

Interestingly, keeping the records separate may not always be the best method for their security. In some large automated systems integrating them with other petit and grand juror records, as long as they are indistinguishable, would make them virtually impossible to identify, whereas, keeping them separate, with the attendant logistical problems, may make them easier to identify. As noted, each district will have to make a determination in this regard.

Transportation of Anonymous Jurors

In the Southern District of New York, transportation is provided to anonymous jurors from the courthouse to home. These jurors are maintained in a semi-sequestered status and as such are protected from any outside contacts and are escorted by Marshals from the courtroom to the transportation terminus. Transportation is provided either to a fixed point, such as a specific subway or train station, or portal-to-portal. It is provided one-way only. It is monitored by the Marshal's Service, but is paid for out of Clerk's office funds.

Appendix 3

Arizona Rules of Civil Procedure
Rule 39: Trial by Jury or by the Court

(a) Trial by Jury.

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless:

1. The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

2. The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

(b) Order of Trial by Jury; Questions by Jurors to Witnesses or the Court.

The trial by a jury shall proceed in the following order, unless the court for good cause stated in the record, otherwise directs:

1. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 39(b)(10), and the elementary legal principles that will govern the proceeding.

2. The plaintiff or the plaintiff's counsel may read the complaint to the jury and make a statement of the case.

3. The defendant or the defendant's counsel may read the answer and may make a statement of the case to the jury, but may defer making such statement until after the close of the evidence on behalf of the plaintiff.

4. Other parties admitted to the action or their counsel may read their pleadings and may make a statement of their cases to the jury, but they may defer making such statement until after the close of the evidence on behalf of the plaintiff and defendant. The statement of such parties shall be in the order directed by the court.

5. The plaintiff shall then introduce evidence.

6. The defendant shall then introduce evidence.

7. The other parties, if any, shall then introduce evidence in the order directed by the court.

8. The plaintiff may then introduce rebutting evidence.

9. The defendant may then introduce rebutting evidence in support of the defendant's counterclaim(s) if any. Rebuttal evidence from other parties or with respect to cross-claims or third party complaints may be introduced with the permission of the court in an order to be established at the court's discretion.

The statements to the jury shall be confined to a concise and brief statement of the facts which the parties propose to establish by evidence on the trial, and any party may decline to make such statement.

10. Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

[Court Comment 1995 Amendments. Rules 39(b)(10). The court should instruct the jury that any questions directed to witnesses or the court must be in writing, unsigned and given to the bailiff. The court should further instruct that, if a juror has a question for a witness or the court, the juror should hand it to the bailiff during a recess, or if the witness is about to leave the witness stand, the juror should signal to the bailiff. If the court determines that the juror's question calls for admissible evidence, the question should be asked by the court of counsel in the court's discretion. Such question may be answered by stipulation or other appropriate means, including but not limited to additional testimony upon such terms and limitations as the court prescribes. If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered. If a juror's question is rejected, the jury should be told that trial rules do not permit some questions to be asked and that the juror should not attach any significance to the failure of having their question asked.]

(d) Verdict, Deliberations and Conduct of Jury; Sealed Verdict; Access to Juror Notes and Notebooks.

1. When the jurors retire to deliberate, they shall be kept together in some convenient place in charge of a proper officer. The court in its discretion may permit jurors to separate while not deliberating, or, on motion of any party, may require them to be sequestered in charge of a proper officer whenever they leave the courtroom or place of deliberation. The court shall admonish them not to converse among themselves or with anyone else on any subject connected with the trial while not deliberating, or to permit themselves to be exposed to any accounts of the proceeding, or to view the place or places where the events involved in the action occurred, until they have completed their deliberations.

2. The court may direct the jury to return a sealed verdict at such time as the court directs.

3. Jurors shall have access to their notes and notebooks during recesses, discussions and deliberations.

(e) Duty of Officer in Charge of Jury.

The officer having the jurors under that officer's charge shall not allow any communication to be made to them, or make any, except to ask them if they have agreed upon their verdict, unless by order of the court, and shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(f) Admonition to Jurors; Juror Discussions.

If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall 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. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.

> [Court Comment, 1995 Amendments. Rule 39(f). In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence among themselves during recesses, the trial 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.]

(g) Communication to Court by Jury.

When the jurors desire to communicate with the court during retirement, they shall make their desire known to the officer having them in charge who shall inform the court and they may be brought into court, and through their foreman shall state to the court, either orally or in writing, what they desire to communicate.

(h) Assisting Jurors at Impasse.

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.

> [Court Comment, 1995 Amendments. Rule 39(h). Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practially possible to do so. The invitation to dialogue should not be coercive, suggestive, or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

"This instruction is offered to help your deliberations, not to force you to reach a verdict.

"You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

"I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try."

If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be addressed. Among the obvious options are the following: giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.]

(i) Discharge of Jury; New Trial.

The jurors may, after the action is submitted to them, be discharged by the court when they have been kept together for such time as to render it altogether improbable that they can agree, or when a calamity, sickness or accident may, in the opinion of the court, require it. When a jury has been discharged without having rendered a verdict the action may be tried again.

• • • • •

(m) Advisory Jury and Trial by Consent.

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(n) Interrogatories When Equitable Relief Sought; Answers Advisory.

In actions where equitable relief is sought, if a jury is demanded, and more than one material issue of fact is joined, the court may submit written interrogatories to the jury covering all or part of the issues of fact, and such interrogatories shall be answered by the jury. The interrogatories shall be approved by the court, and each interrogatory shall be confined to a single question of fact and shall be so framed that it can be answered yes or no, and shall be so answered. The answers shall be only advisory to the court.

(o) Arguments.

The party having under the pleadings the burden of proof on the whole case shall be entitled to open and close the argument. Where there are several parties having several claims or defenses, and represented by different counsel, the court shall prescribe the order of argument among them.

> [Court Comment, 1995 Amendments. Rule 39(o). The Court has discretion to give final instructions to the jury before closing arguments of counsel instead of after, in order to enhance jurors' ability to apply the applicable law to the facts. In that event, the court may wish to withhold giving the necessary procedural and housekeeping instructions until after closing argument, in order to offset the impact of the last counsel's argument.]

(p) Note Taking by Jurors.

The court shall instruct that the jurors may take notes regarding the evidence and keep the notes for the purpose of refreshing their memory for use during recesses, discussions and deliberations. The court shall provide materials suitable for this purpose. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall promptly destroy them.

Appendix 4

Behind Closed Doors: A Guide for Jury Deliberations

This Guide was prepared by the American Judicature Society in cooperation with the Superior Court of Arizona in Maricopa County, under a grant from the Bureau of Justice Assistance, U.S. Department of Justice #97-DD-BX-0054.

The views expressed herein do not necessarily represent the official position or policies of the Bureau of Justice Assistance, the American Judicature Society, or the Superior Court in Maricopa County, Arizona.

The Guide is not intended to take the place of any instructions given to you by the judge.

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Founded in 1913, the American Judicature Society is an independent, nonprofit organization supported by a national membership of judges, lawyers, and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, and public understanding of the justice system.

Introduction

You have just been instructed on the law in the trial before you and are ready to begin deliberating. Before you begin, please take the time to read through this booklet for some tips on how to organize yourselves, how to consider the evidence, and how to reach a verdict. You are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.

Before you get started, it would be useful to think about the following guidelines:

- Respect each other's opinions and value the different viewpoints you each bring to this case.
- Be fair and give everyone a chance to speak in the deliberations.
- It is okay to change your mind.
- Listen carefully to one another, do not let yourself be bullied into changing your opinion, and do not bully anyone else.
- Do not rush into a verdict to save time. The people in this case deserve your complete attention and thoughtful deliberation.
- Follow the judge's instructions about the law, and you will do a good job.

Getting Started

Q. How do we start?

A. At first, you might want to:

- Take some time to get to know one another.
- Talk about your feelings and what you think about the case.
- Talk about how you want to go ahead with the deliberations and lay out some rules to guide you.
- Talk about how to handle voting.

Selecting the Presiding Juror

Q. What qualities should we consider when choosing the presiding juror?

A. Suggestions include someone who:

- Is a good discussion leader.
- Is fair.
- Is a good listener.
- Is a good speaker.
- Is organized.

Q. What are the responsibilities of the presiding juror?

A. The presiding juror should:

- Encourage discussions that include all jurors.
- Keep the deliberations focused on the evidence and the law.
- Let the court know when there are any questions or problems.
- Tell the court when a verdict has been reached.

Q. Does that mean the presiding juror's opinion is more important than mine?

A. No.

- The opinions of each juror count equally.

Getting Organized

Q. Are there any set rules to tell us how to deliberate?

A. No. You could:

- Go around the table, one by one, to talk about the case.
- Have jurors speak up anytime, when they have something to say.
- Try to get everyone to talk by saying something like, "Does anyone else have anything to add?"

- Show respect to the other jurors by looking at the person speaking.
- Do not be afraid to speak up and express your views.
- Have someone take notes during your deliberations so that you do not forget the important points.
- Write down key points so that everyone can see them.

Discussing the Evidence and the Law

Q. What do we do now?

A. First, review the judge's instructions on the law because the instructions tell you what to do.

Q. Is there a set way to examine and weigh the evidence and to apply the law?

A. The judge's instructions will tell you if there are special rules or a set process you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful. Here are several suggestions:

- Look at the judge's instructions that define each charge or claim and list each separate element that makes up that charge or claim.
- For each of these elements, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.
- If there is a lot of evidence, try listing each piece of it next to the elements it applies to.
- Discuss each charge or claim, one at a time.
- Vote on each charge or claim.
- Fill out the verdict form(s) given to you by the judge.

Q. What if someone is not following the instructions, refuses to deliberate, or relies on other information outside of the evidence?

A. This is a violation of a juror's oath and the court should be told.

Voting

Q. When should we take the first vote?

A. There is no best time. But, if you spend a reasonable amount of time considering the evidence and the law and listening to each other's opinions, you will probably feel more confident and satisfied with your eventual verdict than if you rush things.

Q. Is there any correct way to take the vote?

A. No, any way is okay. You might vote by raising your hands, by a written ballot, or by a voice ballot. Eventually, a final vote in the jury room will have to be taken with each of you expressing your verdict openly to the other jurors.

Q. What if we cannot reach a verdict after trying many times to do so?

A. Ask the judge for advice on how to proceed.

Getting Assistance from the Court

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principle or definition?

A. Ask the judge because you must understand the instructions in order to do a good job.

Q. Is there any other type of information we can ask for from the judge?

A. Yes, to refresh your memory about what was said or introduced, you could:

- Ask for a list of the witnesses.
- Ask for a reading back of the testimony of witnesses.
- Ask to review the trial exhibits.

Q. How do we get this information?

A. Write it on a piece of paper and have the presiding juror give it to the court official.

Q. Is there any type of information we cannot ask for?

A. Yes, some examples of information you cannot ask for include:

- Police reports, doctors' reports, etc., that were referred to during the trial, but were not received in evidence as an exhibit.
- Reports and other information that were not referred to during the trial, but which you assume might or should be available.
- There may be some information you ask for that the judge is unable to give you.

The Verdict

Q. After we have reached a verdict and signed the verdict form(s), how do we turn our verdict over to the court?

A. The following steps are usually followed:

- The presiding juror tells the attending court official that a verdict has been reached.
- The judge calls everyone, including you, back into the courtroom.
- The clerk in the courtroom asks the presiding juror for the verdict.
- The verdict is read into the record in open court.

Q. Who reads the verdict?

A. The verdict will be read into the record by the clerk, the judge, or some other court official. The judge may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" OR "not guilty" or "guilty" to the question asked by the judge.

Once Jury Duty is Over

Q. Now that the case is over, may we speak with others about the case and the deliberations?

A. *The judge will inform you about speaking with others after you have been dismissed. Generally, you do not have to talk to anyone about the case. It is entirely up to you.*

Q. How do we know we have done the right thing?

A. *If you have tried your best, you have done the right thing. Making decisions as jurors about the lives, events, and facts in a trial is always difficult. Regardless of the outcome of this case, you have performed an invaluable service for the people in this case and for the system of justice in your community. Thank you for your time and thoughtful deliberations.*

Appendix 5

Suggested Concluding Jury Admonition

From Jury Committee of the Ninth Circuit,
A Manual on Jury Trial Procedures 154 (1993).

Now that you have concluded your service on this case, I thank you for your patience and conscientious attention to your duty as jurors. You have not only fulfilled your civic duty, but have also made a personal contribution to the ideal of equal justice for all people.

You may have questions about the confidentiality of the proceedings. Because the case is over, you are free to discuss the case with any person you choose. However, you do not *have* to talk to anyone about the case if you do not want to. If you tell someone you do not wish to talk about it and they continue to bother you, let the Court know, for we can protect your privacy. If you *do* decide to discuss the case with anyone, I would suggest you treat it with a degree of solemnity, so that whatever you say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of all the parties. Also, if you do decide to discuss the case, please respect the privacy of the views of your fellow jurors. Your fellow jurors fully and freely stated their opinions in deliberations with the understanding they were being expressed in confidence.

Again, I thank you for your willingness to give of your time away from your accustomed pursuits and faithfully discharge your duty as jurors. You are now excused.

Appendix 6

Tips for Coping After Jury Duty

From Superior Court of Arizona, Maricopa County, Jury Service Web Site
http://www.superiorcourt.maricopa.gov/jury/misc/coping.asp

Tips for Coping After Jury Duty

The Jury Duty Experience

Thank you for serving your community. Being on a jury is a rewarding experience which in some cases may be quite demanding. You were asked to listen to testimony and to examine facts and evidence. Coming to decisions is often not easy, but your participation is appreciated.

Serving on a jury is not a common experience and may cause some jurors to have temporary symptoms of distress.

Not everyone feels anxiety or increased stress after jury duty. However, it may be helpful to be aware of the symptoms if they arise.

Some temporary signs of distress following jury duty include: anxiety, sleep or appetite changes, moodiness, physical problems (e.g. headaches, stomach aches, no energy, and the like), second guessing your verdict, feeling guilty, fear, trouble dealing with issues or topics related to the case, a desire to be by yourself, or decreased concentration or memory problems.

Symptoms may come and go, but will eventually go away. To help yourself, it is important to admit any symptoms you may have and deal with any unpleasant reactions.

Coping Techniques After Serving on a Jury

- Talk to family members and friends. One of the best ways to put your jury duty experience in perspective is to discuss your feelings and reactions with loved ones and friends. You may also want to talk with your family physician or a member of the clergy.

- Stick to your normal, daily routines. It is important to return to your normal schedule. Don't isolate yourself.

- Before you leave the court, you may wish to get the names and numbers of at least two of your fellow jurors. Sometimes it is helpful to talk to people who went through the experience with you. This can help you to remember that you were part of a group (jury) and are not alone.

- Remember that you are having normal responses to an unusual experience.

- You can deal with signs of distress by cutting down on alcohol, caffeine, and nicotine. These substances can increase anxiety, fatigue and make sleep problems worse.

- Relax with deep breathing.
  - Breathe in slowly through your nose.
  - Breathe out through your mouth.
  - Slow your thoughts down and think about a relaxing scene.
  - Continue deep breathing until you feel more relaxed.

- Cope with sleep problems.
  - Increase your daily exercise, but do not exercise just before bedtime.
  - Decrease your caffeine consumption, especially in the afternoon or evening.
  - Do "boring" activities before bedtime.
  - Listen to relaxation tapes or relaxing music before bedtime.

Final Thoughts

- Remember that jury service is the responsibility of good citizens.
- Resist negative thoughts about verdict.
- No matter what others think about the verdict, your opinion is the only one that matters.
- You don't have to prove yourself to anyone.
- Sometimes it takes a lot of courage to serve on a jury. Some cases are very violent and brutal and hard to deal with. The case is now over and it is important for you to get on with your life.
- If you are fearful of retaliation or if you are threatened after the trial, tell the court and/or law enforcement immediately.

If signs of distress persist for two weeks after the jury service has ended consider contacting your physician.

Appendix 7

Sample Jury Exit Questionnaire

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Exit Questionnaire

JURY SERVICE EXIT QUESTIONNAIRE

Your answers to the following questions will help improve jury service.
All responses are voluntary and confidential.

1. Approximately how many days did you report to the courthouse? _____
2. What percent of your time at the courthouse was spent in the jury waiting room? _____%
3. How many times were you chosen to report to a courtroom for the jury selection process? _____
4. How many times were you actually selected to be a juror? _____
5. Have you ever served on jury duty before? _____ How many times? _____
6. How would you rate the following factors? (Answer all)

	Good	Adequate	Poor
A. Initial orientation	❑	❑	❑
B. Treatment by court personnel	❑	❑	❑
C. Physical comforts	❑	❑	❑
D. Personal safety	❑	❑	❑
E. Parking facilities	❑	❑	❑
F. Eating facilities	❑	❑	❑
G. Scheduling of your time	❑	❑	❑

7. Did you lose income as a result of jury service? ❑ No
   ❑ Yes How much? _____
8. After being served, what is your impression of jury service? (Answer one)
   A. The same as before — favorable? ❑
   B. The same as before — unfavorable? ❑
   C. More favorable than before? ❑
   D. Less favorable than before? ❑
9. In what ways do you think jury service can be improved?
   _____
   _____
   _____
   _____

The following information will help evaluate the results and responses to this questionnaire:

10. Age ❑ 18-20 ❑ 21-24 ❑ 25-34 ❑ 35-44 ❑ 45-46 ❑ 55-64 ❑ 65-over
11. Sex ❑ Female ❑ Male
12. Occupation: _____

Exit Questionnaire Tabulation Sheet

	1	2	3	4	5		6							7		8	10	11	12
					A	B	A	B	C	D	E	F	G	A	B				
	Days Spent	% Waiting	Times to Ctrm	Times as Juror	Jury Duty	Times Served	Orientation	Treatment	Comforts	Safety	Parking	Eating	Scheduling	Income Loss	How Much?	Impression	Age	Sex	Occupation
RESPONDENT																			
1																			
2																			
3																			
4																			
5																			
6																			
7																			
8																			
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15																			
16																			
17																			
18																			
19																			
20																			
Number Responding																			
Averages																			
Distributions (Number)																			