



*Trial By Jury*  
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# Building On Bedrock: The Continued Evolution of Jury Reform

By G. Thomas Munsterman and Paula L. Hannaford-Agor



*Runaway Jury*  
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In the Fall 1997 issue of *The Judges' Journal*, we reviewed state and federal efforts to improve the jury system, pointing out that the past thirty years involved rather dramatic changes compared to the relative stability of the preceding several hundred years.<sup>1</sup> During this brief period, for example, courts abandoned the key-man system of jury selection in favor of randomly selecting names from broadly inclusive lists of prospective jurors. Simultaneously, many courts introduced cost-cutting measures such as reduced jury sizes and nonunanimous verdicts in civil cases. The scope and cumulative impact of those reforms prompted the editor of *The Judges' Journal* to suggest the title "Reshaping the Bedrock of Democracy."

In conjunction with the American Bar Association's (ABA) new initiative on juries,<sup>2</sup> we have been asked to bring that commentary up-to-date with trends in jury improvement that have emerged over the past seven years. While the number of groundbreaking changes has slowed, state and federal courts have followed the general contours of improvements previously implemented and continue to build on those improvements. Most recently, courts have moved the focus of jury improvement efforts from front-end jury administration and structure and into the courtroom and the deliberation room, introducing procedural reforms designed to improve juror comprehension, performance, and satisfaction with jury service. Jury research efforts have propelled many of these efforts forward, not only by examining their actual effects on judge, lawyer, and juror behavior but also by shedding light on other previously unexamined aspects of the jury process.

Abundantly clear is that, far from being an enclave from the pressures and concerns of contemporary society, jury service readily absorbs and reflects those concerns in ways that can both support and challenge the American justice system. Some of these concerns cut across many stages of jury service, and

Jury improvement efforts have moved into the courtroom and the deliberation room. Procedural reforms seek to improve juror comprehension, performance, and satisfaction.

their effects are felt in unexpected ways. To sift through and identify the most noteworthy jury improvement efforts and concerns, we turned to technology (coincidentally one of the hottest topics in jury service) and examined the topics that subscribers to *Jur-E Bulletin*, the National Center for State Courts' weekly e-newsletter, selected for additional reading most often.<sup>3</sup> In this article, we highlight three of the topics that consistently generate the most interest by readers: the use of technology in jury system management and by jurors, jury issues in notorious trials, and various ideas to improve the conditions and experience of jury service.

### The Use of Technology in Jury Service

Innovations in communications technology—cellular telephones, interactive voice recognition (IVR), and the Internet, to name a few—now affect all aspects of our lives. So it should come as no surprise that these have also been incorporated into the jury system. The effects of improved jury system technology are most apparent in the summoning and qualification stages of jury administration, with implications for both the representativeness of the jury pool and the costs associated with jury system administration. For example, improvements in the ability of jury automation to identify duplicate records now permits courts to expand the use of multiple source lists for compiling the master jury list, result-

ing in a list that is more inclusive of the adult population—and thus more equitable—and providing options to obtain more accurate addresses for prospective jurors.<sup>4</sup> The former improves the likelihood that the master jury list will reflect a fair cross-section of the population, and the latter increases the odds that people on that list will receive their jury summonses.

Other technologies have improved the ease with which prospective jurors respond to qualification questionnaires. In Travis County (Austin), Texas, for example, 85 percent of the citizens summoned to jury service complete their qualification questionnaire online. The Los Angeles County Superior Court has substantially reduced the amount of paperwork its jury managers process by requiring prospective jurors to respond to the qualification questionnaire using IVR technology, trimming postage and staff costs. An increasing number of courts use Internet and e-mail interface technologies to permit prospective jurors to defer jury service to a more convenient date, as an Internet call-in system to inform panels of jurors whether they should report for service, and even to conduct juror orientation online. The most notable change in the past few years has been the evolution in court Web sites from basic communication aimed only at summoned jurors to a broader mission of public education about the jury system.<sup>5</sup> Two excellent examples of state and local court jury applications can be seen in the jury



Web sites for the New York State Unified Court System and for Maricopa County (Phoenix), Arizona.

All of these technology enhancements permit courts to communicate with prospective jurors more efficiently and to be more flexible in accommodating jurors' needs, but they also pose some challenges. One is that as jury management systems become more technologically sophisticated, they introduce the possibility of computer software or system level errors that can undermine the integrity of the jury system by introducing nonrandom selection. In some cases, the errors result in noticeable (even bizarre) changes to the jury pool, but others exert only subtle cues that may go undetected for significant periods of time. One of the classic cases involved a U.S. district court in Connecticut in which the jury management system was inadvertently programmed to interpret the "d" in Hartford as a status designation meaning "deceased," resulting in the exclusion of most of the state's Hispanics, the vast majority of whom lived in Hartford, from the jury pool.<sup>6</sup>

Similar computer bugs have periodically plagued jury systems across the country. During an upgrade to the jury management system in Kent County

(Grand Rapids), Michigan, programmers mistakenly hardwired the random selection mechanism to select names only from the top portion of the master jury list, effectively disenfranchising those whose names appeared in the lower portion.<sup>7</sup> The mistake might have gone unnoticed except the master jury list was organized by zip code and the majority of the district's minority citizens lived in communities whose zip codes placed them near the bottom of the list. More recently, the Santa Barbara County (California) Superior Court experienced a challenge to its jury pool on the ground that Hispanics were underrepresented. Upon close examination, it was discovered that the system gave permanent exemptions to people who failed to respond to jury summonses, a disproportionate number of whom had Hispanic surnames.<sup>8</sup> This was a temporary measure that remained in effect for several years while a policy change was being considered.

The challenges posed by technological improvements are not limited to jury administration. Increasingly, trial judges report that jurors' familiarity with new technologies requires judges to respond to jurors' questions and concerns more directly or take the risk

that jurors will use those technologies in ways that affect their deliberations inappropriately. For example:

- When a deliberating jury in Tennessee was not given any help by the judge on a request for a definition, one of the jurors called his attorney using his cellular telephone. The attorney was not aware the client was a juror, let alone a deliberating juror, and read him the definition from *Black's Law Dictionary*.<sup>9</sup>

- In another trial, the jury learned (much to the dismay of the trial judge) that the defendant might have had a prior criminal record. Using the Internet, a juror was able to verify that this was true and the nature of the offense.<sup>10</sup>

- In Texas, an American airline was sued because the information board at the entrance to the Dallas-Fort Worth airport, which contained gate departure information, caused a driver to divert his attention, resulting in an accident. Jurors noticed many skid marks on the pavement while passing the accident scene and searched the Internet for information about the number of accidents on the airport roads. Based on data from one Web site, they calculated that the number of automobile accidents in the area of the information boards was significantly higher. This was not in the evidence presented to the jury, although possibly it should have been.<sup>11</sup>

### Juror Privacy in High-Profile Trials

Technology has not only affected the internal workings of the jury system and juries but also how the public views the institution of trial by jury, especially through contemporary media accounts of jury service in high-profile trials. Although only a handful of trials receive sustained national attention, they do tend to color public perceptions of jury service. For the judges, lawyers, litigants, and jurors participating in those cases, they also pose a tremendous challenge in balancing the rights of litigants to a fair trial, the rights of the press and the

public to open court proceedings, and the privacy rights of jurors and prospective jurors. The issue of juror privacy has received increasing attention over the past decade, largely in response to citizen expectations to be treated with respect and dignity while serving as jurors. In the vast majority of trials, these expectations can be accommodated with fairly modest restrictions on access to jurors' personal information and modifications to voir dire practices to permit private disclosure of potentially embarrassing or sensitive information. Objections to these restrictions and modifications in the context of routine trials are almost nonexistent; jurors' expectations are easily accommodated when the demand for jurors' personal information is fairly low.

High-profile trials are another beast altogether. The frequency of litigant and media challenges to court efforts to protect juror privacy seems to be increasing in numbers and in virulence over the past decade. And the conflict between juror privacy, litigant rights to a fair trial, and public and press rights to access court proceedings raise unique issues that differ qualitatively from those in routine trials. For example, does the prospect of undergoing intense media scrutiny undermine citizens' willingness to serve? Does intense media attention attract "stealth jurors"—that is, people seeking to be impaneled as jurors to further a philosophical or political objective, achieve some financial gain, or simply to satisfy personal vanity? Does intense media attention affect jury deliberations? What types of techniques and procedures most effectively protect juror privacy without violating the constitutional rights of litigants and the media?

At this point in time, answers to these questions are, at best, speculative because high-profile trials are, by definition, unusual events that do not offer researchers the opportunity to study their effects on jury service in any systematic way. Of the estimated 95,000 jury trials that take place each year in the United States, perhaps only a

dozen receive sustained national media attention, and fewer than 100 get more than a passing reference. For those few high-profile trials that do occur each year, the factors that contribute to each one's notoriety are likely to differ dramatically from case to case. To paraphrase *Anna Karenina*, routine trials are all alike; every notorious trial is notorious in its own way. As such, the reactions of prospective jurors to those trials are also likely to be unique and difficult to predict based on generalizations from other trials. But we can make some educated guesses based on existing research and some trial-and-error experiences in recent cases.

**Citizen willingness to serve.** The recent ABA survey of citizens' views of jury service, conducted by HarrisInteractive, found that 75 per-

unlikely that prospective jurors' decisions to report or not to report for service are affected by knowledge that a high-profile trial is about to begin. Instead, more mundane considerations such as financial hardship, temporary inconvenience, and expectations about what will happen to prospective jurors who fail to report for service play a more important role in this decision.

However, once a prospective juror knows that he or she has been assigned to a voir dire panel for a high-profile trial, the juror's reaction to that knowledge is likely to differ depending on the nature of the case and the juror's personality and personal circumstances. Some jurors may be unenthusiastic about serving in very lengthy trials due to the disruption the trial will have on their personal lives;

A sizeable minority of citizens—about 25 percent—are concerned about the prospect of receiving unwanted publicity in connection with jury service.

cent of jury eligible respondents were not concerned about the publicity they might receive by serving on a jury.<sup>12</sup> By inference, that leaves a sizeable minority—one in four—who indicated that they *are* concerned about the prospect of publicity. Should court policy makers be equally concerned about these people? The answer depends on which aspects of jury service are most likely to be affected by intense media coverage. It is important to recognize that jurors rarely know the trial for which they have been summoned. In larger, urban courts that routinely conduct multiple jury trials simultaneously, the panel of prospective jurors for any individual trial may not be selected until shortly before the jury selection actually begins. So it is highly

others may react negatively to gruesome evidence or emotionally charged factual situations; still others may be anxious about serving in trials involving gang violence or organized crime due to fears for their physical safety or that of their families; and trials involving celebrity litigants may, in fact, generate a great deal of curiosity and increased interest in serving. As a practical matter, jurors in any given trial are likely to have a mixture of reactions to serving, and high levels of media coverage are only one of many possible factors affecting those reactions.

**Stealth jurors and other issues.** John Grisham's popular novel *The Runaway Jury*, in which two people outmaneuver the jury selection process

to embed one of them on the jury in a high-stakes tobacco trial, offers an extreme example of a stealth juror. Fortunately, most contemporary jury management systems are sophisticated enough to prevent attempts at jury-rigging by outsiders. (Inside jobs are another matter, but courts that employ staff that can be bribed or coerced into subverting the judicial process have bigger problems than just the outcome in one trial.) Just as people concerned about publicity have no opportunity to opt out of a high-profile trial venire, people with a desire to serve cannot opt in. Random selection means that people who have a strong desire to serve will be selected for the venire in the same proportion that they exist in the population.

Perhaps more critical than eagerness to serve is juror willingness to be completely forthcoming and candid during voir dire questioning concerning both their ability to serve fairly and impartially and their motivation for serving or not serving. From existing studies of juror candor, we now know that jurors often fail to disclose relevant information during voir dire, even in the most routine trials.<sup>13</sup> Under the best of circumstances, the voir dire process can be an intimidating experience for some people. Answering personal questions in the presence of large numbers of onlookers, including press and television reporters, is just not the most conducive environment for encouraging expansive answers related to a prospective juror's suitability to serve fairly and impartially, particularly if the questions posed to jurors do not appear immediately relevant to issues likely to arise at trial.<sup>14</sup> Techniques such as individual voir dire or case-specific written questionnaires can alleviate some of the discomfort that prospective jurors experience, better preserving litigants' rights to a fair and impartial jury as well as protecting jurors' privacy interests. Questions by the judge and trial lawyers that probe each prospective juror's motivations for serving or not serving in a particular trial provide the appropriate means for identifying jurors who might wish to serve for inappropriate reasons.

**The impact of media coverage on jury deliberations.** Provided that reasonable steps are taken to protect jurors from external distractions—more about what is a “reasonable step” in a moment—intense media coverage of trials appears to have little effect on jury decision making once the jury has been impaneled. Virtually every serious study of juror behavior during deliberations has concluded that jurors take seriously their responsibility to consider the evidence and apply the jury instructions as they understand them. Although jurors sometimes discuss extraneous information during deliberations, these discussions are generally incidental and have little apparent effect on the jury's ultimate verdict.<sup>15</sup> It is important, however, to distinguish between jurors' concerns about intense media coverage and their concerns about public reaction to an unpopular verdict, which may be more likely to affect deliberations. In *Michigan v. Budzyn*,<sup>16</sup> for example, the Michigan Supreme Court overturned the verdicts of two white police officers convicted of beating a black victim to death after a juror testified that during deliberations he had become aware of police contingency plans to control rioting in the event of an acquittal. This situation is best avoided through use of reasonable steps to shield jurors from ex parte information during trial.

**Reasonable steps to protect juror privacy.** Much of the current debate about juror privacy in high-profile trials focuses on anonymous juries. This is unfortunate insofar as those discussions rarely take into account the wide variety of court practices, degrees of anonymity, or complexities of juror privacy interests. Some legitimate court objectives—such as preventing jury tampering or intimidation and insulating jurors from intense public and press scrutiny before and during the trial—can be achieved using juror anonymity. It is likely that this technique would have prevented public disclosure of Ruth Jordan's name in the recent Tyco trial, which resulted in a mistrial after she received several

threats from people angry that she might hold out for the defense.<sup>17</sup> The press appeared to be chastened by its role in this incident, and responsible members of the media may be more cautious in the future about disclosing the names of sitting jurors while a trial is still in session. But preemptive restrictions on access to jurors' names or identifying information are likely to be more effective than attempting to impose prior restraint orders on the media, which are legally unenforceable and amount to little more than pleas from the court to refrain from disrupting jurors' lives while the trial is under way.

However legitimate this technique, concerns about jury tampering and harassment dissipate shortly after the jury's verdict has been delivered in open court. Absent a genuine threat to jurors' safety, anonymity should only extend to the end of the trial. And the media should have open access to information disclosed during voir dire, subject to protections for sensitive or embarrassing information that prospective jurors might otherwise decline to reveal. For that information, trial judges should employ techniques, such as case-specific questionnaires or individual voir dire, that provide a more appropriate balance among the competing interests of litigants to a fair and impartial jury, of the media to public access to court proceedings, and of jurors to privacy.

### **Improving the Conditions and Experience of Jury Service**

Many changes in the jury are predicated on making it feasible for all people to be able to serve. This not only improves the representativeness of the jury but also distributes the educational experience and fulfillment of the obligation of service more fairly among the population. A major obstacle to achieving this objective was the degree of hardship experienced by prospective jurors. An increasingly popular method of surmounting this obstacle was to reduce the term of service, thus minimizing the amount of

hardship experienced by any one juror. Over 50 percent of all U.S. citizens live in jurisdictions that employ "one day or one trial" terms of service. Although the details of each system vary,<sup>18</sup> jurors are either selected for a trial or excused after serving one day. Most of these systems also permit jurors to reschedule their service to a more convenient date, if necessary.

This egalitarian approach to jury service has also spurred the near elimination of occupational exemptions from jury service in most jurisdictions, as courts increasingly reject the justification that some people are too important to serve as trial jurors. With reduced terms of service and the ready availability of deferral policies, few people can say with a straight face that they are so indispensable that they cannot be spared from their duties for even a day. The issue of individual bias can now be resolved during voir dire through removal for cause or with a peremptory challenge rather than broad exclusionary policies based on occupation.

**Juror compensation.** One problem area that has not been adequately met is the fee that jurors receive for service.<sup>19</sup>

Even states that pay the highest amounts—up to \$50 per day—barely exceed the minimum wage. According to a statewide survey conducted in 2004 in California, the single most influential factor associated with juror reports of financial hardship was whether the juror fee adequately reimbursed for all out-of-pocket expenses while on jury service.<sup>20</sup> Employer policies were also a key factor. The study confirmed that lower income employees were less likely to be paid while on jury service compared to higher income employees.<sup>21</sup> Moreover, lower income employees whose employers did provide compensation during jury service provided those benefits for fewer days and were more likely to require employees to surrender their juror fees.<sup>22</sup>

A new approach to juror pay is found in the Jury Patriotism Act, a model statute that has been adopted by eight states as of 2004.<sup>23</sup> In addition to setting tighter restrictions on excusing jurors and including the shorter term of service mentioned above, it establishes a lengthy trial fund based on a surcharge on all civil filings.<sup>24</sup> The funds that are collected are then available to

jurors who serve on long trials. Beginning in July 2004, Arizona legislation based on the Jury Patriotism Act makes provisions to compensate those jurors whose jury service extends longer than ten days the difference between their normal salary and the amount paid to them by their employer and the court while on jury service. The limit is up to \$100 a day after the third day of service and, after ten days, the fee increases to up to \$300 a day.<sup>25</sup>

**In-court innovations.** Innovations in the courtroom to help jurors understand the evidence and the instructions continue to be adopted and tested across the country. Most states permit jurors to take notes and to take their notes with them into deliberations, and judges increasingly inform jurors about this option along with cautionary instructions about using their notes appropriately in deliberations. (For example, they caution that notes are for each juror's personal use and should not be confused with trial evidence.) Only a small handful of states continue to restrict juror note taking.<sup>26</sup>

Likewise, permitting jurors to submit questions to witnesses (in writing



12 Angry Men  
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and subject to evidentiary rules), a practice that was once strongly discouraged or prohibited outright in most states, is becoming a more common practice.<sup>27</sup> Research examining how often jurors avail themselves of this opportunity, how often those questions survive evidentiary objections, what types of questions jurors most frequently raise, and how jurors react to unanswered questions has allayed many concerns about this practice.<sup>28</sup>

One of the most controversial jury reforms—permitting jurors in civil trials to discuss the evidence among themselves prior to deliberations<sup>29</sup>—was adopted in Arizona in 1996. Evaluations of this practice consistently found no evidence that juror discussions encourage premature judgments or result in more frequent verdicts for plaintiffs.<sup>30</sup> One of the studies, in which researchers were given permission to videotape juror discussions and deliberations in fifty civil trials, found that juror discussions contributed to improved juror comprehension of evidence in more complex cases.<sup>31</sup> Although no other state has followed Arizona's lead by implementing this innovation, it has provided unique research opportunities that have dramatically expanded our knowledge about jury decision making and deliberations. For



**G. Thomas Munsterman** is the director of the Center for Jury Studies at the National Center for State Courts. He is a member of the American Jury Project, a branch of the American Jury Initiative. His e-mail address is [tmunsterman@ncsc.dni.us](mailto:tmunsterman@ncsc.dni.us). **Paula L. Hannaford-Agor** is a staff attorney at the National Center for State Courts. She also serves as the principal court research consultant at the Center. She can be reached at [phannaford@ncsc.dni.us](mailto:phannaford@ncsc.dni.us).

example, studies of this innovation have disproved a great deal of conventional wisdom about the timing of juror opinion formation,<sup>32</sup> the extent and effects of juror consideration of “forbidden” topics (e.g., insurance and lawyers’ fees),<sup>33</sup> jurors’ comprehension of instructions,<sup>34</sup> and other aspects of jury decision making that were previously only a matter of speculation.

### Looking Forward

A recent national poll conducted on behalf of the ABA found that 60 percent of Americans have been summoned for jury service at some point in their lives, and 30 percent have actually served as trial jurors.<sup>35</sup> Their views on this uniquely American institution were refreshingly supportive. Three-quarters of the respondents said that they would prefer to be judged by a jury than by a judge, and 60 percent said they looked forward to jury service. Although 60 percent of the responses were positive, by implication 40 percent were not, which indicates that improvements are still needed. It also means that some courts, especially those where the 60 percent served, need to share their ideas with other jurisdictions where jurors had less positive views about their experiences.

We expect that the next article in this series will not have to wait another seven years before publication. The current ABA jury efforts will undoubtedly produce some very noteworthy items and hopefully will generate continued discussion and debate. The American Jury Project will submit revised jury standards<sup>36</sup> to the ABA House of Delegates in February 2005. The Commission on the American Jury is looking ahead to how trial by jury will operate well into the future and will produce materials to reach out to citizens, employers, judges, lawyers, and all who must be involved to help improve our jury system.

### Endnotes

1. G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the*

*Last 30 Years*, 36/4 JUDGES’ J. 5 (Fall 1997). We would also like to state that “reform” may be too strong a word insofar as it implies a wrong that needs to be corrected. Perhaps “improvement” or “innovation” is a better word.

2. Stephanie Orbais-Tibbs, *Robert Grey Becomes ABA President, Launches Jury Initiative*, ABA NEWS RELEASE (2004), at [http://www.abanet.org/media/releases/news081004\\_5.html](http://www.abanet.org/media/releases/news081004_5.html).

3. The *Jur-E Bulletin*, which is distributed to more than 1,000 subscribers weekly, consists of excerpts or short paragraphs about recent jury news items or jury issues. These often include a link to a Web site where readers can obtain more information or can access source documents. Based on the number of readers who click through to these materials, it is possible to determine which articles generate the most interest in that issue. To subscribe, go to <http://www.ncsconline.org/Juries/bulletin.htm>.

4. The availability of computerized access to National-Change-of-Address vendors also provides updated addresses.

5. For links to our favorite jury Web sites, see <http://www.ncsconline.org/Juries/links.htm>.

6. *United States v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992).

7. G. THOMAS MUNSTERMAN, JURY MANAGEMENT STUDY: KENT COUNTY, MICHIGAN (May 6, 2003) (technical assistance provided by the National Center for State Courts).

8. *Blair v. Superior Court*, 199 Cal. App. 4th 532 (Cal. App. 2d Dist. June 15, 2004).

9. G. THOMAS MUNSTERMAN & PAULA L. HANNAFORD-AGOR, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY 3 (2003).

10. *Id.*

11. *Id.* at 2.

12. HARRISINTERACTIVE, JURY SERVICE: IS FULFILLING YOUR CIVIL DUTY A TRIAL? (July 16, 2004), at [www.abanews.org/releases/juryreport.pdf](http://www.abanews.org/releases/juryreport.pdf).

13. See, e.g., Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 37 CT. REV. 10 (1999); Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 CRIM. JUST. 451 (1991).

14. See Mary R. Rose, *Expectations of Privacy? Jurors’ Views of Voir Dire Questions*, 85 JUDICATURE 10, 14–16 (2001).

15. See Shari S. Diamond & Neal Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

16. 566 N.W.2d 229 (Mich. 1997).

17. Barbara Ross & Corky Siemaszco, *Tyco Trial a \$12M Fiasco: Threatening Letter to Juror Spurs Mistrial—Post Scolded for Naming Her*, N.Y. DAILY NEWS (Apr. 3, 2004), at [www.nydailynews.com/news/crime\\_file/v-pfriendly/story/180143p-156543c.html](http://www.nydailynews.com/news/crime_file/v-pfriendly/story/180143p-156543c.html).

18. Prospective jurors may be on call for several days before being told to report to the courthouse, for example.

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on such matters” is good advice for any judge in any jurisdiction. So, too, is the statement that “the judge must also expressly and firmly prohibit any discussion of the jury’s deliberations,”<sup>10</sup> as any inquiry may suggest that the deliberations were not fair or not conducted well. Experienced judges are able to gauge the tone of the questions by jurors and give responses that reinforce confidence in the justice system.

Opinions from another state caution against encouraging donations of jury compensation to charitable causes. One Washington ethics advisory opinion found it improper for a court to provide jurors with an option on the jury service form that would allow the jurors to donate their compensation for jury service to specific community programs or charities.<sup>11</sup> That form was found to have violated the prohibition against using the prestige of the judicial office to support the activities of not-for-profit charitable causes. Conversely, it was appropriate for the form to allow donation of juror compensation to a

“jury foundation” that has the purpose of obtaining furniture and other goods for the comfort of jurors during their service.<sup>12</sup> This distinction arose from a specific section of Washington’s Canon 4C that allows judges to assist organizations devoted to the improvement of the law, the legal system, or the administration of justice in raising funds. The opinion did note, however, that the judge’s name should not appear on the form and the judge should not distribute the form personally.

In short, the same provisions of the Model Code of Judicial Conduct that govern other communications with the public also govern communications with jurors. Communications with jurors may raise special concerns where those communications may imply that the jurors did not act as the judge would have. Judges should also be cautious in not undermining the confidence of jurors by sharing information concerning excluded evidence, the defendant’s prior criminal history, or other information that would lead jurors to question

their ultimate verdict. Jurors hold judges in the highest esteem. It is essential under our ethical framework that judges show jurors that they are held in equally high esteem by the judges and the courts that they serve.

## Endnotes

1. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (1990).
2. *Id.*
3. *In re John R. Goshgarian*, Circuit Judge, 19th Circuit, Lake County (Illinois Courts Comm’n 63.98 CC-2, Nov. 18, 1999).
4. Decision and Order Re: Judge Van Voorhis (Cal. Comm’n on Judicial Performance, Feb. 22, 2003).
5. *Id.*
6. Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 01-01 (reissued Jan. 22, 2003).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Wash. Ethics Advisory Comm., Op. 95-18 (July 31, 1995).
12. Wash. Ethics Advisory Comm., Op. 99-08 (Sept. 21, 1999).

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19. This usually consists of a daily fee and a mileage allowance. Unemployed people are given expenses in Connecticut, Colorado, and Massachusetts. Minnesota provides an allowance for childcare.

20. PAULA L. HANNAFORD-AGOR, *INCREASING THE JURY POOL: IMPACT OF THE EMPLOYER TAX CREDIT 6* (Aug. 2004).

21. *Id.* at 5-6.

22. *Id.*

23. See Jury Patriotism Act, at [www.ALEC.org](http://www.ALEC.org). States that have adopted the Jury Patriotism Act in some form include Arizona, Colorado, Louisiana, Mississippi, Missouri, Oklahoma, Utah, and Vermont. The lengthy trial fund feature has been adopted in Arizona and Oklahoma, and is subject to a study requested from the legislature in Louisiana.

24. Indigent parties may be exempt from the fee. See Jury Patriotism Act § 6(e) (delineating attorneys and causes of action that are exempt from payment of the Lengthy Trial Fund fee).

25. ARIZ. REV. STAT. § 21-222 (2004).

26. See, e.g., *Nebraska v. Kipf*, 450 N.W.2d 397 (Neb. 1990) (requiring both parties to consent

before permitting jurors to take notes); *Wharton v. Mississippi*, 734 So. 2d 985 (Miss. 1999) (permitting jurors to take notes, but prohibiting them from taking notes into deliberations).

27. Permitting jurors to submit questions is one technique being examined in a national survey by the National Center for State Courts under its National Program to Increase Citizen Participation in the Jury Trials. See <http://www.ncsconline.org/Juries/projects.htm> for more information about this project.

28. See, e.g., Shari S. Diamond et al., *Jurors’ Unanswered Questions*, 41 CT. REV. 20 (Spring 2004); Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not to Ask, That Is the Question,”* 78 CHL.-KENT L. REV. 1099; PAULA L. HANNAFORD & G. THOMAS MUNSTERMAN, FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICES (Jan. 30, 2001).

29. Jurors are admonished that they may discuss the evidence among themselves, but only in the jury room and only when all other jurors are present. They are also cautioned not to make premature judgments about the merits of the

case until after all the evidence has been presented in court and they have heard the final instructions on the applicable law. See ARIZ. R. CIV. PROC. Rule 39(f).

30. Shari S. Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 48-59, 62-67 (2003); Paula L. Hannaford et al., *Permitting Jury Discussion During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359, 369-75 (2000).

31. Diamond et al., *supra* note 30, at 40-47.

32. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000).

33. Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

34. Diamond et al., *supra* note 30.

35. HarrisInteractive, *supra* note 12.

36. The American Jury Project is currently reviewing and integrating the various jury standards promulgated by the Section of Litigation, the Section of Criminal Justice, and the Judicial Division.



on such matters” is good advice for any judge in any jurisdiction. So, too, is the statement that “the judge must also expressly and firmly prohibit any discussion of the jury’s deliberations,”<sup>10</sup> as any inquiry may suggest that the deliberations were not fair or not conducted well. Experienced judges are able to gauge the tone of the questions by jurors and give responses that reinforce confidence in the justice system.

Opinions from another state caution against encouraging donations of jury compensation to charitable causes. One Washington ethics advisory opinion found it improper for a court to provide jurors with an option on the jury service form that would allow the jurors to donate their compensation for jury service to specific community programs or charities.<sup>11</sup> That form was found to have violated the prohibition against using the prestige of the judicial office to support the activities of not-for-profit charitable causes. Conversely, it was appropriate for the form to allow donation of juror compensation to a

“jury foundation” that has the purpose of obtaining furniture and other goods for the comfort of jurors during their service.<sup>12</sup> This distinction arose from a specific section of Washington’s Canon 4C that allows judges to assist organizations devoted to the improvement of the law, the legal system, or the administration of justice in raising funds. The opinion did note, however, that the judge’s name should not appear on the form and the judge should not distribute the form personally.

In short, the same provisions of the Model Code of Judicial Conduct that govern other communications with the public also govern communications with jurors. Communications with jurors may raise special concerns where those communications may imply that the jurors did not act as the judge would have. Judges should also be cautious in not undermining the confidence of jurors by sharing information concerning excluded evidence, the defendant’s prior criminal history, or other information that would lead jurors to question

their ultimate verdict. Jurors hold judges in the highest esteem. It is essential under our ethical framework that judges show jurors that they are held in equally high esteem by the judges and the courts that they serve.

## Endnotes

1. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (1990).
2. *Id.*
3. *In re John R. Goshgarian*, Circuit Judge, 19th Circuit, Lake County (Illinois Courts Comm’n 63.98 CC-2, Nov. 18, 1999).
4. Decision and Order Re: Judge Van Voorhis (Cal. Comm’n on Judicial Performance, Feb. 22, 2003).
5. *Id.*
6. Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 01-01 (reissued Jan. 22, 2003).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Wash. Ethics Advisory Comm., Op. 95-18 (July 31, 1995).
12. Wash. Ethics Advisory Comm., Op. 99-08 (Sept. 21, 1999).

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## Continued Evolution of Jury Reform

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19. This usually consists of a daily fee and a mileage allowance. Unemployed people are given expenses in Connecticut, Colorado, and Massachusetts. Minnesota provides an allowance for childcare.

20. PAULA L. HANNAFORD-AGOR, *INCREASING THE JURY POOL: IMPACT OF THE EMPLOYER TAX CREDIT 6* (Aug. 2004).

21. *Id.* at 5-6.

22. *Id.*

23. See Jury Patriotism Act, at [www.ALEC.org](http://www.ALEC.org). States that have adopted the Jury Patriotism Act in some form include Arizona, Colorado, Louisiana, Mississippi, Missouri, Oklahoma, Utah, and Vermont. The lengthy trial fund feature has been adopted in Arizona and Oklahoma, and is subject to a study requested from the legislature in Louisiana.

24. Indigent parties may be exempt from the fee. See Jury Patriotism Act § 6(e) (delineating attorneys and causes of action that are exempt from payment of the Lengthy Trial Fund fee).

25. ARIZ. REV. STAT. § 21-222 (2004).

26. See, e.g., *Nebraska v. Kipf*, 450 N.W.2d 397 (Neb. 1990) (requiring both parties to consent

before permitting jurors to take notes); *Wharton v. Mississippi*, 734 So. 2d 985 (Miss. 1999) (permitting jurors to take notes, but prohibiting them from taking notes into deliberations).

27. Permitting jurors to submit questions is one technique being examined in a national survey by the National Center for State Courts under its National Program to Increase Citizen Participation in the Jury Trials. See <http://www.ncsconline.org/Juries/projects.htm> for more information about this project.

28. See, e.g., Shari S. Diamond et al., *Jurors’ Unanswered Questions*, 41 CT. REV. 20 (Spring 2004); Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not to Ask, That Is the Question,”* 78 CHL.-KENT L. REV. 1099; PAULA L. HANNAFORD & G. THOMAS MUNSTERMAN, FINAL REPORT OF THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICES (Jan. 30, 2001).

29. Jurors are admonished that they may discuss the evidence among themselves, but only in the jury room and only when all other jurors are present. They are also cautioned not to make premature judgments about the merits of the

case until after all the evidence has been presented in court and they have heard the final instructions on the applicable law. See ARIZ. R. CIV. PROC. Rule 39(f).

30. Shari S. Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 48-59, 62-67 (2003); Paula L. Hannaford et al., *Permitting Jury Discussion During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359, 369-75 (2000).

31. Diamond et al., *supra* note 30, at 40-47.

32. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000).

33. Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

34. Diamond et al., *supra* note 30.

35. HarrisInteractive, *supra* note 12.

36. The American Jury Project is currently reviewing and integrating the various jury standards promulgated by the Section of Litigation, the Section of Criminal Justice, and the Judicial Division.