

JURY NEWS

G. THOMAS MUNSTERMAN

Juror Privacy versus the Need to Know: What Should be Given, When, and to Whom?

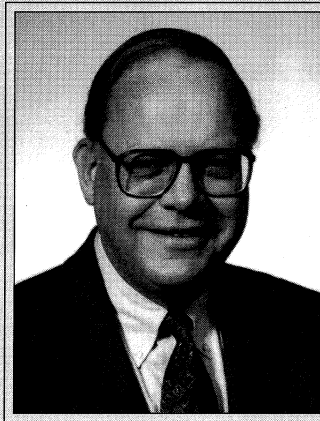
Although the Constitution does not expressly recognize a right to privacy, a substantial body of case law recognizes that people have a legitimate expectation of privacy in conducting their affairs. Citizens who report for jury service likewise expect some protections of their privacy; however, recent notorious cases have reduced the expectations of many prospective jurors. One reason given by persons who fail to respond to their jury summons is the expectation of a lack of privacy and the fear of retribution for their verdicts. While the number of violations involving jury tampering or intimidation are almost zero and certainly small, considering the number of citizens who do serve, the fear and concern still exist. When two California municipal courts implemented a routine practice of anonymous juries in which jurors' names and addresses were known only by court officials, the reaction of jurors was overwhelmingly positive: over 99 percent of them approved.

The middle ground between complete anonymity and knowing everything about a potential juror (for the purpose of exercising a challenge for cause or a peremptory challenge) has many dimensions. In this article, I examine some of these dimensions in light of current court practices concerning voir dire information. This would seem to be fairly easy since contemporary court practice ranges the entire spectrum from no information to the publication of all prospective juror's names in the newspaper. Unfortunately, there is little agreement by the bench and bar on the issue of juror privacy. Jurors, however, agree unanimously—they want privacy before, during, and after the trial.

The dimensions I propose to examine are:

- What personal data are available?
- Who may see it and can it be copied?
- When can they see it?
- Are the data preserved and privacy protected?

What personal data are available? We gather several types of data from jurors to be used for several distinct purposes. Because the data are often gathered all together, we tend to think of this information as an entity. First, we gather information about the qualifications of the prospective juror. This includes citizenship, residency, age, prior criminal convictions, and the ability to speak English. Courts also gather information needed for jury management, including the ad-



dress and phone numbers for the juror. Then, jurors provide the court with information, which is sometimes very personal, to support requests for an excuse or deferral. Again, this information is needed only by the court.

Finally, we have information about jurors that enables the parties to determine whether to exercise a challenge for cause or a peremptory challenge. What items are gathered and provided to parties? Some courts give only the juror's name. Others provide a detailed personal history including information about the prospective juror's family. In Philadelphia, jurors complete separate forms as part of their orientation for civil and criminal trial voir dres.

Some courts separate the different types of information—qualification, administrative, and voir dire—by using separate forms or by copying the forms in such a way that only voir dire information is available to the parties. Unfortunately, we can only say that the attorneys always want more information and the jurors want to give less.

Many courts give the juror an option of responding to questions privately, particularly for cases such as sexual or child abuse cases. This is often done during voir dire by permitting the prospective juror to answer the question at the sidebar, in chambers, or in some form of individual voir dire. On juror questionnaires, jurors may indicate that they chose not to answer.

In January 1994, a prospective juror in Texas refused to answer some of the questions on a questionnaire for a capital trial. She considered the questions too personal and not relevant to her ability to be a juror in the case. For example, one question asked the type of car she drove. She told the court her reasons and when she persisted in her refusal to answer the questions, she was held in contempt of court, fined \$200, and required to serve three days in the county jail. A federal magistrate set the contempt order aside, ruling that the court failed "to determine the relevancy of the questions and conduct a balancing test of the competing interests." *Brandborg v Lucas*, 4:94CV228 (E.D. Tex.).

Who may see the information and can it be copied? The ABA *Standards Relating to Juror Use and Management* state in standard 7(a) "to reduce the time required for voir dire, basic background information regarding panel members should be made available in writing to counsel for each party on the day on which selection is to begin" and standard 7(c) states that "the judge should ensure that the privacy of prospective jurors is reasonably protected, and that the questioning is consistent with the purpose of the voir dire process." Some courts copy the qualification forms, which may contain all the types of information discussed above, of all the prospective jurors

expected during the term and bind them into volumes that are available in each courtroom. Other courts permit the attorneys to borrow and copy all the forms they like, or even make copies for the attorneys or sell the forms to anyone. Obviously, juror privacy is not a concern in these courts.

In Michigan, by contrast, Rule 2.510 of the Michigan Rules of Civil Procedure states that only the judge, clerk, parties, and their attorneys to the action for which the juror is called and persons authorized by the court by rule or order may view the confidential personal history questionnaire completed by all prospective jurors. These authorized persons may not show these questionnaires to anyone else.

When can they see it? The above referenced ABA standard states that parties may have access to background information about prospective jurors "on the day on which selection is to begin." Courts may wish to adopt this posture and provide that the court may permit prior day access for certain cases. In many notorious cases, jurors complete case specific questionnaires that go into specific issues or inquire about the prospective jurors' knowledge of the case or the parties. These are often completed well before the voir dire and copied for the parties. Some courts prohibit the release of these to the public or may state that they will be released only for those persons actually questioned in the voir dire and then many months after the trial when, it is hoped, the media interest has waned.

Is the data preserved and privacy protected? If the qualification or voir dire questionnaires become public records, the information is public. The voir dire questionnaire used in Maricopa County (Phoenix, Arizona), which was shown in the summer 1995 issue of this column, is completed by the prospective juror upon reporting to the court. The "no-carbon-required" form provides copies for the parties for use during voir dire. At the conclusion of voir dire the copies are destroyed. There are no other copies and the information is not in any computer databank. Privacy may be another reason for using this low-tech approach rather than entering all that juror biographical information into some court or public database.

In Michigan the personal history questionnaire is confidential, as mentioned above, and the rules state that they must be kept for three years. Juror information does not become a public record.

For further reading I suggest the following: Nancy J. King, "Nameless Justice: the Case for the Routine Use of Anonymous Juries in Criminal Cases," 49 *Vand. L. Rev.* 123 (1996); Jennifer S. Buckley, "*Press Enterprise Co. v. Superior Court*: A Juror's Right to Privacy," 1985 *Det. C. L. Rev.* 449; Nancy A. Novak, "Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts," 3 *San Diego Just. J.* 215 (1995); Timothy R. Murphy, Genevra K. Loveland, and G. Thomas Munsterman, *Managing Notorious Cases* 97-120 (1992); and G. Thomas Munsterman, *Jury System Management* available from the National Center. In another column I will examine

the complex issue of post verdict contact with the jurors by the attorneys, the parties, and the press.

New Jury Publications

Two new jury publications are now available from the National Center.

Jury System Management is a revision and update of the *Methodology Manual for Jury Systems*, which was published in 1983, and includes the materials from the supplement to the *Manual* published in 1987. It contains many jury forms including qualification questionnaires, summons, follow-up notices, and exit questionnaires. Examples of data collection forms illustrate the data needed to manage a jury system and analyses of data from these forms demonstrate appropriate evaluation of the data. The publication also references the applicable American Bar Association *Standards Relating to Juror Use and Management* for each portion of the jury system and covers the methods for implementing those Standards. (185 pp., \$24.00).

Jury Trial Innovations is a compilation of techniques introduced by one or many courts to improve their jury system. The document begins with an examination of the research about "How Jurors Make Decisions" and "The Value of Innovations." Each innovation is presented individually and includes a description of the technique, the issues associated with the use of the technique, the procedures used, the advantages and disadvantages and the legal authority, and references to the scholarly literature about each technique. The techniques range from such topics as juror source lists and juror privacy in voir dire to permitting jurors to ask questions and post-verdict debriefings of jurors. The sections were written by judges, administrators, attorneys, academics, and trial consultants experienced in the particular techniques. This work was made possible through an SJI grant and is a joint project of the National Center and the Section of Litigation of the ABA. (325 pp., \$18.00)

To order write:

National Center for State Courts
Fulfillment Department

Box 580

Williston, VT 05495-0850

Or call (toll free): 1-888-228-NCSC

Or e-mail: ncsc.orders@aidcvr.com

Please note that these are new numbers for ordering National Center publications.

The continued support to the NCSC from the State Justice Institute and the many contacts with individual courts and states have made this column possible. Through this column we hope to maintain a dialogue on jury matters among courts. To that end please direct your comments and ideas for this column to Tom Munsterman at the Center for Jury Studies of the NCSC at (703) 841-0200, (703) 841-0206 (fax), or tmunsterm@ncsc.dni.us on the Internet. CM