

DECEMBER 2023

CITIZENS ON CALL:

Responding to the Needs of 21st Century Jurors



COSCA
Conference of State Court Administrators

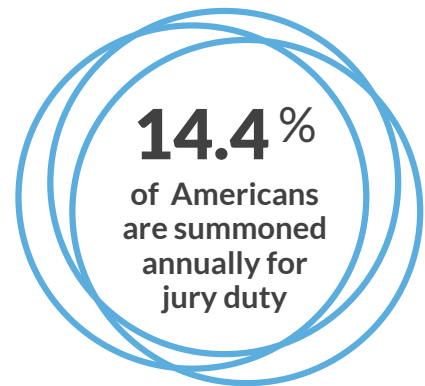


"It is imperative that court systems make greater efforts to treat jurors with respect and appreciation, and to value their time."

INTRODUCTION

In 1906, Roscoe Pound, then-dean of the University of Nebraska College of Law, delivered a lecture to the American Bar Association on the popular causes of dissatisfaction with the administration of justice. It became a clarion call for legal system reform in America. COSCA believes it is time for a similar call to action regarding the treatment of jurors. In the spirit of that lecture, we dissect the current causes of juror dissatisfaction and the potential to make meaningful changes to address them. We conclude that courts must think critically about how to improve the juror experience from first contact until the verdict is rendered and beyond.

It is incontrovertible that in America very few legal disputes are actually decided by a jury.¹ While the number of actual trials has dropped significantly over recent decades, the use of jurors has not significantly decreased. It is estimated that 14.4% of Americans are summoned for jury duty and approximately 11 million individuals report for jury service every year.² It is widely thought that jury service is a discrete event tied to the day an individual reports for service or is seated as a juror on a trial. But jury service does not begin at trial and often goes well beyond issuance of a verdict. The cost of service to the individual juror in time, money and peace of mind is substantial. It is time for the courts to re-think their approach to jury service and the unanswered needs of the individuals who collectively make jury trials a reality.



¹ Based on survey data collected by the National Center for State Courts for its forthcoming 2023 State-of-the-States Survey of Jury Improvement Efforts:

- Rural courts, which were defined in the survey as serving populations less than 25,000, conducted an average of 25 jury trials per year in 2019; this fell to 4 per year each in 2020 and 2021;
- Courts serving populations from 25,000 to 100,000 conducted an average of 37 trials per year in 2019, 9 in 2020, and 13 in 2021;
- Courts serving populations 100,000 to 500,000 conducted an average of 75 jury trials per year in 2019, 7 in 2020, and 10 in 2021; and
- Courts serving populations 500,000 and over conducted an average of 143 jury trials per year in 2019, 39 in 2020, and 48 in 2021.

It should be noted that data from 2020 and 2021 are reflective of the effects of court limitations on trials due to the national Covid-19 pandemic. Therefore, the data from 2019 should be the measure to which pre- and post-pandemic data is compared.

² National Center for State Courts, 2023 State-of the-States Survey of Jury Improvement Efforts (forthcoming)

The founding fathers considered the right to a jury trial to be so important that they included it in both the Constitution and the Bill of Rights.³ Other than serving in the military following a draft, jury duty is the only civic responsibility that requires citizens to involuntarily step away from their jobs, their families and other personal obligations to serve the government. Through jury service, ordinary citizens from all walks of life maintain the integrity of the legal system by ensuring that defendants are given a fair trial and that everyone is treated equally under the law.

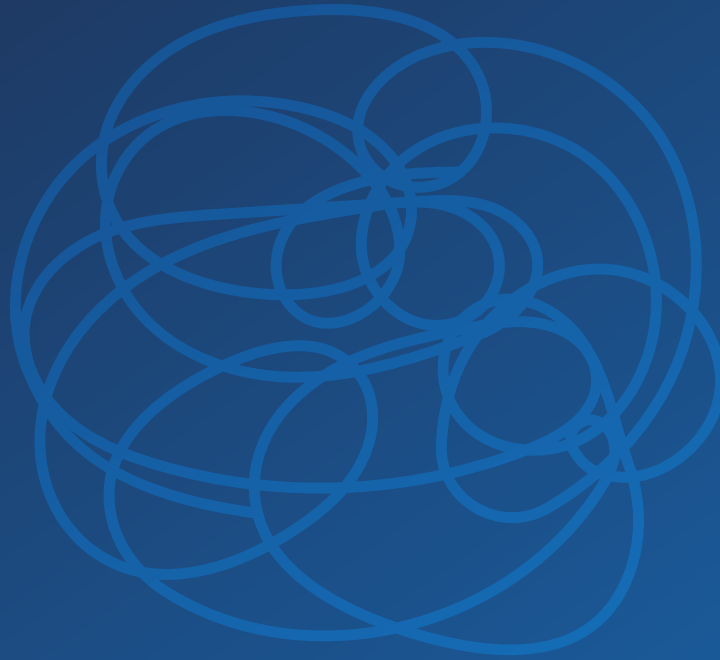
Moreover, the opportunity to engage in jury service has a greater societal benefit.

Taking an active role in the justice system through jury service promotes civic engagement, creates a sense of ownership and responsibility, and fosters understanding and communication between people with diverse backgrounds and experiences. Greater understanding and empathy serves to make society more cohesive. On a larger scale, jury duty helps to preserve democracy by giving citizens a chance to be a part of the government function of maintaining an orderly and just society and to be a voice in the delivery of justice. Jury service may be the only exposure most citizens have to the court system. Recognizing the important role that these citizens play in society, it is imperative that court systems make greater efforts to treat jurors with respect and appreciation, and to value their time. Studies show that many jurors do not want to serve because of the inconvenience to their daily lives, concern about the unknown length of service, and fear of what to expect if chosen to be on a jury. Complaints abound from those called for service about long waits at the courthouse before going to a courtroom for voir dire or being told they are not needed and then sent home. Communication is often lacking about the reasons for the delays. It cannot be overstated that the pittance of juror pay in almost all jurisdictions presents a hardship for many citizens to serve because it does not come close to replacing lost wages and expenses directly related to jury service. For some, the type of case they are called to sit on raises concerns about privacy, personal and family safety, and the aftereffects of emotional distress.



Before going further, it should be noted that this paper deals with the importance of improving the juror experience. These are long-standing issues that courts are well-positioned to address. However, addressing those issues does not begin to touch on the much larger issue of litigant dissatisfaction with the composition of juries. These issues include concerns about the representativeness of source lists, the number and types of automatic exemptions, the disproportionate impact on minorities created by felony disqualification, the use of peremptory strikes, and the inadequacy of Batson protections. Numerous papers already exist covering each of these topics. COSCA urges every court, if they have not already begun to do so, to undertake the labor of examining and remediating these issues within their own jurisdiction.

³ Clause 3: "The Trial of all Crimes, except in Cases of impeachment, shall be by Jury..." and Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." and Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."



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CAUSES OF JUROR STRESS



CHALLENGE 1:

Uncertainty, lack of control and long wait times

It should come as no surprise to anyone that a summons for jury service is disruptive to the daily routine of the individuals who are called upon to serve. In a 2022 study done in Maricopa County (Arizona), a common theme of focus group perceptions was that receiving a jury summons provokes feelings of dread or stress.⁴ Courts typically think of jury service as something that individuals do for the court on a specific date. In actuality, jury service starts when a citizen receives a summons and suddenly must rearrange work or personal schedules. Transportation to the courthouse, child or dependent adult care, and other family or community obligations are among the myriad of concerns that may need to be addressed, usually without the summoned individual knowing the specific date they will need to report or the length of their service. In addition, the language used in a jury summons, juror qualification questionnaire and instructions regarding jury service may be confusing to individuals who are unfamiliar with legal terms or who have never been involved in a legal proceeding. It is understandable then that not knowing what to do and when to do it are significant sources of stress for potential jurors.



RECOMMENDATION:

Courts should use modern technology more effectively to provide potential jurors timely information and some control over when they report for service.



STRATEGY:

Online juror qualification questionnaire

A 2022 California Supreme Court workgroup proposed “allowing jurors to complete their juror questionnaire and hardship forms online, before being required to physically appear in court for voir dire.” The Report adds: “Providing summonsed jurors with the option to complete their initial questionnaires or hardship forms online, after they are empaneled but before having to physically come to the courthouse, can result

⁴ Jury Service Perceptions and Attitude Research, conducted by Judicial Branch Administration Maricopa County March 3 – May 5, 2022. Contact Executive Officer, Maricopa County Superior Court at: www.superiorcourt.maricopa.gov.

in significant efficiencies in court resources, while promoting greater access to the public.”⁵ Modern jury case management systems have the capability of allowing potential jurors to complete their qualification questionnaire online. A 2007 survey conducted by the National Center for State Courts found that 11% of courts were taking advantage of this option – a number which has grown to only 32% during the intervening years, despite the convenience to jurors and the time-saving benefit for staff.⁶ Directing potential jurors to a website has the added advantage of being able to leverage the site for additional information about jury service. This can include such things as a frequently asked questions section, maps, parking information and public transportation routes, juror orientation videos, videos on the importance of jury service, and comments from former jurors.



STRATEGY:

Online deferral or excusal request

These same systems often have the capability of allowing prospective jurors to request an exemption (permanent excusal based on a statutory right to decline to serve) or deferral (postponement of service at the discretion of the court) online. Even when available, some jurisdictions continue to require jurors to make these types of requests, and submit any required supporting documentation, in person or through the U.S. postal service. Most jury management software will have the capability to handle online requests and document submission. If it is not available through the software vendor, most internal IT staff should have the capabilities to create an online submission process, independent from the jury management software, without a lot of cost.



STRATEGY:

Online scheduling

Although it is common to use online scheduling systems to change appointments and reservations in other industries, the courts have been reluctant to provide this same courtesy to jurors and litigants. A common fear in introducing this type of self-service in the context of jury duty is that every potential juror would try to put off service as long as possible or that so many would cancel on a particular date that scheduled trials would have to be moved. However, scheduling software can be set programmatically to prevent either of those scenarios from happening. Furthermore, that mindset is a disservice to the many conscientious citizens who have every intention of serving but may have a conflict on a particular date or for a specific time period. Introducing online scheduling would not significantly alter current practice. In

⁵ California Supreme Court Ad Hoc Workgroup on Post-Pandemic Initiatives Interim Report: Improving the Juror Experience. March 2022.

⁶ Hannaford-Agor, Paula. 2008. *Jury News: Getting the Biggest Bang for Your Buck from Online Qualification Technologies*. 23 (1) Court Manager; and National Center for State Courts. 2023 State-of-the-States Survey of Jury Improvement Efforts (forthcoming)

every instance in which individuals are summoned to jury service, there are always some who will ask for and receive deferrals. Making it inconvenient to request deferrals by limiting the time to make a request to courthouses hours, requiring hard copies of documents, and mandating mail or in-person delivery of documents and forms does not minimize these requests. They only serve to make the process of requesting changes inconvenient and time-consuming for both the potential juror and court staff.

Another common fear in allowing jurors some ability to self-schedule is that an individual may attempt to be seated on a particular case for nefarious reasons or because of intense interest in a well-known case. However, both the size of the jury pool and voir dire practices are specifically intended to root out and replace individuals with a bias toward the parties or for a pre-determined outcome for the case. Scheduling software can also be set to limit the number of persons self-selecting to a particular date, including removing its availability completely for some dates.



STRATEGY:

Text and email messaging

Several courts, either on their own or in conjunction with a case management or jury management software company, allow jurors to sign up for email or text updates on the status of their jury service. This use of technology is particularly effective in one day/one trial systems since jurors can be released from service as soon as all cases scheduled for a specific date have either settled or been moved to another date. But even in more complicated systems that use a two-step qualification and summoning process or require a multi-day standby process for voir dire, text and email messaging is a convenient way to advise of schedule changes, send reminders to report for service, issue weather-related or road delay announcements, or let jurors know that their service has ended or if they have been returned to the pool and may be called again during the current jury cycle.



RECOMMENDATION:

Courts should adapt qualification and summoning practices to reduce standby time and provide more certainty for reporting for service.



STRATEGY:

One-step process

Many courts still use the two-step process, placing a burden on the potential jurors to notify the court if they have a change of address, vacation plans, serious illness or other ordinary life event that may prevent them from serving during a portion of time when they are in standby status.

Research has shown that two-step systems are highly inefficient, with typical jury yields that are 20% lower than one-step systems.⁷ There is also some evidence that two-step courts tend to be less conscientious about following up with non-response to qualification questionnaires, which may result in underrepresentation of people of color.⁸

In contrast, the one-step process combines the initial qualification questionnaire with a summons to report for jury service on a specific date. The one-step process ensures that the information collected in the qualification questionnaires is current but it also requires jury administrators to plan ahead to ensure sufficient time to process the questionnaires. In some courts, it may also require some degree of over-summoning if the court does not have sufficient juror utilization data on rates of undeliverables, non-responses, deferrals and disqualifications when determining how many individuals to summons. The rates of undeliverable summonses may be decreased if courts, in addition to the basic information they currently receive, also request telephone numbers and email addresses, information that may already be available from the entities who provide the courts with their voter identification, motor vehicle and other source lists. This information can be used to follow-up with individuals if their summons is returned to the court as undeliverable. Although the additional planning required in the one-step process places demands on court staff, the process benefits the court because the information received is current and it benefits potential jurors by reducing much of the uncertainty about whether their service will be needed and when it will be needed.



RECOMMENDATION:

Courts should ensure that the term of jury service should be the shortest period necessary to serve the needs of justice.



STRATEGY:

1 day/1 trial service

It is convenient for court staff to go through the qualification process only once or twice a year, but there is hardly ever a good reason to keep dozens of private citizens on the hook for months at a time in the event that a case may require their service sometime during the time they are on standby. The traditional two-step process is a carryover from times when source lists were manually compiled, potential jurors were

⁷ Hannaford-Agor, Paula and Nicole Waters. 2010. *Tripping Over Our Own Feet: In Jury Operations, Two Steps Are One Too Many*. In *Trends in State Courts 2010* (National Center for State Courts, 2010) at 112. Originally published as *Jury News in Court Manager*, vol. 25, no. 1 (2010). At: <https://nationalcenterforstatecourts.box.com/s/jvswf8cfsyyeq4sko9mosocpwqg42dnc>.

⁸ Hannaford-Agor, Paula. 2011. *Systemic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded*. 59 Drake L. Rev. pps. 762, 783-785. At: https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0020/7337/systematic-negligence-in-jury.pdf.

selected from printed lists by hand using a randomly selected starting number, pre-printed qualification summons had to be individually selected and mailed to potential jurors, and responses had to be manually sorted and processed. It was a laborious, time-consuming, all-hands-on-deck process for most clerk's offices. Technology has ensured that those days are long gone.

The one day/one trial term of jury service was first pioneered in Houston, Texas in the mid-1970s and has since been successfully implemented in courts of all sizes. Minnesota successfully implemented this system in rural and urban districts more than 20 years ago. In 1999, the Oregon legislature, through passage of ORS 10.107, directed the Chief Justice to take all reasonable actions necessary to expedite the implementation of 1 day/1 trial service in all circuit courts. This practice shortens the amount of standby time required of potential jurors to a very narrow window and provides them certainty as to what date they may need to be absent from work, need alternative arrangements for such things as school drop-offs/pick-ups, childcare, or transportation arrangements. It also eliminates the yo-yo effect of re-summoning individuals over a period of days, weeks or months only to waive them off at the last minute. If 1 day/1 trial service is not feasible, then courts should reduce the length of jury service to the shortest time necessary to meet the needs of the court.⁹

A 1998 manual published by the National Center for State Courts states bluntly, "Many individuals are unprepared for, and amazed at, how much time they spend waiting," and "Prospective jurors are frustrated by the seemingly inefficient use of jurors' time."¹⁰ In response, many courts have provided more comfortable waiting rooms and better entertainment for jurors, but rarely have they taken the steps to reduce the number of jurors called or the actual time they spend waiting for voir dire. Ten years later, the National Center for State Courts published another manual and stated, "The single biggest complaint that people have about jury service is the seemingly interminable waiting...Most jurors recognize the importance of jury service, but understandably resent the apparent lack of consideration for their time, the disruption to their daily schedules, and their unreimbursed expenses related to jury service."¹¹

The single biggest improvement courts could make to reduce juror dissatisfaction would be to simply not keep jurors waiting!¹² There are several ways to accomplish this and it is helpful to identify all the points in the process that cause jurors to wait.

⁹ ABA Principles for Juries and Jury Trials: Principle 2(C) specifies that "the time required of persons called for jury service should be the shortest consistent with the needs of justice" – ideally no more than one day or one trial.
At: https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.pdf.

¹⁰ National Center for State Courts. 1998. Through the Eyes of the Juror: A Manual for Addressing Juror Stress.
At: https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0022/7438/through-the-eyes-of-the-juror.pdf.

¹¹ National Center for State Courts. 2009. Jury Managers' Toolbox.

¹² Post jury service surveys from a recent misdemeanor case in Alaska include the following comments from two of the six respondents: "First day spent almost 3 hours in jury room waiting to go into courtroom. Don't feel like that was respectful of my time," and "we waited for 3 hours after we were asked to be here."

These include calling more jurors than can realistically go through voir dire in a single day causing many to wait unnecessarily when they could have been called for a later time or another date.¹³ Unless it is a simple case, it is rare that a judge can get through voir dire with more than 20 people in a two-hour session of court time. During this time, of course, other jurors are simply waiting, either in the courtroom or elsewhere in the courthouse. Using this rule of thumb while considering the length of the trial day, the court should summons no more than the number of jurors who can be questioned during a single trial day.



STRATEGY:

Process for reviewing trial specific juror questionnaires

In addition, lawyers often review juror questionnaires at the start of the trial that the jurors either filled out online before coming to court or at the courthouse after arrival. Instead, courts should identify processes that require jurors to fill out questionnaires in advance of the trial, provide the completed questionnaires promptly to the parties, and arrange for a review of the questionnaires on the record with the litigants present. In this way, disqualified jurors can be released without having to report for jury service and the court will have had an opportunity to pre-approve follow-up procedures and questions for the remaining jurors that may touch on sensitive areas.



STRATEGY:

Motions Practice

It is understood that circumstances will arise during trial that require the court to make immediate rulings outside the hearing or presence of the jurors. To the extent possible, judges should attempt to limit the disruption of motions during trial by resolving as many motions at pre-trial as possible and hearing those that remain in conjunction with natural breaking points in the trial. A best practice is to schedule the attorneys to appear before the scheduled trial time each morning or to delay motions and procedural discussions with counsel until after the jurors have been dismissed for the day.



RECOMMENDATION:

Courts should use data and modern technology to improve juror utilization rates, to shorten wait times during voir dire, and to reduce the number of potential jurors required to report for service.

Many practices were established during the pandemic to avoid unnecessary congregating of jurors and to reduce the amount of waiting time in close quarters. Those changes that resulted in improving the juror experience and court efficiency should be continued.

¹³ Overcalling in this way may also result in unnecessary costs to the court system for juror travel and per diem pay.



STRATEGY:

Juror utilization rates

In evaluating jury practices, the first thing to consider is juror utilization, with a goal to reducing the percentage of “jurors unused in the courtroom.” The “unused” number represents the number of jurors in a given trial who appeared for service but were never reached.¹⁴ A related goal is to reduce the number of trials that fold after jurors have reported for service, resulting in an entire panel of unused jurors. The National Center for State Courts recommends that “courts summon only enough jurors to ensure that 90% or more are sent to a courtroom for voir dire, and that 90% of jurors sent to a courtroom are actually ‘used’ (sworn as a trial juror or alternate, excused for cause or hardship, or removed by peremptory challenge) during jury selection. This standard provides for an overall utilization rate of 81%, ensuring enough ‘extra’ jurors to accommodate most unanticipated circumstances, but not so many that substantial numbers of jurors are unused during voir dire or, worse, left waiting in the jury assembly room each day.”¹⁵

The greatest gains in juror utilization efficiency can be found by calling fewer jurors per trial, absent special circumstances that warrant a larger panel, and by reducing the number of trials that fold or settle at the last minute.¹⁶ Without available data, judges may call a large number of jurors based solely on intuition or past practice. Jury clerks often have the experience and expertise to determine the appropriate size of a jury panel for a particular case and their expertise should be utilized by the court. It is wise to implement guidelines for a recommended number of jurors based on the most serious offense being tried, using actual data from past trials. When setting juror utilization standards, courts should identify special circumstances that may warrant a larger jury pool. This approach has been successfully used in some states. “Courts with good juror utilization rates often have strictly enforced panel sizes for different types of cases (e.g., felony, misdemeanor, civil) based on information about the number of jurors needed to impanel juries for those cases.”¹⁷ Note also *Michigan Supreme Court’s Jury Management Best Practices Manual (2019)*: “Best Practice #7: Standardized Jury Panel Sizes – Court leadership should collaborate with all judges in the court to adopt a standardized jury panel size for certain case types and complexities.” North Dakota adopted statewide juror summoning standards in 1996 and periodically reviews utilization data and the expert opinion of experienced judges

¹⁴ According to data collected by the National Center for State Courts for its 2023 State-of-the-States Survey of Jury Improvement Efforts (forthcoming), Approximately two-thirds of qualified and available jurors (66%) are told to report for service. Three-quarters (76%) of reporting jurors are sent to voir dire.

¹⁵ Jury Managers’ Toolbox: 2009. Best Practices for Effective Juror Utilization. National Center for State Courts.

¹⁶ Hannaford-Agor, Paula. 2014. *Jury News: What is Normal Juror Utilization? And How much Better—or Worse—Is Your Court?* 29(1) Court Manager 49. At: <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2148/rec/4>.

¹⁷ Jury Managers’ Toolbox: 2009. Best Practices for Effective Juror Utilization, National Center for State Courts.

to revise standards as needed.¹⁸ Through Administrative Order 2013, the Alaska Supreme Court has established jury panel sizes, defined special circumstances, and established a procedure for requesting an exception to the panel sizes.¹⁹

Because judges rarely get the opportunity to observe the practice of their fellow jurists, a best practice to improve juror utilization is to periodically present juror utilization data at a judge's meeting. This data should include the actual and average number of jurors called for trial; the actual and average number of jurors who went unused; the average length of time it took between jurors reporting and unused jurors being dismissed; the number of cases that folded after jurors reported; and if available, the average length of time it took to pick a jury based on case type, and any other relevant juror data that is routinely collected which may provide insight into areas that could be improved.



STRATEGY:

Staggered jury panels

A successful practice to improve utilization is to have smaller groups of prospective jurors appear at staggered times for service. Through careful data analysis, the state of Alaska determined that a best practice is to call groups of 15-20 prospective jurors per scheduled trial in two-hour increments. Calling smaller groups of jurors at staggered intervals can mitigate court costs and expenses incurred by individual jurors.

One of the recommendations recently made by a workgroup of the California Supreme Court is to stagger juror reporting times “with varying panel sizes in order to maximize efficiency for court staff and the public.”²⁰ A major advantage to staggered appearance times is that jurors who do have to wait spend significantly less time doing so. Alaska’s largest trial court, located in Anchorage, compared a one-year pre-COVID period with a one-year post-COVID period, and found that jurors called before staggered panels were implemented waited twice as long for events to happen than those who were part of staggered panels.²¹ The use of staggered panels also resulted in fewer unused jurors due to trials folding, although this benefit was reduced

¹⁸ See N.D.Sup.Ct.Admin.R.9, Appendix 2, Jury Selection Plan. Last updated in 2021 to allow for larger panels in certain cases including sexual assault, felony assault, murder, theft, controlled substances, and driving under the influence.

¹⁹ Supreme Court of Alaska, Administrative Order 2013 (effective Sept. 1, 2023)

²⁰ California Supreme Court Ad Hoc Workgroup on Post-Pandemic Initiatives Interim Report: Improving the Juror Experience. March 2022.

²¹ It compared a one-year period pre-COVID, July 1, 2018-June 30, 2019, and a one-year period post-COVID, July 1, 2021-June 30, 2022, avoiding the “height” of the pandemic when many other factors were affecting jury trials:

- pre-COVID time spent waiting for a courtroom: 5 hours 30 minutes
- post-COVID time spent waiting for a courtroom: 2 hours 31 minutes
- pre-COVID time spent waiting to find out trial has folded: 1 hour 42 minutes
- post-COVID time spent waiting to find out trial has folded: 49 minutes

for those in court locations where distances require jurors to be in travel status long before their report times. Between July 1, 2021 and September 30, 2022, the average panel size for a felony trial in Fairbanks, Alaska was 50 jurors. However, because they have implemented staggered panels, the unused juror rate for folded trials now averages just 24 jurors. The use of staggered panels has been so successful in Anchorage that this practice has now been mandated through the promulgation of Alaska Supreme Court Administrative Order No. 2013 (effective date Sept. 1, 2023). While not mandated, Administrative Order No. 2013 also encourages judges to consider using remote technology for voir dire.



STRATEGY:

Online trial specific juror questionnaires

Online processes can be implemented for completing trial specific questionnaires. Use of online questionnaires can eliminate the need for some individuals from ever having to report to the courthouse if they are excused from service due to a hardship, need to defer to a later date, or are disqualified for cause due to information disclosed in the questionnaire. One way to encourage prospective jurors to complete the pretrial questionnaire is to let them know that they will not be required to appear on the first morning of their service term if they complete the questionnaire ahead of time through the online process.



STRATEGY:

Jury Selection through Remote Technology

A recent workgroup in Washington State concluded, “Voir dire is the portion of a jury trial that appears most amenable to remote proceedings. Remote voir dire allows jurors to comply with jury service with minimal disruption to their daily lives. Remote voir dire holds the potential for making jury service more accessible and less burdensome to individuals who have childcare responsibilities, who must take uncompensated leave from work, who have underlying health conditions, or who face transportation challenges in traveling to a courthouse. It also may allow for more diversity in the jury pool.”²² One of the four recommendations recently made by a workgroup of the California Supreme Court is to “develop[] or adopt[] virtual jury selection platforms that incorporate modules for conducting voir dire, which can help to streamline the juror selection process and gather information related to for-cause

²² Remote Jury Trials Work Group: Best Practices in Response to Frequently Asked Questions, Washington Courts. June 2021.

and peremptory challenges.”²³ Remote voir dire using video is currently occurring in some jurisdictions, including King and Snohomish Counties in Washington. Initial feedback from trial participants and prospective jurors participating in remote voir dire has been positive.”²⁴ The supreme courts of Alaska, California and Florida have issued either an administrative order or court rule that is permissive of the use of remote technology for jury selection.²⁵

An added benefit to using these innovative practices is the increased diversity in those reporting for jury service. “The dual goals of jury diversity and the detection and elimination of bias can be promoted by both structural and conceptual changes. In terms of structural elements, a few examples of effective upstream practices that improve diversity are: . . . (3) virtual jury selection that includes more people in the selection process (and, in fact judges have reported greater venire diversity with virtual jury selection compared to in-person jury selection); . . . and (4) expanding the use of juror questionnaires, completed in advance of trial, that ask about hardship, schedule conflicts, knowledge of the parties, and a list of case-specific questions that can identify in advance juror who would be excused for cause, if stipulated to by counsel.”²⁶

Remote jury selection may require a significant upfront investment of time, training and resources to accomplish effectively on a large scale. Personnel and judges need to be trained on using meeting and breakout rooms for large groups; summonses and instructions for jurors need to be modified and communicated or posted online, access to technology for prospective jurors should be provided for those that do not have it, and participating lawyers need to be consulted and trained.

Once operational, a remote jury selection process will assist the court in identifying qualified jurors without the need to bring lots of people into the courthouse only to have many of them spend the day waiting around and ultimately be excused from service. Remote jury selection is safer, more efficient and has less environmental impact. Anecdotal reports from judges and lawyers who have used remote technology for jury selection have indicated that jurors appear to be more candid in their

²³ California Supreme Court Ad Hoc Workgroup on Post-Pandemic Initiatives Interim Report: Improving the Juror Experience. March 2022.

²⁴ California Supreme Court Ad Hoc Workgroup on Post-Pandemic Initiatives Interim Report: Improving the Juror Experience. March 2022.

²⁵ Alaska Supreme Court Administrative Order 2013 (effective Sept. 1, 2023); California Rules of Court, Rule 3.672 Remote Proceedings (amended effective Aug. 4, 2023); Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 3 (filed Jan. 8, 2022)

²⁶ ASTC Position Paper on the Elimination of Peremptory Challenges: And Then There Were None . . . American Society of Trial Consultants. 2022.

responses. In addition, remote jury selection may ultimately save time and money and may reduce inconvenience to prospective jurors. The Joint Technology Committee, made up of representatives of the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC) has issued a bulletin outlining specific strategies for courts to consider when switching to the use of remote technology for jury selection.²⁷

If remote jury selection is not an option, courts should still consider ways to be more efficient in the jury selection process, mindful that a streamlined process honors the commitment and service provided by prospective jurors without overburdening their time.



STRATEGY:

Exercise of peremptory challenges

Instead of waiting until all jurors have been questioned, voir dire can be done more efficiently if judges require that peremptory challenges are exercised either per panel or after the questioning of an individual juror. This requires lawyers to make decisions more quickly and closer in time to questioning a juror and it keeps the jury selection process moving. Experience from the Alaska study has shown that by using this method 12-person juries are often selected within two panels and 6-person juries from the first panel drawn.

²⁷ Joint Technology Committee. 2023. Remote Jury Selection: Technology and Staff.
At: https://www.ncsc.org/_data/assets/pdf_file/0029/89318/JTC-2023-04-Remote-Jury-Selection-QR-Final.pdf.



CHALLENGE 2:

The cost of jury service

Serving on a jury has long been understood as a citizen’s “civic duty,” an obligation born from our collective commitment to a system of government that guarantees the right to a jury of one’s peers. When public trust in government was higher, serving on a jury may have been an obligation willingly undertaken based on this shared commitment. This may explain why juror pay has historically been nominal – because citizens were more willing to serve despite the hardships that sometimes come along with jury service. Today we cannot take that commitment for granted. A 2017 Pew Research Center study found that young people and minorities are less likely to view jury duty as an element of good citizenship.²⁸ In addition to the public’s decreasing trust in public institutions, the burden of serving on a jury has only increased. To address these issues, states need to be proactive in removing the biggest barriers to juror service: financial hardship compounded by extensive time commitments. In a recent survey of 1,184 Americans, 9% of respondents claimed to have lied to get out of jury service. Forty-eight percent lied because of financial concerns. Nineteen percent lied because they feared consequences from their employer and 16% lied because of a lack of childcare.²⁹

While jurors may assert financial hardship to be excused from jury duty, whether to grant the excusal is judge dependent and may be rarely granted absent compelling circumstances. Excusals for this reason disproportionately reduce the number of low-income workers whose experience and perspective bring greater diversity of thought to jury panels.

Courts need to actively address the financial hardship caused by jury service to improve participation from citizens across the economic spectrum.



RECOMMENDATION:

Courts should advocate for adequate per diem pay and other cost mitigation measures.

For most states, it is the legislature that sets base per diem rates, mileage or transportation reimbursement rates, and other lawful use of funds to provide for jury service.³⁰ It is naïve to expect that rates of juror compensation will rise to a level of awareness that will put it at the forefront of a legislative initiative unless a legislator

²⁸ Pew Research Center. 2017. “Jury duty is rare, but most Americans see it as a part of good citizenship.” At: <https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/>.

²⁹ Keller, John. 2021. Confessions of a Juror: How Jury Duty Impacts Americans. Bar Prep Hero. April 11, 2021. At: <https://barprephero.com/confessions-of-a-juror/>

³⁰ Similarly, in states that allow varying rates of juror compensation, it is typically the local government’s executive body that sets these rates.

has recently been contacted by a constituent or actually served as a juror. The judiciary is the only branch of government that has first-hand knowledge of the effect of low juror compensation on response rates and hardship excusals and the ability to regularly solicit input from potential and actual jurors regarding juror compensation. As such, courts have a duty to be a firm advocate for adequate juror compensation.

Most people who work hourly wage jobs are not paid if they do not work, so spending any time away from work waiting to be selected for a jury or actually serving on a jury means foregoing income. All states have laws prohibiting employers from interfering with or retaliating against an employee because of jury service, but most states do not require that employers provide employees with paid time off to perform jury service. Those jurisdictions that do require employers to pay employees for jury service limit such obligation to larger companies and limit the benefit to full-time employees who work regular schedules.³¹ Consequently, even in states with the most generous juror compensation, those individuals working for a small employer or working multiple part-time jobs to make ends meet — the people who are the least likely to be able to afford to step away from their sources of employment — have the least protection from financial hardship.

Over the years, juror pay has not kept pace with changes to the minimum wage, inflation or cost of living.³² Nationally, flat per diem rates vary from \$4 to \$50 per day.³³ States with graduated rates for juror compensation attempt to reconcile extended service and compensation rates, however, the high-end of these graduated rates, notwithstanding Arizona's recent increase, is still low, topping out at \$50 per day. New Mexico is the only state that has tied juror pay to the prevailing minimum wage. That rate is currently \$12/hour, and equates to \$96 for an 8-hour day. Arizona is the first state to pay per diem rates tied to the actual wages of jurors. Under this model, jurors can claim up to \$300 per day for wage replacement.

Effective strategies for raising juror pay have included an emphasis on the number of years and the changing cost of living since the last time juror pay was increased and a repudiation of using other low-paying jurisdictions as a reason to continue to keep per diem rates low. As noted by Arizona State Court Administrator Dave Byers, courts should not be content to argue for incremental adjustments to juror pay. Instead, they should make a robust argument for a rate of pay that is fair to jurors and will make an actual difference in response rates.

³¹ Jurisdictions that require employers to continue paying wages while an employee is serving on jury duty are Alabama, Colorado, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, Tennessee and the District of Columbia.

³² Hyatt, Kim. 2023. *Advocates Hope Automatic Voter Registration Diversifies Jury Pools Across Minnesota*. Minneapolis StarTribune. February 18, 2023. At: <https://www.startribune.com/advocates-hope-automatic-voter-registration-diversifies-jury-pools-across-minnesota/600252741/>, explaining that Minnesota's per diem rate of \$20 is the equivalent of a one-day parking pass at the Hennepin County Government Center parking ramp.

³³ Center for Jury Studies, Comparative Data, Juror Compensation (<https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>). See also Clark, Brandon W. 2022. *Juror Compensation in the United States*.



STRATEGY:

Lengthy Trial Funds

A 1998 trial in Ramsey County (St. Paul) Minnesota serves as a stark reminder of the financial harm that jurors may face if seated on a lengthy trial. In that case, the trial lasted four months and several jurors were severely impacted by lost wages. One juror had her house foreclosed on and two others had to declare bankruptcy. After another juror, who was a single parent, was denied food stamps, the other jurors began bringing food for him and his children.³⁴ In recognition of the burden a lengthy trial may place on jurors, some states have established “lengthy trial funds” which allow jurors to seek partial or full reimbursement for lost income due to extended jury service. How the funds operate differ. Arizona’s previously named lengthy trial fund was updated on September 24, 2022, so that superior court petit jurors are now eligible to receive compensation from the Arizona Trial and Digital Evidence Fund (ATDEF).³⁵ Jurors who serve are eligible to receive reimbursement from \$40 to \$300 per day starting on the first day of jury service. Jurors who are unemployed or retired may receive up to \$28 per day from ATDEF. Jurors who are employed but whose employer does not pay their full wages while serving on jury duty may be eligible to receive up to \$300 per day from the ATDEF. Louisiana and Mississippi have the same hardship exceptions in their Lengthy Trial Funds, although they each provide for up to \$100 dollars per day from day 4 to day 10.³⁶ Arizona, Louisiana and Mississippi all fund their Lengthy Trial Fund through legislative appropriations.

The existence of a lengthy trial fund is a major step in ensuring adequate compensation in those instances where trials last ten or more days. However, they are not a complete solution to the juror pay dilemma because of the number of days that must elapse before the benefit is available and because they generally are not available to those who are summonsed for multiple days of voir dire but never get seated on a jury.



STRATEGY:

Per diem jury pay and other expenses

Juror pay needs to be viewed as a tool to ensure that, at the outset, jury pools are composed in an equitable manner that does not overburden low-income citizens. Recently, several jurisdictions have taken steps to increase juror pay. As already mentioned, Arizona will now pay jurors chosen to sit on superior court trials \$300 per

³⁴ Rybek, Deborah Caufield and David Phelps. 1998. Smoked: The Inside Story of the Minnesota Tobacco Trial. See also, Van Voris, Bob. 1998. *In St. Paul, Everybody Won But the Jurors*. The National Law Journal.

³⁵ Arizona Revised Statute 2-222. At: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/21/00222.htm>.

³⁶ Oklahoma statute provides for a lengthy trial fund but it has never been funded. If it were ever funded, jurors who are seated on a case may qualify for additional compensation of up to \$200 per day from the Lengthy Trial Fund after ten days of service. Jurors who demonstrate an exceptional financial hardship may be eligible to collect up to \$50 per day from the fourth to the tenth day of service.

day, although jurors reporting for justice and municipal courts will continue to receive only \$12 per day. In 2022, Alaska doubled juror pay from \$25 to \$50 per day after the first day of service and in July 2023, North Dakota's juror pay doubled from \$25 for the first half-day and \$50 for each full day of service to \$50 and \$100, respectively. Working in partnership with a philanthropic organization, the city of San Francisco, California recently launched a pilot program called "Be The Jury" which will pay eligible jurors \$100 per day for their service in an effort to enhance the diversity of the city's jury pools. The financial impact of increases to juror pay can be substantial; Arizona's juror pay increase came from a \$1.6 million state appropriation, Alaska's cost was \$1 million and the North Dakota increase is estimated to be \$960,000.

In crafting proposals for increased juror pay programs, jurisdictions may wish to consider a number of options, including: tying juror pay to the local minimum wage; creating specialized funds for particular hardships such as child or dependent care; reimbursing for mileage (as numerous states already do); providing gas cards or vouchers for public transportation; or working with the legislature and state agencies that administer unemployment benefits to allow workers who are not paid during jury service to collect unemployment benefits. Some states already have mechanisms for people to donate their juror pay. By court rule, the Oregon Judicial Department has established a Juror Access and Experience Improvement Account funded through per diem fees voluntarily waived by jurors. Although the fund does not provide direct reimbursement to jurors, it can ease the cost of service by allowing jurisdictions to provide microwaves and refrigerators and other amenities for juror use.³⁷

In addition to designating waived fees to a fund like Oregon's or to eligible charitable organizations, jurisdictions might consider statutory or policy amendments that would allow them to establish a "pay it forward" fund to compensate those jurors who suffer extreme financial hardship caused by jury service.

³⁷ ORS 10.075(3)



CHALLENGE 3:

Privacy concerns and fears about personal and family safety

Juror Privacy

In recent years, more attention has been given to juror privacy and the consequences of publicly releasing personal information.³⁸ The debate over these issues has led to discussions about a defendant's right to a fair trial and the need to ensure juror impartiality. The Sixth Amendment requires that a criminal defendant be tried publicly. The media and public have rights under the First and Fourteenth Amendment to observe many criminal proceedings including trials and often the process to evaluate jurors for partiality.³⁹

Courts in both civil and criminal matters frequently find it necessary to inquire about personal matters during questioning.⁴⁰ Juror names and addresses are often revealed during the trial's voir dire phase. Transcripts from preliminary hearings concerning jurors are often available to the public. Moreover, juror information is generally made available after a verdict. This helps ensure that the proceedings are conducted fairly. But this threat to juror privacy may impact a willingness to serve. “[J]urors do not deliberately seek out this particular form of public service and do not, therefore, automatically surrender all expectations of privacy.”⁴¹ With the advent of social media and the availability of information on the internet, the debate over whether the public's right to monitor the trial outweighs the jurors' right to privacy continues to intensify.

Throughout the voir dire process, jurors are often asked questions about their relationships, family, and friends. Jurors have expressed worry over the release of information about their residence, occupation, and educational background.⁴² They fear that the release of private information in their completed questionnaires may cause personal embarrassment.⁴³ Questions about personal health issues, use of

³⁸ Litt, Marc O. 1992. “*Citizen Soldiers*” or *Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 Colum. J.L. & Soc. Probs. 371, 371. “Over the past twenty-five years, the Sixth Amendment right of an accused to a fair criminal trial, the First Amendment right of the media to gather and publish news and the privacy right of jurors have come into increasing conflict.”

³⁹ Wilson, Melanie D. 2023. *Juror Privacy in the Sixth Amendment Balance*, 2012 Utah L. Rev.

⁴⁰ Wilson, Melanie D. 2023. *Juror Privacy in the Sixth Amendment Balance*, 2012 Utah L. Rev.

⁴¹ Mize, Gregory E. and Paula Hannaford-Agor and Nicole L. Waters. 2007. *The State-of-the-States Survey of Jury Improvement Efforts: A compendium*.

⁴² Wilson, Melanie D. 2023. *Juror Privacy in the Sixth Amendment Balance*, 2012 Utah L. Rev. Note 212, at 2025. “Because jurors play this critical role of deciding guilt and protecting the accused from government overreaching, during the voir dire stage of the case, potential jurors are asked to share information about their lives, quirks, proclivities and beliefs, and sometimes insights into the lives of their friends, relatives, and loved ones who influence them.”

⁴³ Wilson, Melanie D. 2023. *Juror Privacy in the Sixth Amendment Balance*, 2012 Utah L. Rev. Pg. 2025.

legal and illegal medications, or experience as crime victims are common.⁴⁴ Some have expressed overall worry about the extent of media coverage of the trial and the consequences of that coverage for their exposure during and after the trial, including to their employment or reputation in the community.^{45,46}

Privacy concerns beyond voir dire

Juror privacy also remains at risk outside the voir dire process. Investigation of both potential and seated jurors has become a regular occurrence in jurisdictions that provide access to juror contact information. Private attorneys may hire jury consultants or private investigators to search juror backgrounds and scour social media accounts, while government lawyers may use existing government resources to do the same.⁴⁷ In a 2021 study of jurors and new media, 40% of judges and lawyers reported that attorneys frequently use the internet to conduct research on prospective jurors and another 30% reported that they sometimes do.⁴⁸

Privacy issues have only been exacerbated with increased use of social media platforms. With sites like Facebook and X, formerly known as Twitter, lawyers and litigants now have a treasure trove of information at their fingertips. There is no recognized right to monitor a juror's use of social media. However, it has become standard practice for counsel and jury consultants to do so. A 2019 article in a publication of the American Bar Association titled *Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection*,⁴⁹ devotes one paragraph to concerns about invading juror privacy and several pages to the dangers of forgoing such a search. A lawyer risks alienating a juror by violating privacy. But there are risks of not conducting online research. Jurors may engage in online misconduct risking a mistrial. There are many instances in which a case has been undone by the actions of a single juror who has taken it upon his or her self to research the issues, parties, and even evidence in a case, or to communicate with third parties about the case. Jurors have posted on Facebook about their deliberations or sent "friend" requests to parties.

⁴⁴ *United States v. Holmes*, 572 F. Supp. 3d 831 (N.D. Cal. 2021). Jurors identified a series of concerns regarding privacy; presumption of openness of criminal proceedings can be overcome and juror identities can be narrowly sealed by showing compelling interests.

⁴⁵ Wilson, Melanie D. 2023. *Juror Privacy in the Sixth Amendment Balance*, 2012 Utah L. Rev. pg. 2026.

⁴⁶ CNN. 2020. <https://www.cnn.com/2020/04/16/politics/roger-stone-jury-privacy/index.html>. In 2022, all jurors in *U.S. v. Roger Stone* wrote in a series of powerful, anonymized statements that they felt harassed, afraid and objected to information about them being revealed to the public.

⁴⁷ Ferguson, Andre Guthrie. 2016. *The Big Data Jury*, 91 Notre Dame L. Rev. 93.

⁴⁸ Hannaford-Agor, Paula, et.al. 2021. *Jurors & New Media: Filling Knowledge Gaps for Judicial and Legal Policymakers*. At: https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0020/63803/Jurors-and-New-Media-Report.pdf.

⁴⁹ Browning, John G. 2019. *Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection*. The Brief. American Bar Association. Vol. 45, No. 2.

Big Data

The emergence of “big data” threatens to further complicate the landscape. Commercial providers possess, and many government databases contain, better, more targeted, but very personal data in easily accessible formats. Courts could use this data to select a larger jury venire, and litigants could use this data to select the particular jury panel. For court administrators, the availability of additional information provides the potential for increased jury diversity, beyond the categories of race, gender, and geography. For litigants, the available information could provide a wealth of insights once only available from expensive jury consultants. “Big data could democratize access to information about jurors, leading to more diverse juries and jury venires, and potentially less discriminatory jury selection practices.”⁵⁰

At the same time, court use of big data technology carries real risks. Increased collection of personal information involves an invasion of privacy that could result in significant backlash against jury service. “Jurors summoned to serve in the venire or questioned for the jury panel do not expect that jury selection will involve use of the full range of available consumer data. Jurors generally expect to be anonymous, more a juror number than a name. Jurors expect to arrive as citizens, do their job, and then disappear back into society as faceless, nameless members of a jury. Equalizing the availability of big data information about jurors and making it a part of the jury selection system, raises practical, theoretical, and constitutional dilemmas which must be addressed.”⁵¹ If courts are going to venture into the use of big data, they must inform potential jurors about the use of the data collected by the court and, to the extent possible, take steps to prevent commercialization of the data by third parties.

Protection for jurors

Recently more attention has been paid to protecting both jurors and the accused without undercutting First Amendment rights to observe criminal trials. In response, courts have recognized some limited privacy rights for jurors. The Supreme Court has called juror privacy a “compelling interest” when balancing privacy rights with the First Amendment right of the press to know about public jury trials.⁵² Many trial judges and court staff are becoming more sensitive and sympathetic to the privacy concerns of jurors and are modifying their jury procedures.^{53 54} “The result is a national hodge-

⁵⁰ Ferguson, Andre Guthrie. 2016. *The Big Data Jury*, 91 Notre Dame L. Rev. 93.

⁵¹ Ferguson, Andre Guthrie. 2016. *The Big Data Jury*, 91 Notre Dame L. Rev. 93.

⁵² *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511. 1984.

⁵³ Hannaford, Paula L. 2001. *Safeguarding Juror Privacy*, 85 Judicature 18, pg. 23.

⁵⁴ Wolfson & Leon. 2015. <https://www.miamipersonalinjuryattorneyblog.net/juror-safety-and-identity-theft/> (A mistrial was declared in a 2015 Broward Circuit Court when several jurors voiced concerns about their personal safety from a criminal defendant. They also worried about identity theft because of their personal information being in the public record.)

podge of court procedures concerning litigant and public access to juror information—few of which adequately address all facets of juror privacy and many of which are of questionable legality given the strong statutory and constitutional policies in favor of open court proceedings and records.”⁵⁵

Jurors are not volunteers. They come to court under summons and answer questionnaires under court order. The sharing of private information is compelled under threat of contempt of court.⁵⁶ In her article, Hannaford speaks to a number of tactics employed by courts to protect juror privacy but notes that they are often limited and inadequate in many cases. “Most citizens understand the importance of revealing personal information in the context of a specific trial, but are less convinced that the court should permit unrestricted public access to that information in the context of a specific trial, ...[and] are less convinced that the court should permit unrestricted public access to that information forever.”⁵⁷ Recognizing the growing concerns about juror privacy and safety, Oregon adopted a statutory provision in 2021 which prohibits identification of a juror by name in any court proceeding that is open to the public. The statute protects the parties right to the names of the jurors, unless the court determines there is good cause to order otherwise.⁵⁸

With the recent explosion of information readily available to litigants, the tension between juror privacy and the need to ensure juror impartiality can be expected to intensify.



RECOMMENDATION:

Courts should establish an expectation that parties conduct pre-service background checks only as authorized by court order or through supplemental questionnaires that have been approved by the court.

An opinion from the New Jersey Supreme Court aptly sums up the need for uniform rules on background checks of potential jurors. “Courts, not the parties, oversee the jury selection process. On occasion, it may be appropriate to conduct a criminal history check to confirm whether a prospective juror is eligible to serve and to ensure a fair trial. That decision, though, cannot be made unilaterally by the prosecution. Going forward, we direct that any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge. We refer to a check of a government database that is available to only one side. The results of the check must be shared with both parties and the court, and the juror should be given an opportunity to respond to any legitimate concerns raised.”⁵⁹

⁵⁵ Hannaford, Paula L. 2001. *Safeguarding Juror Privacy*, 85 *Judicature* 18, pg. 19.

⁵⁶ Colquitt, Joseph A. 2007. *Using Jury Questionnaires; (Ab)using Jurors*, 40 *Conn. L. Rev.* 1.

⁵⁷ Hannaford, Paula L. 2001. *Safeguarding Juror Privacy*, 85 *Judicature* 18, pg. 23.

⁵⁸ ORS 10.097

⁵⁹ *State v. Andujar*, 245 N.J. 275 (2021)



RECOMMENDATION:

Courts should be sensitive to privacy and safety concerns that arise out of certain trials and take steps to proactively address them.

Courts that provide information about juror's contact information and employment, should routinely warn jurors about the possibility of counsel or members of the media contacting them after a trial has concluded. This should include information about a juror's obligation to respond to inquiries, any trial-specific constraints on sharing certain information, the juror's right to express his or her opinion, and how to do so with restraint so as to respect the deliberation process and their fellow jurors.⁶⁰

In addition to the indignity of being subject to secret background checks and stealth monitoring of their cyber activity, jurors have concerns about physical safety when serving on high-profile or high-conflict cases. It is not hard to imagine the intimidation jurors feel entering and exiting court facilities when they are faced with a barrage of media equipment and a mob of spectators. They may be equally intimidated by the presence of supporters and opponents of litigants inside the courtroom or court facilities. Jurors also have safety concerns for themselves and their families after a trial concludes when there has been heavy public interest in the outcome. This is especially true when politicians and pundits use their pulpits to attack the integrity of the jurors. Courts should ensure the concerns raised by these threats are acknowledged and addressed to the fullest extent possible.



RECOMMENDATION:

Courts should have policies or rules on the use of anonymous jurors.

In those cases where a court has been concerned about juror safety, jurors have been allowed to remain anonymous. Anonymous juries, in which the names and other identifiable information about individual jurors are withheld from the media, the public and sometimes litigants, are constitutionally permissible and sometimes used when safety or privacy of jurors are of concern.⁶¹ According to a recent USA today article, anonymous juries are used in approximately 12 of the 100,000 jury trials held nationally each year.⁶² The U.S. Supreme Court has held that anonymous juries are

⁶⁰ Idaho Jury Instruction ICJI 232 Post Verdict Jury Instruction is illustrative of the routine instruction that should be provided to jurors in this regard. Courts may need to expand on the instruction or provide it earlier in the trial proceedings if media or public scrutiny is intense.

⁶¹ *Hamer vs. United States*, 259 F.2d 274 (9th Cir. 1958)

⁶² Della Cava, Marco. 2021. *Anonymous Jury in Derek Chauvin Trial Part of a Growing Trend That Has Some Legal Experts Worried*. USA Today. April 25, 2021.

At: <https://www.usatoday.com/story/news/nation/2021/04/25/chauvin-trial-jury-anonymous-concerning-trend-us-justice/7342909002/>.

appropriate “when genuinely called for and when properly used.”⁶³ Trial judges are justifiably reluctant to use anonymous juries since the practice may appear to fly in the face of the American justice system’s commitment to open and transparent processes. Nevertheless, they remain a practical and effective method for protecting juror safety and addressing juror privacy concerns for themselves and their families in cases where they might be subject to threats, physical danger, targeted social media attacks or intense media scrutiny.



RECOMMENDATION:

Courts should ensure that security concerns are addressed in any new construction or remodeling projects of court facilities.

At a minimum, courts should have dedicated jury facilities, including nearby restrooms that are reserved solely for juror use. Courthouses should be zoned so that separate security screening processes for jurors are possible. If courts do not have separate parking and exits for jurors, then they should actively manage breaks and provide for juror escorts through public areas, including parking lots. Courts should consider having jurors leave the premise while parties, witnesses and the public are asked to wait before leaving. Additional recommendations can be found in the publication, *Court Security Includes Jurors Too*.⁶⁴

⁶³ *E. Jean Carroll v. Donald J. Trump*, U.S. Dist. Court, Southern District of New York, 22-cv-10016, quoting *United States v. Kadir*, 718 F.3d 1215,120 (2d Cir. 2013) quoting *United States v. Pica*, 692 F.3d 79, 88 (2d Cir.2012).

⁶⁴ Hannaford-Agor, Paula. 2009. Jury News: Court Security Includes Jurors Too, 24(1) Court Manager 60. At: https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0017/7082/court-security-includes-jurors.pdf.



CHALLENGE 4:

Post-trial anxiety, guilt and vicarious trauma

In addition to security and privacy concerns, the impact of jury service on juror mental health is a serious consideration that warrants the attention of the courts. In a recent survey, 26% of jurors admitted to struggling with persistent negative emotions after completing jury duty, with nearly 50% reporting high levels of anxiety. Other symptoms included guilt, shame, anger and fear. The survey found that negative emotions persisted for an average of two years following service.⁶⁵

Vicarious trauma has been defined as, “the emotional residue of exposure to traumatic stories and experiences of others through work; witnessing fear, pain, and terror that others have experienced; a pre-occupation with horrific stories told to the professional.”⁶⁶ The term is sometimes used interchangeably with terms such as compassion fatigue, secondary trauma, or insidious trauma. This phenomenon is most often related to the experience of being exposed to stories of cruel and inhumane acts perpetrated by and toward people in our society.⁶⁷

By virtue of their responsibilities, judges and court staff are susceptible to vicarious trauma “due to the combination of working in a busy court, hearing repeated accounts of harrowing or traumatic events, and worrying about safety issues that may arise around volatile or emotionally charged cases.”⁶⁸ Likewise, jurors who are exposed to these same cases and stories, and whose function it is to evaluate and analyze gruesome evidence and facts, are at risk for the same kind of trauma.

A 2002 study conducted by Sonia Chopra at Simon Fraser University describes how taxing it can be to serve on a jury. Two-thirds of former jurors interviewed for Chopra’s study reported experiencing stress as a result of their jury experience, and nearly half of them said they believed that stress affected the decisions made by their fellow jurors. A third said they had difficulty sleeping as a result of their trial memories, while almost 20% said the experience left them feeling “more fearful” than before.⁶⁹

⁶⁵ Keller, John. 2021. *Confessions of a Juror: How Jury Duty Impacts Americans*. Bar Prep Hero. At: <https://barprephero.com/confessions-of-a-juror/>.

⁶⁶ American Counseling Association. 2016.

⁶⁷ Town, Michael A. 2022. *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*. Posted October 23, 2003; At: <https://www.judgemiketown.com/vicarious-trauma-in-judges-the-personal-challenge-of-dispensing-justice/>.

⁶⁸ Smith, Deborah Wood. 2017. *Secondary and Vicarious Trauma Among Judges and Court Personnel*. Trends 2017. At: <https://cdm16501.contentdm.oclc.org/digital/collection/hr/id/171>.

⁶⁹ CBA National Journal/ABC National. 2020. *Coping with Jury Duty*. 13 Jan. 2020. At: <https://nationalmagazine.ca/fr-ca/articles/law/in-depth/2020/coping-with-jury-duty>.

According to the U.S. Department of Justice, Office of Crime Victims, some of the negative effects of vicarious trauma may include:

- Difficulty managing emotions;
- Feeling emotionally numb or shut down;
- Fatigue, sleepiness, or difficulty falling asleep;
- Physical problems or complaints, such as aches, pains and decreased resistance to illness;
- Being easily distracted, which can increase one's risk of accidents;
- Loss of a sense of meaning in life and/or feeling hopeless about the future;
- Relationship problems (e.g. withdrawing from friends and family, increased interpersonal conflict, avoiding intimacy);
- Feeling vulnerable or worrying excessively about potential dangers in the world and loved ones' safety;
- Increased irritability, aggressive, explosive, or violent outbursts and behavior;
- Destructing coping or addictive behaviors (e.g. over/under eating, substance abuse, gambling, taking undue risks in sports or driving);
- Lack of or decreased participation in activities that used to be enjoyable;
- Avoiding work and interactions with clients or constituents; and
- A combination of symptoms that comprise a diagnosis of Post-traumatic Stress Disorder (PTSD).

In 1998 the National Center for State Courts released "Through the Eyes of the Juror."⁷⁰ This manual identifies causes of juror stress at all stages of jury service and includes extensive recommendations on mitigating the impact of those stressors. Twenty-five years after this manual was published, only a handful of courts have implemented strategies to actively support jurors following their service, though that trend may be starting to change in light of society's increased acknowledgement of vicarious trauma and heightened awareness of the importance of mental health.

⁷⁰ National Center for State Courts. 1998. "Through the Eyes of the Juror." NCSC Publication Number R-209.



RECOMMENDATION:

Courts should follow in-trial best practices for mitigating trauma and should establish a post-trial trauma program for certain case types.



STRATEGY:

In-trial mitigation strategies

The best approach to addressing post-trial trauma is to utilize in-trial mitigation strategies. They include commonsense things such as:

- Limiting the number of disturbing images and amount of testimony presented at trial to the minimum needed to establish the case and requiring that each image or witness provide new information rather than allowing repetition as a strategy to amplify juror sympathy;⁷¹
- Warning jurors before displaying disturbing or gruesome materials;
- Limiting the amount of time jurors are exposed to images by requiring they be taken down as soon as they are no longer needed and informing jurors they only need view the images once;⁷²
- Allowing frequent breaks to allow jurors to expel the emotions and adrenaline surge that follow exposure to upsetting testimony or visual images; this may include instructing bailiffs to let jurors walk around designated areas of the court facility and grounds;
- Allowing jurors to contact a family member or designated support person to discuss emotional reactions without discussing evidence or thoughts about the case in general or alternatively, having a mental health professional available for jurors during the trial; and
- Keeping jurors informed of the trial schedule, including estimated number of witnesses per day and estimated length of testimony for each witness.

Other in-trial mitigation strategies that should be considered, if they are not already common practice, include allowing juror notetaking, pre-deliberation discussion and juror submission of questions for witnesses. These practices are aligned with adult learning principles and can assist jurors in ordering their thoughts to better contextualize traumatic sights and testimony. Notwithstanding some of the initial hesitation courts expressed at introducing these practices, no court has found them to be harmful or has rescinded them once they were implemented.

⁷¹ Most court systems have adopted a variation of Fed.R.Ev. 403 of the Federal Rules of Evidence which grants the judge the authority to exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue waste of time, or needless presentation of cumulative evidence.

⁷² It is unlikely that a court will have a rule specific to the handling of sexually graphic or gruesome exhibits, but it is clear that judges have the inherent power to control the courtroom and to manage juries.



STRATEGY:

Post-trial mitigation

Mitigation strategies to address vicarious trauma post-trial may include one or more of the following:

- **Providing written information about potential juror stress** either passively, for example by leaving brochures or information sheets in a rack in the jury deliberation room, or actively by giving jurors information as they leave or mailing it to them shortly after the trial ends.
- **Conducting judge-led post-verdict de-briefing.** This is a short, informal session between the judge and the jurors following the verdict and before jurors are discharged from their duty, to which counsel for the parties may be invited to attend. Alternate jurors who have already been released should be sent a follow-up letter by the judge that includes information on juror stress and any services provided by the court to mitigate this stress.⁷³
- **Conducting critical incident debriefing.** This is a counselor-led discussion with jurors based on the methods used to assist military and emergency personnel following a traumatic experience. Critical incident debriefings may be held immediately after a verdict or may be held within a short period afterward. Alternate jurors, regardless of whether they participated in deliberation, should be included in the debriefing. The trial judge, counsel for the parties, and court staff may attend the same juror debriefing or a separate debriefing session just for judges, court staff and counsel since their experiences and coping mechanisms may differ from that of a juror.
- **Making trauma counseling available in a group or individual session.** This allows jurors “an opportunity to walk through their experience and unload the emotional and mental burden in an effort to prevent vicarious trauma.”⁷⁴

⁷³ Munsterman, Thomas and Paula L. Hannaford-Agor and G. Marc Whitehead. 1998. *Jury Trial Innovations*. 2nd ed. Pps. 172-173. At: https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0021/7644/jury-trial-innovations-2d-ed-2006.pdf. Although judge-led debriefings are common, the National Center for State Courts discourages judges from conducting post-trial debriefing of high-stress trials unless they have been properly trained or are working in conjunction with a mental health practitioner.

⁷⁴ Awusah, Daria C. 2022. *Combating Vicarious Trauma: A Corps-Wide Strategic Approach to Combating Vicarious Trauma*. JAG Reporter. June 27, 2022. At: <https://www.jagreporter.af.mil/Post/Article-View-Post/Article/3056485/combating-vicarious-trauma/>.

Several states and individual jurisdictions have instituted programs to address juror trauma.⁷⁵ The program in Alaska is especially instructive in its design since it is funded through legislative appropriations, is available to both grand and petit jurors, sets criteria by case type for when the program must be offered, allows for different levels of counseling, and has an extended length of time for when jurors may access the service.⁷⁶ Absent a legislatively funded trauma program, partnerships with Employee Assistance Programs, state and county health departments, and non-profit mental health providers are all strategies that jurisdictions have used to mitigate the cost of providing trauma services.⁷⁷

COSCA believes it is imperative to address the specific harm that may be imposed on a juror's health and well-being by virtue of their jury service. There is a general concern among some judges that using trauma mitigation protocols or post-trial trauma services may create an appealable issue. It is understood that the purpose of a jury trial is to render a decision for the parties and the court's primary responsibility is to ensure a neutral playing field and a fair trial. If a judge has concerns in regard to a specific mitigation strategy being considered in a case, then the judge should carefully consider how the strategy will be deployed to address those concerns. Despite those concerns, it is incumbent upon all courts to also be mindful of the lasting and potentially adverse impact of jury service on the jurors themselves and to actively address those issues to the extent practicable.

⁷⁵ Some of these jurisdictions include Alaska, Massachusetts, North Dakota, Texas, the California counties of Orange, Merced and Stanislaus and individual counties in Maryland and Ohio. Since the mid-2000s, Canadian provinces have been an international leader in addressing juror trauma and juror stress.

⁷⁶ See A.S.12.456.018 and related directives from the Supreme Court of Alaska.

⁷⁷ Examples of these funding strategies can be found in Massachusetts, North Dakota, and individual counties in California, Maryland and Ohio.

Summary of Recommendations

COSCA believes it is the responsibility of courts to treat jurors with respect and compassion, including respect for their time, financial condition, and ongoing stress caused by jury services.

To that end, COSCA offers the following recommendations:

- **Ensure that the number of jurors asked to report is based on actual need using historical data and court expertise;**
- **Shorten the length of jury service to the shortest period needed to adequately serve court needs;**
- **Advocate for adequate payment for jury service including providing per diem pay starting with the first day a juror reports for service; sufficient per diem pay to realistically offset loss of wages and expenses directly incurred due to jury service; and establishment of directed funds such as a lengthy trial fund or dependent care fund;**
- **Educate trial court judges on vicarious trauma in jurors and effective use of informal debriefing and critical incident debriefing;**
- **Implement a juror trauma program that includes a range of responses from critical incident debriefing to individual counseling;**
- **Address juror concerns about safety during and following trials and consider juror safety needs in courthouse remodeling or building plans; and**
- **Establish court rules to limit the invasion of juror privacy, including rules specific to the use of anonymous juries.**



 **COSCA**
Conference of State Court Administrators