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The Journal of Court Innovation

The *Journal of Court Innovation* is published by the Center for Court Innovation, the New York State Judicial Institute, and Pace Law School to promote and highlight innovative programs and strategies in court systems around the United States.

The *Journal* invites submissions of articles about innovative programs and strategies in court systems. Topics of interest include, but are not limited to: jury issues, case management, judicial selection and evaluation, court structure, judicial training, technology, problem-solving courts, and efforts to create stronger links between courts and communities. Submissions, which can be anywhere from eight to 35 pages, will be reviewed by the executive and managing editors as well as outside reviewers.

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Special Issue on Juries

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A WORD FROM THE EXECUTIVE EDITORS

Welcome to Volume I, Number 2 of the *Journal of Court Innovation*. This is our first special issue. Our topic is one of critical importance to courts: juries. We dedicate this issue to New York State Chief Judge Judith S. Kaye, a national leader in the effort to improve the jury process. We also recognize the American Bar Association's leadership in strengthening the jury system by timing our publication date to coincide with the ABA's 2008 National Symposium on the American Jury System in New York.

Chief Judge Kaye's article, "*Why Juries? Looking Back, Looking Ahead*," provides an introduction to our Jury Issue. Tom Munsterman explains, in an interview, how jury improvements have made juries more representative and given jurors new tools to help them make informed decisions. Gregory Mize and Paula Hannaford-Agor of the National Center for State Courts provide an overview of the *State-of-the-States-Survey*, the first-ever effort to review the status of the jury across the nation—from jury composition, to conduct of voir dire, to modern trial practices for jurors such as note-taking and juror questions during trial. Peter Tiersma and Mathew Curtis tackle the thorny question of whether revised jury instructions actually improve jurors' comprehension of legal rules. Moving from jury instructions into the jury room, Ryan Ferch presents a novel argument for an improvement aimed at jurors' comprehension—permitting demonstrative evidence to be sent to the jury room during deliberations.

As part of our ongoing commitment to incorporating theory and practice, we include three practice pieces. Ellen Brickman and her colleagues address the potentially prejudicial impact of Internet use by jurors during voir dire and trial. New Mexico Chief Justice Edward L. Chavez describes New Mexico's unique experience providing interpreters for non-English speaking jurors. New York City Criminal Court Judge Anthony J. Ferrara describes his experiences allowing jurors to submit written questions for witnesses. In addition, Gary R. Giewat offers his review of the book *Scientific Jury Selection*.

Also included in this issue is a piece that is not related to juries: a roundtable discussion on improving court responses to domestic violence.

As always, we welcome your feedback.

Greg Berman Robert G.M. Keating Michelle S. Simon

Why Juries? Looking Back, Looking Ahead

*Judith S. Kaye**

With my term as New York State's Chief Judge nearing an end, I am filled both with a passion for further reform and with the pleasure of reflection on the past 15 years in this truly extraordinary position. Whether looking forward, or back, jury innovation tops the list. Here are just three of my reasons.

"PR" in the Furtherance of Justice

Most heartening, invigorating, inspiring of all is the response of the public to efforts to make the jury experience less burdensome and more meaningful for them. It's 10:30 a.m., I've just had effusive compliments from two nonlawyers who completed their first jury service (having for years successfully avoided it like the plague), and I'm flying. Three lawyer-friends (one big firm litigation partner, one global media company general counsel, one appellate judge) told me that it was the experience of their life—a positive one. What a relief!

In the courts we constantly search for ways to promote public understanding of our work and our role. The judicial branch needs the confidence and respect of an informed public, and we know that we cannot rely on the press, or the schools, to secure it. We also have to take a lead role in this endeavor. Across the state and nation, courts sponsor innumerable civic

* Judith S. Kaye is Chief Judge of the State of New York.

education programs, but the job is a difficult one and our success is spotty.

Jury service is an opportunity like no other to educate the public about the justice system. This will, for many people, be their only real-life encounter with the courts. Why not show them the courts at their best, with clean, dignified facilities, trained and attentive personnel, and efficient, effective procedures. Given the huge numbers of people called for jury service—650,000 every year just in New York State—obviously there is enormous potential here.

Public relations is, of course, only one side of my topmost reason for singling out jury innovation in my current ruminations. The corollary is that when the public is well served by a quality jury system, so are the litigants. And that is, after all, our prime objective.

Generating Energy Within

Having recently hosted a two-day statewide seminar in Albany for our jury commissioners, I'd also put way high on my list the effect *within* the court system of a statewide jury innovation program. Jury innovation engages judges and court staff at every level.

The Albany seminar featured our newest publication—"Best Practices for Jury System Operations"—which summarizes what we have learned works best, from qualifying and summoning to processing payroll. This practical operational tool is now on every commissioner's desk for routine use as a resource, and is also available on line. It was developed by our central Jury Support Office, which deserves much of the credit for our successes. For the past 15 years we have had a terrific group of innovators at the core of our statewide jury initiative—judges and others—each year developing a menu of brand new ideas—usually at least 12.

The most exciting part of the seminar for me as Chief Judge was spending time with nearly all of our 62 commissioners of jurors—some from rural upstate counties, some from bustling cities—as they exchanged views and learned new ideas they might take back home. I was reminded once again that the

enthusiastic personal commitment of judges and staff in the end is what *will* make the entire system work better.

So, whether viewed from within the court system or from the perspective of the public, jury innovation is ideal both for continuing dynamic action and for quiet reflection on what has already been achieved.

Nationwide Energy

Beyond New York State, I remain impressed and inspired by the nationwide movement for jury reform. No other subject has so easily crossed state and professional boundaries. I love the books and articles, whether by law-trained jury gurus, behavioral scientists, statisticians or jurors themselves. I read them all. There's always something new and wonderful afoot, something to try.

For me additionally there is this striking coincidence. When I became Chief Judge back in March 1993, my first subject of interest was the jury. Having been a trial lawyer for 21 years before ascending the bench, I thought we had nowhere to go but up. "The Jury Project," chaired by now-United States District Judge Colleen McMahon, was the first of many commissions I appointed, and within months it handed me its report—120 power-packed pages, with 10 appendices. I believe this was the first statewide, comprehensive blueprint for jury reform in the nation, the first of many. It remains a reference point for us here in New York.

That report was organized and structured around the then-current American Bar Association Standards Relating to Juror Use and Management, the product of years of painstaking effort by national panels of judges and lawyers, jury experts, scholars and research institutions. What a resource! The ABA Standards became the pivot of our efforts in New York, working within our own ranks (for example, on new court rules) and working with our partners in government on new legislation.

Still I remember our boundless joy when the mountain began to move: all automatic jury exemptions abolished, mandatory sequestration of all deliberating criminal juries abolished, two week terms of service reduced to one day/one trial

and on and on. At last, our jury system entered the twentieth century!

What a wonderful coincidence it is that, at the brink of the twenty-first century, once again we are led in this exciting national initiative by the American Bar Association's Principles for Juries and Jury Trials, another monumental effort by the very best in the field. Once again this is a visionary yet highly practical, well-researched document that will continue to fuel a whole new generation of jury innovation. Again we gather around the ABA's "gold standard" to learn from and inspire one another, comparing notes through periodic meetings with lawyers, judges and others.

Those meetings, and the literature, assure me that I am not alone in my prospective/retrospective enthusiasm for jury innovation. From every vantage point, this is a truly important subject. The day will never come when there is not a great deal more that the courts can, and must, do to improve the operation of the prized American jury system. (I swallow hard when I think that all five of my praise-filled friends were actually selected to sit on juries—not the common experience in New York State, where those called still are overwhelmingly excused without having been seated on a case. We need to change that picture.) The impact of modern technology on jurors, jury operations and trial procedures alone presents a brave new frontier. Every advance opens a world of new possibilities.

As we look back on more than a decade of jury innovation, we know that it is merely the preface for what lies just ahead.

Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other

*By Gregory E. Mize and Paula Hannaford-Agor**

Between 2004 and 2006 the National Center for State Courts conducted three related studies of jury practices in state and federal courts throughout the United States. Combined, the studies make up the *State-of-the-States Survey of Jury Improvement Efforts*, a first-ever effort to survey the entire field of jury issues and practices from state and local jury reform and improvement efforts to in-court use of tools aimed at improving juror comprehension and participation—including note-taking, juror questions and providing jurors with written instructions. The resulting data sets are available in full online, allowing users to review their own states' practices in comparison both to those of other states and of nationwide trends. This article, authored by the principal investigators on this path-breaking study, summarizes the major findings of the *State-of-the-States Survey* and highlights ways in which its data can be mined to assist state and local efforts at jury improvement.

Introduction

Over the past two decades, the American jury system has become the focus of unprecedented interest by the legal com-

* Gregory Mize was appointed to the Superior Court of the District of Columbia in 1990 by President George H.W. Bush. After taking senior status in 2002, he has served as a judicial fellow at the National Center for State Courts. Paula Hannaford-Agor is a principal court research consultant at the National Center for State Courts and director of the National Center's Center for Jury Studies. Judge Mize and Ms. Hannaford-Agor are the principle investigators for the *State-of-the-States Survey* highlighted in this article.

munity and by the broader American public. Some of the interest responds to criticisms about the continued utility of the jury system. The rate of civil and criminal jury trials has steadily declined in recent years, eclipsed by non-trial dispositions such as settlement, plea agreements, and summary judgment.[1] Meanwhile, proponents of the jury system have maintained that trial by jury continues to play a critical role in the American justice system by protecting the rights of criminal defendants, resolving intractable civil disputes, and promoting public trust and confidence in courts.

Beginning in the early 1990s, these debates prompted renewed efforts by judges, lawyers, and scholars to examine jury performance and to consider the potential effects of various proposals for reform. A popular approach adopted by many judiciaries was to create commissions or task forces to examine reform proposals and to make recommendations. National efforts also took place during this time, including the 1992 Brookings Institution symposium on the civil jury and the 2001 National Jury Summit in New York City.[2]

More recently, leadership from courts and lawyer organizations has placed jury trial improvements high up on court systems' action plans. For example, the chief judge of New York, Judith S. Kaye, began a statewide initiative to experiment with innovative jury trial practices. Judges volunteered to try these practices, which ranged from permitting jurors to submit questions to witnesses and using mini-opening statements to the use of preliminary jury instructions and summary jury trials. The positive results from these cases were disseminated to the New York judiciary in *Jury Trial Innovations In New York State: A Practical Guide for Trial Judges*.[3]

Similarly, Robert J. Grey, Jr. made the American jury the focus of his tenure as the 2004-2005 president of the American

1. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

2. VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993); Robert G. Boatright & Elissa Krauss, *Jury Summit 2001: A Report on the First National Meeting of the Ever-Growing Community Concerned with Improving the Jury System,* 86 JUDICATURE 144 (2002).

3. JURY TRIAL PROJECT, OFFICE OF COURT RESEARCH, JURY TRIAL INNOVATIONS IN NEW YORK STATE (2006), *available at* http://www.nyjuryinnovations.org/materials/JTI%20booklet05.pdf.

Bar Association. Under his leadership, the American Bar Association undertook a yearlong effort to update, consolidate, and harmonize the various sets of jury trial standards developed by the association's Criminal Justice Section, the Section on Litigation, and the Judicial Division. The ultimate product, the ABA *Principles for Juries and Jury Trials,* is a set of "gold standards" for managing and conducting jury trials.[4] They rely on a large body of empirical research about juror behavior and provide a philosophical framework for trial innovations. The principles call upon courts and trial lawyers to take specific steps to improve jury trials during the next decade. These efforts are beginning to affect court policies as evidenced by revised court rules and case law and the development of judicial and legal education curricula.

While statewide policy changes are fairly easy to track, most inside-the-courtroom innovative practices are the product of trial court discretion. Until recently, we had little idea how often judges chose to exercise that discretion. Now, the National Center for State Court's *State-of-the-States Survey of Jury Improvement Efforts* carefully documents local practices and jury operations in the context of their respective state infrastructures.[5] These rich data enable court policymakers to assess their own systems vis-à-vis their peers and nationally recognized standards for effective practices.

The *State-of-the-States Survey* was designed to produce an encyclopedic display of data about jury trial practices across America. The entire dataset is accessible at http://www.ncscjurystudies.org. The information was collated uniformly with respect to every state and the District of Columbia in order to enable comparative analyses between one or more states or regions or the nation. In addition, interested persons can undertake cross comparisons that involve a single operational procedure such as jury summoning or a multitude of procedures or innovations.

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4. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

5. GREGORY E. MIZE, PAULA HANNAFORD-AGOR, & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendium Final.pdf.

Website visitors can readily compare their own court system's practices with neighboring jurisdictions or with national averages. Users can then choose a state and a particular trial practice and compare the frequency of its usage in that state with usage in another state or the nation. In addition, a statistical formula is provided to estimate how a particular trial practice might increase or decrease the time duration of jury selection or final deliberations. In short, as soon as anyone identifies a particular interest in a jury trial procedure or innovation, he or she can consult the *State-of-the-States Survey* data to gain a perspective on the frequency of its usage and possible implications for other court practices. We urge readers to engage in their own exploration of the data. In doing so, you will be joining in a growing effort across the country to understand jury trials practices from an empirical perspective.

In Part I of this article, we highlight the major findings in the *State-of-the-States Survey*. In Part II, we describe several practical outcomes resulting from the growing attention given to the survey by bench and bar leaders. We close, in Part III, with suggestions for future innovative undertakings by judges, trial practitioners and empirical researchers.

I. The *State-of-the-States Survey of Jury Improvement Efforts*: A Gold Mine for Prospectors

The *State-of-the-States Survey* is the result of a multiyear effort to gauge jury improvement efforts in the nation's state courts.[6] It included three separate but related surveys:[7] a Statewide Survey completed by court administrators or managers in all 50 states and the District of Columbia; a Local Court Survey, distributed to each state's general jurisdiction trial courts, and completed by representatives of 1,546 individual counties from 49 states and the District of Columbia and encompassing 70% of the total U.S. population; and a Judge and Attorney Survey, resulting in 11,752 completed surveys describing practices employed in state and federal jury trials in all 50 states, the District

6. The survey instruments were distributed and returned during the period 2004 to 2006.

7. MIZE ET. AL., *supra* note 5.

of Columbia, and Puerto Rico. Table 1 describes the Judge and Attorney Survey dataset.[8]

Table 1: Judge and Attorney Survey		
	N	**%**
Respondent Type		
State Trial Judge	4,081	35
Federal Trial Judge	255	2
Attorney	7,209	61
Other/Unknown	207	2
Jurisdiction		
State Court	10,395	92
Federal Court	884	8
Cases		
Criminal*	**5,622**	**48**
Capital Felony	343	6
Felony	3,868	69
Misdemeanor	1,341	24
Civil	**5,819**	**50**
Other	**311**	**3**
Attorneys		
Criminal Prosecution	917	16
Criminal Defense	1,345	23
Civil Plaintiff	1,909	32
Civil Defense	1,714	29
TOTAL	11,752	100
* Includes 70 trials designated as "criminal" only		

A. The Volume and Frequency of Jury Trials and Jury Service

The *State-of-the-States Survey* allows us to estimate the number of jury trials that take place in state courts annually by extrapolating from the proportion of state population reflected in the Local Court Surveys. We now have a solid empirical basis upon which to estimate that state courts conduct 148,558

8. The National Center for State Courts reports that there were 11,349 judicial officers assigned to general jurisdiction courts in 2004. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 17 (Richard Y. Schauffler et al. eds., 2006). It is possible that some of the respondents were limited jurisdiction court judges, especially in trials for misdemeanor and specialized jury-demandable cases broadly categorized as "other" in the survey instrument. But most states restrict trial by jury to courts of general jurisdiction. *See* BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, 265-319 (2006).

jury trials each year. By comparison, federal courts conducted 5,463 jury trials in 2006.[9] California has the largest volume of jury trials — approximately 16,000 per year. Vermont and Wyoming each had the lowest (126 trials annually).

Table 2: National Jury Trial Rates and Characteristics	
# of Counties Represented	**1,546**
% of US Population Represented	70.3
Trial Rate per 100,000 population	**58.6**
Estimated number of jury trials annually	**148,558**
% Felony	46.7
% Misdemeanor	18.7
% Civil	30.6
% Other	4.0
Estimated number of summonses mailed	**31,857,797**
% Adult population represented (age 18+)	14.8
Estimated number of jurors impaneled	**1,526,520**
% Adult population represented (age 18+)	0.8

In order to conduct jury trials, citizens must be summoned to serve as jurors. State courts mail an estimated 31.8 million jury summonses annually to approximately 15% of the adult American population. This percentage varies from state to state, depending on the number of jury trials in each state and local juror utilization practices. In addition, the percentage is affected by the number of jurors to be selected for each trial, which can range from six to 12 jurors, plus alternates.[10] The number of peremptory challenges available to each party also affects the number of people to be sent to a courtroom for jury selection. In non-capital felony trials that number ranges from three per side in Hawaii and New Hampshire to 20 per side in New Jersey.[11] Despite the large quantity of summonses sent each year, only 1.5 million Americans are seated on juries each year, less than 1% of the adult American population.

Although the probability of being impaneled in any given year is quite small, the likelihood of being summoned to serve has been increasing steadily. More than one-third of all Americans (37.6%) are now likely to be impaneled as a trial juror

9. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006, tbl. C-7 (2006).

10. BUREAU OF JUSTICE STATISTICS, *supra* note 8, at tbl. 42 (2006).

11. *Id.* at tbl. 41.

sometime during their lifetime.[12] This represents a tremendous increase in the distribution of the responsibility for jury service over the past three decades. As recently as 1977, a national public opinion survey found that just 6% of adult Americans had served as trial jurors.[13] By 1999, this figure had increased to 24%.[14] In 2004, the American Bar Association reported that 29% of the adult American population had served as trial jurors.[15] Thus, in spite of declining numbers of jury trials,[16] a larger and larger proportion of American citizens have first-hand experience with jury service, due to more inclusive master jury lists, shorter terms of service, and other policies designed to make jury service more convenient and accessible for all citizens.

B. State/Local Infrastructure Differences

1. TERM OF SERVICE

The degree to which local jury operations are directed by state law varies tremendously by jurisdiction. For example, 27 states gave discretion to local courts to establish maximum terms of service.[17] Of the 24 state-mandated jurisdictions, nine states and the District of Columbia set the maximum term of service at one day or one trial (see Table 3). The remaining 14 states permit longer terms of service, but some limit the maximum number of days that a person must serve in any given period of time. For example, Georgia law specifies that citizens cannot be required to serve more than two consecutive weeks in any given term of court or more than four weeks in any 12-month period.[18]

The actual breakdown for term of service for all of the courts represented in the Local Court Survey dataset is described in Table 4. We find that more than one-third of local courts, and nearly two-thirds of the U.S. population, live in ju-

12. *See* MIZE ET AL., *supra* note 5, app. D (detailed information about the methods used to calculate the constituent elements of this percentage).

13. NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 15 (1999).

14. *Id.*

15. HARRIS INTERACTIVE, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? (2004), http://www.abanet.org/media/releases/juryreport.pdf.

16. Galanter, *supra* note 1.

17. These states encompass nearly half (49.3%) of the total U.S. population.

18. GA. CODE ANN. § 15-12-3 (2007).

Table 3: State-Established Maximum Terms of Service		
Term of Service	**States**	**% of US Population**
One Day or One Trial	AZ, CA, CO, CT, DC, FL, HI, IN, MA, OK	29
Two to five days (one week)	NY, SC	8
Six days to 1 month	GA, KY, ME, NH, ND, OH, RI	10
Greater than 1 month to 6 months	NM	1
Longer than 6 months	MT, UT, VT, WV	2
Total Population Included		49

risdictions that have a one-day or one trial term of service.[19] Clearly, courts in more populous jurisdictions are more likely to adopt one day or one trial terms of service than those in less populous jurisdictions.

Table 4: Term of Service in Local Courts				
Term of Service	**# of Courts**	**% of Courts**	**Average # Jury Trials Annually**	**Estimated % of US Population**
One Day or One Trial	490	35	129	63
Two to five days (one week)	213	15	85	18
Six days to 1 month	327	23	46	12
Greater than 1 month to 6 months	283	20	21	6
Longer than 6 months	82	6	15	0

2. JUROR COMPENSATION

All 50 states and the District of Columbia compensate jurors as reimbursement for out-of-pocket expenses as well as token monetary recognition of the value of their service (see Table 5).

States have begun to recognize the relationship between the amount of juror compensation, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool.[20] As a result, a number of states have increased juror compensation, but in doing so, have changed

19. *See* MIZE ET AL., *supra* note 5. Estimates for the proportion of U.S. population were calculated using the methods described in Appendix E.

20. Paula Hannaford-Agor, *Jury News: The Laborer is Worthy of His Hire and Jurors Are Worthy of Their Jury Fees,* 21 CT. MANAGER 38 (2006).

the structure of the payment system from a flat daily rate to a graduated rate in which jurors receive a reduced compensation, or no compensation, for the first day(s) of service and increased compensation if impaneled as a trial juror or required to report for additional days. Over half of the courts responding to the Local Court Survey reported that they pay mileage reimbursement with rates varying from $.02 to $.49 per mile. Arizona has implemented a Lengthy Trial Fund, funded with litigant filing fees, to compensate jurors for lost income up to $300 per day.[21]

3. JURY SOURCE LISTS

Another area of jury operations in which states sometimes delegate authority to local courts is the source list(s) used to compile the master jury list. The choice of source lists is an important policy decision for state courts because it establishes the inclusiveness and initial demographic characteristics of the potential jury pool.[22] Thirty states mandate that courts within the jurisdiction use only the designated source lists, while 15 states and the District of Columbia permit local courts to supplement the required lists with additional lists. The remaining five states do not mandate the use of any specific source list, but enumerate the permissible lists that can be employed for this purpose. The most commonly mandated source lists are the lists of registered voters and licensed drivers, mandated by 13 states. In states that leave the choice of source lists to the discretion of the local courts, many (but not all) local courts choose to supplement the master jury list with the permissible source lists. Only 11 states (representing 14% of the U.S. population) mandate the use of three or more source lists to compile the master jury list, yet 283 local courts reported doing so in the Local Courts Survey of the *State-of-the-States Survey* (see Table

21. G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, 45 JUDGES' J. 18 (Winter 2006).

22. A substantial body of federal and state constitutional and statutory law requires that the pool from which prospective jurors are summoned reflect "a fair cross section of the community," specifically, its racial, ethnic, and gender demographic characteristics. *See* Duren v. Missouri, 439 U.S. 357 (1979). Because a broadly inclusive list of the jury-eligible population is more likely to mirror the demographic characteristics of the community, the National Center for State Courts recommends that the master jury list include at least 85 percent of the total community population. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4-5 (1996).

Table 5: State-Mandated Juror Compensation Structure

State	Initial Rate or Flat Daily Rate	Graduated Rate	Trigger for Graduated Rate
Alabama	$10.00	n/a	
Alaska	$ 5.00	$25.00	Beginning 2nd Day
Arizona*	$ .00	$12.00	Beginning 2nd Day
Arkansas	$15.00	$35.00	Sworn Juror
California	$ .00	$15.00	Beginning 2nd Day
Colorado	$ .00	$50.00	Beginning 4th Day
Connecticut	$ .00	$50.00	Beginning 6th Day
District of Columbia	$30.00	n/a	
Delaware	$20.00	n/a	
Florida	$ .00	$30.00	Beginning 4th Day
Hawaii	$30.00	n/a	
Idaho	$10.00	n/a	
Iowa	$10.00	n/a	
Kentucky	$12.50	n/a	
Louisiana	$25.00	n/a	
Maine	$10.00	n/a	
Massachusetts	$ .00	$50.00	Beginning 4th Day
Michigan	$25.00	$40.00	Beginning 2nd Day
Minnesota	$20.00	n/a	
Montana	$12.00	$25.00	Sworn Juror
Nebraska	$35.00	n/a	
Nevada	$ .00	$40.00	Sworn Juror
New Hampshire	$20.00	n/a	
New Jersey	$ 5.00	$40.00	Beginning 4th Day
New Mexico	$41.20	n/a	
New York	$40.00	n/a	
North Carolina	$12.00	$30.00	Beginning 6th Day
North Dakota	$25.00	$50.00	Beginning 2nd Day
Oklahoma	$20.00	n/a	
Oregon	$10.00	$25.00	Beginning 3rd Day
Pennsylvania	$ 9.00	$25.00	Beginning 4th Day
Rhode Island	$15.00	n/a	
South Dakota	$10.00	$50.00	Sworn Juror
Tennessee	$11.00	n/a	
Texas	$ 6.00	$40.00	Beginning 2nd Day
Utah	$18.50	$49.00	Beginning 2nd Day
Vermont	$30.00	n/a	
Virginia	$30.00	n/a	
West Virginia	$40.00	n/a	

* Arizona's Lengthy Trial Fund compensates jurors up to $300 per day for lost income while on jury service. The LTF is available retroactively to the 4th day of service beginning on the 6th day of trial.

6). By extrapolating these courts to the entire country, we estimate that more than one-third of the U.S. population lives in jurisdictions that use three or more source lists to compile the master jury list.

Table 6: Source Lists Mandated by State Law and Actually Used by Local Courts

Source Lists	# of States	% of US Population	# of Local Courts	% of US Population
Registered Voters Only	2	1	160	5
Licensed Drivers Only	4	6	82	7
Voter and Driver Only	13	19	706	51
3+ Lists Required	11	14	283	37

4. STATUTORY EXEMPTIONS

The trend in recent years has been to eliminate occupational and status exemptions altogether under the theory that no one is too important or too indispensable to be summarily exempted from jury service, particularly in jurisdictions with relatively short terms of service. Instead, local courts are gaining discretion to accommodate or excuse jurors on an individual basis. The Statewide Survey identified 10 distinct categories of exemptions, including previous jury service, the most commonly allowed exemption (see Table 7). The median number of exemption categories was three per state. Louisiana was the only state with no statutory exemptions; Florida, which offers nine exemption categories, had the most of any state.

5. ONE-STEP VERSUS TWO-STEP JURY QUALIFICATION AND SUMMONING

A final area of state versus local control over jury operations involves the process through which local courts qualify and summon citizens for jury service. Eighteen states and the District of Columbia specify that local courts employ a one-step process in which jurors are summoned and qualified simultaneously, while five states mandate that local courts employ a two-step process in which citizens are first surveyed to determine their eligibility for jury service, and then only qualified jurors are summoned for service. The remaining 25 states leave this decision to the discretion of the local courts.[23]

23. Data on this variable is missing for two states.

Table 7: Statutory Exemption Categories	
Categories	**# States**
Previous Jury Service	47
Age	27
Political Officeholder	16
Law Enforcement	12
Other Exemptions	12
Judicial Officers	9
Healthcare Professionals	7
Sole Caregiver	7
Licensed Attorneys	6
Active Military	5

States vary a great deal in how closely jury operations are dictated at the state level or left to the discretion of local courts. Interestingly, the degree of state control over local jury operations has no statistically significant relationship to the number of jury improvement efforts underway in those states. Nor does it appear to be related to the volume of jury trials or the trial rate for each state. This suggests that jury reform has not followed either an exclusively top-down or exclusively grassroots approach, or even one dictated by exigencies associated with the volume or frequency of jury trials. Rather, the various approaches derive from unique institutional and political cultures in each jurisdiction. Given that reality, we now take a closer look at variations in local court operations.

C. Local Court Initiatives

The *State-of-the-States Survey* provides a snapshot of state and local jury improvement efforts. Twenty states reported having a formal organization responsible for managing or overseeing jury operations for the state. The relatively high number of states with permanent jury offices or organizations demonstrates the visibility and prominence of jury operations in court management.

With respect to recent jury improvement efforts, the preferred approach in most states has been a statewide commission or task force to examine issues related to jury operations and trial procedures. The vast majority of these commissions were established by the chief justice or under the authority of the

court of last resort and consisted of 15 to 20 individuals representing a variety of constituencies (see Table 8).

Table 8: Constituencies Represented on Statewide Task Forces and Commissions

Constituencies	% of Task Forces/ Commissions
Trial judges	97
Civil litigation lawyers	86
Criminal defense lawyers	78
Prosecutors	76
Court administrators	70
Jury managers	65
Clerks of court	65
Private citizens/Former jurors	62
Appellate judges	59
Other individuals	46
State legislators	43

The most common focus involved making recommendations for legislative and rule changes related to jury operations and trial procedures. Education of judges and court staff were also reported as a frequent focus of activity (see Table 9).

Table 9: Statewide Jury Improvement Efforts

Focus on . . .	% of States
Legislative or rule changes	65
Judicial education	41
Public education/outreach	31
Court staff education	29
Evaluations	18
Survey research	18
Pilot or demonstration programs	14
Technology	14
Other	14
Attorney education	12
Court observations	10
Juror Fees	6

The Local Courts Survey provides an instructive picture of jury operations nationally by highlighting local jury operations and improvement priorities in greater detail and examining the impact of state infrastructures and statewide initiatives on local

operations and initiatives. Nationally, we find that 52% of courts report some type of jury improvement activities in the past five years. The single most popular focus of local jury improvements was upgrading jury automation, but other, more substantive efforts captured the attention of a substantial portion of courts (see Table 10). The majority of courts (75 %) that reported any improvement efforts focused on multiple areas. Nearly 10% reported seven or more different efforts underway.

Table 10: Local Court Jury Improvement Efforts

Focus on . . .	% of Courts
Upgrade Automation	59
Decrease Non-Response Rate	54
Improve Jury Yield	45
Improve Facilities	43
Improve Juror Utilization	42
Improve Public Outreach	36
Improve Jury Representation	33
Improve Jury Instructions	29
Improve Juror Comprehension	23
Other Improvement Effort	11

The existence and magnitude of local jury improvement efforts correlated, not surprisingly, with population size and jury trial volume.[24] Courts with more jury trials and those in urban communities were more likely than rural courts to initiate improvement efforts. Statewide leadership in the form of a centralized jury management office or statewide task force/ commission also played a substantial role in motivating local court activity. In states with a jury task force, the average number of efforts that local courts undertook was 3.2 compared to 1.6 in states with no statewide task force.[25] Statewide activities focused on court staff education and on changes to legislation or court rules appeared to increase the number of local court efforts on average by 50% to 70%.[26]

24. Population *Rho* = .383, Jury Trial Volume *Rho* = .210, both *p*s < .001.
25. F (1, 1,394) = 44.310, p, .001.
26. Court Staff Education F (1, 46) = 4,323, p = .043; Change Legislation/Court Rules F (1, 46) = 6.873, p = .012.

1. AUTOMATION

As noted in Table 10, upgrades to jury technology were the single most frequently reported focus of local jury improvement efforts, undertaken by 59% of courts reporting any improvement efforts. The Local Courts Survey also examined current use of technology (see Table 11). Courts in rural and smaller suburban jurisdictions were more likely to use commercial jury management software than those in more populous areas that, presumably, can afford to develop and support an in-house system.

Table 11: Percent of Courts Using Various Types of Technology

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
N =	**84**	**233**	**404**	**526**	**1,247**
Commercial Jury Software	57	59	62	76	65
Juror Qualification					
Online	48	20	10	2	11
IVR Technology	33	12	8	1	8
Reporting Technology					
Telephone Call-In System	87	82	71	43	62
Online	41	22	12	2	12
Automated Call-Out System	2	2	4	4	3
Orientation					
Basic Information Online	62	37	18	61	19
Orientation Video Online	23	10	8	2	7
Orientation Video on Cable Television	4	1	1	1	1

The most popular form of technology, by a large margin, continues to be the telephone call-in systems (which allow summoned jurors to call the court to find out if they will be needed). Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes. Less than 20% provide basic juror orientation information online and barely more than half of that percentage use the Internet for juror qualification or for informing jurors about their reporting status. Interestingly, courts that rely on commercial jury management software were

actually *less* likely to employ all of the more sophisticated types of automation, even after controlling for population size.

2. JURY YIELD

The term "jury yield" refers to the number of citizens who are *qualified* and *available* for jury service expressed as a percentage of the total number of summonses mailed. It is a critical concept in jury system management insofar as it provides a standard measure of efficiency for jury operations. Jury yield allows a court to measure the upfront administrative effort and cost that the court undertakes in securing an adequate pool of prospective jurors for jury selection. The Local Court Survey inquired about jury yield with respect to summoning only, without distinguishing between one-step and two-step systems.[27] Typically, urban and larger suburban courts experience lower jury yields than smaller suburban and rural courts (see Table 12).

Table 12: Jury Summoning Yields by Population Size

	Population Size				
	500,000 or More	**100,000 to 500,000**	**25,000 to 100,000**	**Less than 25,000**	**All Courts**
One-Step Courts (n)	39% (60)	41% (134)	45% (207)	50% (265)	46% (666)
Two-Step Courts (n)	43% (18)	54% (76)	59% (170)	63% (210)	60% (474)

An important question for local courts is what happened to those people who were mailed summonses, but were not qualified or available for jury service. Table 13 shows the rates at which summoned jurors are disqualified, exempted or excused, and the rate at which summonses are undeliverable or not responded to. How can courts increase the jury yield? As a practical matter, courts have no options when people sum-

27. Courts employing a two-step qualification and summoning process often differentiate between the qualification yield (the proportion of citizens that is qualified for jury service) and the summoning yield (the proportion of jury-eligible citizens that is available for jury service on the date summoned). In one-step courts, qualification and summoning are combined and therefore the yield is expressed as a unitary measure. For instructions on how to calculate jury yield in one-step versus two-step courts, see COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS, http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure8.pdf.

moned for jury service are disqualified (e.g., non-citizen, non-resident, under age 18, previous felony conviction, not fluent in English). However, courts have developed a number of approaches to minimize undeliverable summonses and non-response rates that affect jury yields. With respect to undeliverable summonses, for example, many courts have borrowed techniques from commercial mail-order companies such as contracting with vendors to provide updated addresses for people who have moved.

Table 13: Average Percent Undeliverable, Disqualification, Exemption, Excusal and Non-Response Rates by Population Size

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts					
Undeliverable	15	14	16	14	15
Disqualified	12	10	8	7	8
Exempted	4	7	8	8	7
Excused	9	10	9	9	9
Non-Response/FTA	15	11	9	7	9
Two-Step Courts					
Undeliverable	7	10	8	10	9
Disqualified	7	10	8	7	8
Exempted	3	3	5	6	5
Excused	4	6	5	7	6
Non-Response/FTA	13	6	6	5	6

The number of exemption categories had a significant effect on exemption rates in one-step courts within those states[28]—from an average of 5% in states with only one exemption to 14% in states with seven exemption categories. Florida had the highest number of exemption categories (9) and the second highest exemption rate (12%).

Similarly, term of service and juror compensation rates affect excusal rates. Courts with a one-day or one-trial term of service had significantly lower excusal rates than those with longer terms of service—6% versus 9% (see Table 14). Moreover, courts with juror fees exceeding the national average ($21.95 flat fee or $32.34 graduated rate) also had significantly

28. We did not calculate the exemption rate in two-step courts because presumably anyone claiming the exemption had already done so at the qualification step.

lower excusal rates—7% compared to 9% for courts whose juror fees were lower than the national average.

Table 14: Average Percent Excused by Term of Service and Juror Compensation

Juror Fee. . .	One Day/ One Trial	Longer than One Day / One Trial	Total
Exceeds National Average	4	8	7
Less than National Average	8	9	9
Total	6	9	8

Citizens who fail to return their qualification questionnaires or who fail to appear for jury service have increasingly challenged courts across the country. Twenty percent of one-step courts reported non-response/failure-to-appear rates of 15% or higher. Even more remarkable, 10% of two-step courts, which had already located and qualified the prospective juror, reported failure-to-appear rates of 16% or higher. To address these problems, 80% of courts in the *State-of-the-States Survey* reported using some type of follow-up program to track down non-responders and those who fail to appear. The most common approach was simply to send a second qualification questionnaire or summons.

Follow-up programs had various degrees of effectiveness. After controlling for population size and one-step versus two-step jury operations, the Local Court Survey data showed that only those follow-up programs that involved sending a second summons or qualification questionnaire, or that involved a stringent approach (e.g., bench warrant), significantly reduced non-response rates. Order to show cause hearings and fines had no effect, possibly due to the infrequency with which they are typically imposed. Courts that had no follow-up program had significantly higher non-response/FTA rates.

3. JUROR PRIVACY

To meet jurors' expectations of privacy, courts increasingly place restrictions on the types of information that prospective jurors are required to disclose, to whom that information may

be subsequently released, and at what point in the trial process (e.g., pre-trial, jury selection, post-trial) it can be released.[29]

Attorneys and their clients arguably have the greatest legitimate interest in access to juror information. Table 15 shows the percentage of local courts that reported providing attorneys with access to juror information before jury selection begins.

Table 15: Attorney Access to Juror Information Before Jury Selection Begins

Type of Juror Information	% of Courts
Name	88
Full Address	64
Zip Code Only	13
Qualification Information	55

In many states, access to juror information is restricted by state statute or court rule. Thus, we find that access to some of these categories of information was restricted in all of the Local Court respondents.[30] Restrictions on access to juror information do not necessarily reduce costs or boost efficiency. However, courts that have reviewed their approach to juror privacy have often declined to collect juror information for which they do not perceive a legitimate administrative or voir dire need.

In addition to basic information such as name and address, the majority of courts obtain preliminary voir dire information from prospective jurors, such as marital status (64%), occupation (72%), number and ages of minor children (52%), and other information not directly related to juror qualification criteria or contact information (28%).

In sum, the Local Court Survey makes clear that state courts differ a great deal in their approaches to automation, jury yield and juror privacy.

29. *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

30. For example, access to jurors' full street addresses was uniformly denied in courts in Arizona, Delaware, Hawaii, New Jersey, and the District of Columbia. New Jersey and the District of Columbia do provide access to jurors' zip codes, however. Similarly, Delaware, Massachusetts, North Carolina, and the District of Columbia restrict access to juror qualification information.

D. Innovations Inside the Courtroom

In most states the trial judge has discretion to determine how to manage the jury trial and what tools or assistance, if any, to provide to jurors. The Judge and Attorney Survey is the first known study to document nationwide the extent to which judges exercise their discretion to employ various practices and procedures during voir dire, trial, and jury deliberations.

1. VOIR DIRE

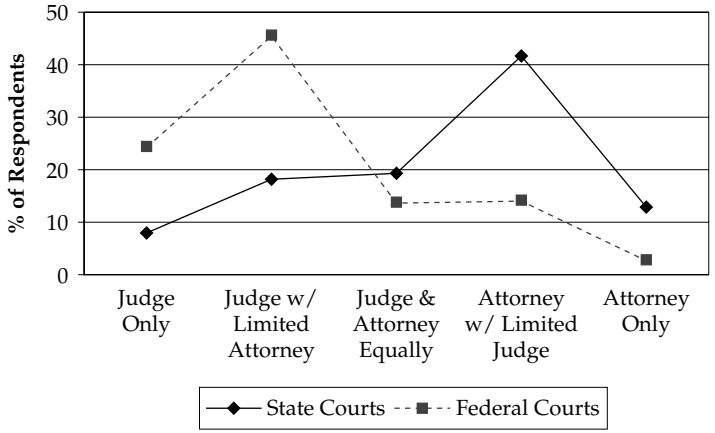
Jury selection practices vary tremendously from state to state across a number of key characteristics. For example, all courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Other key differences in voir dire among states are the number of peremptory challenges available to each side; the legal criteria for ruling on challenges for cause; and the basic mechanics of voir dire such as judge-conducted or lawyer-conducted questioning, the use of general or case-specific questionnaires, and questions addressed to a jury panel as a whole versus individual questioning.

Figure 1 illustrates the continuum of voir dire questioning from exclusively judge-conducted voir dire on the left to exclusively attorney-conducted voir dire on the right. Judge-conducted voir dire is the norm in federal courts and attorney-conducted voir dire is common in state courts. There is substantial state-to-state variation (see Table 16).

The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.[31] Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges. On the other hand, many judges prefer to conduct most

31. Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire*, 11 L. & HUM. BEHAV. 131 (1987).

Figure 1: Who Conducts Voir Dire?



or all of the voir dire themselves. They assert that attorneys waste too much time and unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial.

Table 16: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

The methods used to question jurors also vary considerably (see Table 17). The vast majority of judges and attorneys (86%) reported that in their most recent jury trial, at least some questions were posed to the full panel, usually with instructions to answer by a show of hands. Another common approach is to question each juror individually in the jury box, moving from juror to juror until the entire venire panel has been questioned. This approach was more common in state courts than in federal courts.

Table 17: Voir Dire Methods		
	% of Respondents	
Questions to . . .	**State Courts**	**Federal Courts**
Full Panel	86	86
Individuals in the Jury Box	63	52
Individuals at Sidebar/Chambers	31	31
Questionnaire		
General	34	33
Case Specific	5	10

These techniques are often used in combination with one another. Less than one-third of jury trials relied on a single voir dire technique. In nearly half of the trials, voir dire involved direct questioning of the entire panel with supplemental individual questioning in the jury box or at sidebar. Seventeen percent (17%) of trials involved all three methods. Written questionnaires supplemented oral voir dire in 38% of the trials and were the only form of voir dire in 1% of the trials. Interestingly, use of case specific questionnaires was more common in federal than in state courts.

The Judge and Attorney Survey also captured data about the time duration of voir dire. Capital felony trials required the most time to impanel a jury; the median was six hours in state courts and seven hours in federal courts. Non-capital felony trials and civil trials required two hours, and misdemeanor trials only 1.5 hours in state courts and one hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (one hour or less). Connecticut, which has a constitutional requirement of individual voir dire of each prospective juror, consistently had the longest voir dire time—10 hours in felony trials and 16 hours in civil trials.

2. PRACTICES DURING PRESENTATION OF EVIDENCE

Once the jury has been impaneled, the evidentiary portion of the trial begins. This aspect of trial practice has undergone dramatic changes in recent years as a sea change has occurred in the way judges and attorneys view the jury's role during trial. The traditional view is that jurors are passive receptacles

of evidence and law who can suspend judgment about the evidence until final deliberations, perfectly remember all of the evidence presented, and consider the evidence without reference to preexisting experience or attitudes. This view is giving way to empirically tested understandings of how adults perceive and interpret information. Scientific studies have established that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial.[32] This has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall, comprehension of evidence, and confidence and satisfaction with deliberations.[33] The Judge and Attorney Survey asked trial practitioners to report their experiences with these procedures in their most recent trials. Table 18 provides an overview comparing the responses of practitioners in state court to those in federal court.

a. Note-taking and Notebooks In more than two-thirds of both state and federal trials courts permitted juror note-taking; and in the vast majority of those trials jurors were provided with writing materials. Jurors serving in trials with more complex evidence were significantly more likely to be permitted to take notes and to be provided with note-taking materials than jurors in less complex trials. The presence or absence of positive law had some relationship to use of each of the trial techniques examined in the Judge and Attorney Survey. The Statewide Survey asked respondents whether these trial practices were required, permitted in the discretion of the trial judge, or prohibited and to provide the legal authority (statute, court rule, or court opinion).[34] Table 19 shows the percentage of trials in

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

33. G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2d ed. 2006); AMERICAN BAR ASSOCIATION, *supra* note 4.

34. Arizona, Colorado, Indiana and Wyoming mandate that trial judges permit jurors to take notes; judges have no discretion to prohibit the practice. ARIZ. R. CIV. P. 39(p); ARIZ. R. CRIM. P.. 18.6(d); COL. R. CIV. P. 47(t); Colo. Pen. R. 16(f); IND. JURY R. 20(a)(4); WYO. R. CIV. P. 39.1(a); WYO. R. CRIM. P. 24.1(a). Only Pennsylvania and South Carolina reported on the Statewide Survey that juror note-taking was prohibited. PA. R. CRIM. P.644. In August 2005, while data collection for the *State-of-the-States Survey* was underway, Pennsylvania temporarily amended its rule and permitted jurors to take notes in trials lasting longer than two days. The Pennsylvania Supreme Court issued an order permanently amend-

Table 18: Use of Trial Innovations		
	% of Respondents	
	State Courts	Federal Courts
Note-taking		
Jurors allowed to take notes	69	71
Jurors given paper for notes	64	68
Jurors given a notebook	6	11
Jurors allowed to submit written questions	15	11
Criminal Trials	14	11
Civil Trials	16	11
Jurors could discuss evidence before deliberations	2	1
Criminal Trials	1	0
Civil Trials	2	1
Juror instruction methods		
Preinstructed on substantive law	18	17
Instructed before closing arguments	41	36
Given guidance on deliberations	54	53
At least 1 copy of written instructions provided	69	79
Each juror received copy of written instructions	33	39

which jurors were permitted to take notes based on responses to the Statewide Survey concerning the existence of legal authority governing juror note-taking. Not surprisingly, in states where juror note-taking is required, the percentage of trials in which jurors were permitted to take notes is extremely high.

Overall, jurors were permitted to take notes in more than two-thirds of the trials in states that leave the decision on juror note-taking to the discretion of the trial judge, but state-by-state rates of juror note-taking ranged from a low of 19% in Rhode Island to a high of 96% in Arkansas. What is particularly surprising is the apparent lack of compliance in those states that prohibit juror note-taking. According to the Judge and Attorney Survey reports, of the 206 criminal trials that took place in

ing the rule rule effective August 1, 2008. South Carolina did not indicate the authority for the prohibition and a search of relevant statutes, court rules, and case law failed to identify the source of the prohibition. The only judicial opinion that discusses juror note-taking in criminal trials – a 1985 appeal from a capital felony trialindicated that juror note-taking is a matter of trial court discretion. South Carolina v. South, 331 S.E.2d 775 (S.C. 1985) "Finally, South Carolina contends the lower court erred in allowing jurors to take notes. Such was a proper exercise of discretion." *Id.* at 778.

Table 19: Note-taking Law and Practice		
	% of Trials in which Jurors were Permitted to Take Notes	
Juror Note-taking . . .	**Civil**	**Criminal**
Prohibited	42	27
Permitted	70	69
Required	97	95

Pennsylvania and South Carolina (the only two states that reported that juror note-taking was prohibited), more than one-fourth of the judges permitted jurors to take notes, and in 42% of the 36 South Carolina civil trials jurors were permitted to take notes. In fact, in 23% of both the criminal and civil trials, jurors were actually given writing materials with which to take notes.[35]

Trial complexity also affects judicial decisions about trial techniques, and thus deserves some additional explanation. Two survey questions asked respondents to rate the level of evidentiary and legal complexity on a scale of one (not at all complex) to seven (extremely complex). Overall, 18% of trials were rated as very complex (six or seven) on at least one measure of complexity and 7% on both measures.

Trials that are highly complex—six or seven on the scale—are trials in which juror notebooks can be extremely helpful, but overall juror notebooks were not very popular, even in complex

35. The apparent non-compliance with the prohibition on juror note-taking by Pennsylvania and South Carolina trial judges is quite puzzling. Certainly one possibility may be that judges and lawyers in those states have learned enough about the benefits of this technique (and the absence of any disadvantages) that they simply ignore the prohibition. As we find throughout this discussion, many of these techniques are employed in combination with one another, suggesting that judicial and lawyer education about these techniques in many jurisdictions may have begun to show measurable effects. The South Carolina Statewide Survey response reported that juror note-taking is prohibited in both criminal and civil trials, but did not report legal authority for the prohibition. Perhaps the individual who completed South Carolina's Statewide Survey was simply mistaken. Or perhaps the report reveals a widespread perception within the South Carolina legal community that juror note-taking is prohibited. There can be little doubt that cultural opposition to these practices in the absence of legal authority prohibiting them affects the extent of their use in states that leave these decisions in the sound discretion of the trial judge. *See also* Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts,* 28 N. ILL. U. L. REV. 407 (2008)

trials.[36] Only 11% of trials involving complex evidence and law provided notebooks for jurors. Notebooks were used twice as often in civil trials (8%) as in criminal trials (4%), and nearly twice as often in federal court (11%) as in state court (6%).

b. Juror Questions to Witnesses One of the more controversial innovations involves permitting jurors to submit written questions to witnesses. A substantial and growing body of empirical research has found that this practice, if properly controlled by the trial judge, improves juror comprehension without prejudicing litigants' rights to a fair trial.[37] The crux of the controversy stems from philosophical arguments about the role of the jury in the context of an adversarial system of justice. The practice is mandated for criminal trials in three states,[38] prohibited by case law in five states,[39] and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in six states,[40] prohibited in 10 states,[41] and left to the discretion of the trial judge in the rest. Despite ongoing controversy in many jurisdictions about whether jurors

36. The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds. MUNSTERMAN ET AL., *supra* note 33, at 102-03.

37. Shari S. Diamond, et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VANDERBILT L. REV. 1927 (2006); Larry Heuer & Steven Penrod, *Juror Note-taking & Question Asking During Trials*, 18 L. & HUMAN BEHAV. 121 (1994).

38. ARIZ. R. CRIM. P. 18.6(e); COLO. R. CRIM. P. 24(g); IND. JURY R. 20(7).

39. Matchette v. Georgia, 364 S.E.2d 545 (1988); Minnesota v. Costello, 646 N.W.2d 204 (2002); Wharton v. Mississippi, 784 So.2d 985 (1998); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). Statewide Survey respondents for Illinois, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina reported that juror questions were prohibited but did not report the legal authority for this prohibition. NCSC staff was unable to locate the source of prohibition in the relevant state statutes, court rules, and case law. After data collection was complete Arkansas became the sixth state to prohibit juror questions. *See* ARK. R. CRIM. P. Rule 33.8.

40. At the time of the survey data gathering, four states reported mandatory jury questioning in civil cases. ARIZ. R. CIV. P. 39(b)(10); COLO. R. CIV. P. 47(u); IND. JURY R. 20; WYO. R. CIV. P. 39.4. Since then, Florida and Washington State have adopted similar rules. FLA. R. CIV. P. 1.452; WASH. C.R. 43(K) & C.R.L.J. 43(K).

41. Minnesota v. Costello, 646 N.W.2d 204 (2002); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). The Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff was unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.

should be permitted to ask questions, jurors were allowed to ask questions in 15% of trials reported on in this study. Evidentiary complexity played a role, with judges permitting juror questions in 17% of the most complex cases, but in only 12% of the least complex cases. Judges were also significantly less likely to permit juror questions in federal court compared to state courts.

c. Discussion of Evidence During Trial Another controversial technique is to allow jurors in civil trials to discuss the evidence among themselves before final deliberations.[42] In most states it is prohibited altogether.[43] Overall, juror discussions were permitted in only 2% of state jury trials and only 1% of federal court trials. Surprisingly, one-third of the trials in which jurors were permitted to discuss the evidence took place in states that prohibit the practice. Given that juror discussions took place in 29 states that expressly prohibited them, it appears that this particular technique has generated enough interest to encourage a small number of judges to ignore the prohibition and secure the consent of counsel to permit juror discussions in individual cases.

d. Legal Instructions A substantial amount of research suggests that juror comprehension of the law is affected by the timing and form of jury instructions. One technique growing in prevalence (18%) is to pre-instruct jurors about the substantive law—that is, to provide a basic overview of the black letter law governing the case in addition to administrative housekeeping rules and general legal principles.[44] Survey respondents from eight states report that judges are required to pre-instruct jurors on the substantive law before the evidentiary portion of the

42. MUNSTERMAN ET AL., *supra* note 33, at 124-25. Arizona, Colorado, and Indiana have enacted court rules explicitly permitting this practice. Maryland has case law that condones the practice. Wilson v. State, 242 A.2d 194 (Md. 1968). Elsewhere, the practice is implicitly permitted by virtue of the fact that no legal authority explicitly prohibits it.

43. *See* Valerie P. Hans, et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J. L. REFORM 349, 352-60 (1999).

44. MUNSTERMAN ET AL., *supra* note 33, at 132-33.

trial.[45] However, most of the required instructions deal with basic legal principles such as burden of proof and admonitions concerning juror conduct rather than specific instructions on the elements of crimes or claims to be proven at trial.[46]

Judges were significantly less likely to pre-instruct in civil trials than in criminal trials. Federal judges were marginally more likely to pre-instruct than were state judges. Trial complexity was unrelated to judges' decisions to pre-instruct. It does appear that many judges who pre-instructed juries view this technique as part of a set of jury trial practices. Those that did so were also significantly more likely to permit jurors to take notes, to submit questions to witnesses, to permit juror discussions before deliberations, to deliver final instructions before closing arguments, and to provide jurors with a written copy of the instructions.

Other techniques to improve juror comprehension of the law involve instructing the jury before closing arguments and providing written copies of the instructions to jurors for use during deliberations.[47] Fewer than half of the trials in the study did so. At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials and in nearly three-quarters of federal jury trials.

II. The "S.O.S. Effect"

Since completion of the survey and publication at the National Center for State Courts' Center for Jury Studies website, its content has repeatedly provided a useful baseline against which state and local policymakers could assess their own systems and make appropriate adjustments. A variety of legal organizations and governmental entities in more than a dozen states have focused upon the *State-of-the-States Survey*. Their

45. COLO. R. CIV. P. 47(a)(2)(V), 47(a)(5); COLO. R. CRIM. P. 24(a)(5); IND. R. CT. Jury Rules 20(a); MO. R. S. CT. Rule 27.02; N.Y. CRIM. PROC. LAW §§ 260.30, 270.40; OR. R. CIV. PROC. Rule 58B(2); OR. REV. STAT. § 136.330; TENN. R. CRIM. PROC. Rule 51.03(1); TENN. R. CIV. PROC. Rule 30(d)(1); WYO. R. CIV. PROC. Rule 39.3, WYO. R. CRIM. PROC. Rule 24.3. No legal authority could be found for the requirement in South Carolina.

46. Respondents from Nevada and Texas reported that pre-instruction is prohibited without citing any legal authority.

47. MUNSTERMAN ET AL., *supra* note 33, at 142-43, 151-52.

deliberations occurred at bench and bar conferences, judicial educational programs, court manager meetings, and in state legislatures. These focused gatherings have often resulted in lively debate, jury-centered educational programming and, in some instances, legislative action. This might be called the *State-of-the-States Survey*—or S.O.S.—Effect.[48]

A. Judge and Lawyer Dialogues

The *State-of-the-States Survey* has been a focal point at judge-lawyer conferences in California, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New York, Ohio, Pennsylvania, Texas, Virginia, Wisconsin, Washington, and West Virginia. These conferences have typically been hosted by the state judicial conference, a state bar association or national lawyer organizations like the American Board of Trial Advocates. Staff from the National Center for State Court's Center for Jury Studies have been presenters at the meetings, explaining the survey's core findings and comparing practices in the host state with those in other jurisdictions. There has been recurring interest in jury management practices such as summoning methods and in the extent to which trial judges embrace the latest in-trial innovations.

Discussions have often turned to an assessment of one or more key assumptions underlying the innovations charted in the *State-of-the-States Survey*. These assumptions include:

> (1) Courts that increase their use of technology, improved records management, and "customer care" of jurors, will achieve greater efficiency and inspire public trust and confidence.
>
> (2) To honor the oft-stated instruction to juries that they are the sole "judges" of the facts, trial judges and lawyers must give jurors a full package of tools to facilitate their recall of evidence and comprehension of the applicable law.
>
> (3) In managing our adversarial justice system, courts must attend to the jurors' needs for education, respect, safety and privacy.

Our recent experience tells us that open-minded discussion of the *State-of-the-States Survey* and of the ABA *Principles* inspires

48. The Survey's utility has not been limited to public policy discourse. A mere three months after its public release, Associate Justice John Paul Stevens cited the *State-of-the-States Survey* in his dissent in Fry v. Pliler, 127 S.Ct. 2321, 2329 (2007) (Stevens, J., dissenting) as a criterion for the average length of jury deliberations in capital cases in California.

robust reflection on the purposes and values undergirding trial by jury. In turn, these conversations about fundamentals result in action plans.

B. Legislation and Court Rules

A pre-publication version of the *State-of-the-States Survey* was examined during the first-ever Texas Civil Jury Trial Summit in 2006. Judges, including the chief justice of the Texas Supreme Court, and trial lawyers from across the state discussed jury trial innovations during the two-day summit. At the end of the summit, the chairman of the Texas Senate Judiciary Committee, Jeff Wentworth, announced his intention to introduce a bill to implement several of the innovations described in the ABA *Principles* and quantified in the *State-of-the-States Survey*. In 2007, Senate Bill No. 1300 was the subject of a Committee hearing in Austin. The bill would authorize, among other things, in civil cases: preliminary instructions to the jury at the beginning of trials regarding basic legal rules, juror ability to take notes and to ask written questions to witnesses (after vetting by the court and counsel), and interim summations by counsel during trial. Although the legislation was not adopted by the full legislature before its adjournment, the public hearing energized additional segments of the legal community to evaluate innovations aimed at enhancing juror understanding of facts and law.

Similarly, the Illinois State Bar Association organized a two-day statewide conference to discuss appropriate jury innovations for Illinois in 2006. The ABA *Principles* and the *State-of-the-States Survey* statistics provided the framework for the discussion. Attendees discussed, evaluated, and ranked a variety of possible jury trial innovations. At the end of the conference, participant voting yielded broad support for certain reforms, including increased use of substantive jury instructions during civil trials, greater opportunities for jurors to submit written questions in civil trials, more statewide uniformity in early juror screening, greater use of questionnaires in voir dire, and higher juror pay.[49] Thereafter a bar committee was tasked with draft-

49. *See* Jeffrey A. Parness, *Reforming the Civil Jury in Illinois: the 2006 Allerton Conference*, 94 ILL. B.J. 608 (2006).

ing rules for adoption by the Illinois Supreme Court. At the time of this printing, the Rules Committee of the Court was scheduled to recommend a new rule to require trial courts to give a written copy of final instructions to each member of a deliberating jury and to authorize the rendering of final instruction to juries prior to closing arguments.

In Nebraska, the *State-of-the-States* data provided the legislature with important factual premises to support adoption of a statute overturning case law prohibiting juror note-taking during trials absent consent of all parties.[50] Nebraska Bill LB 804 had been introduced by a state senator at the behest of one of his constituents, a trial lawyer. Discussion of the bill before the Nebraska Senate Judiciary Committee was unusually contentious.[51] Representatives of the Legislative Committee of the Nebraska State Bar testified against the bill, arguing that the prohibition on juror note-taking was believed to be tactically advantageous to trial lawyers in cases in which the evidence was weak or ambiguous.

Proponents of the bill, countering that the strategic considerations of lawyers should not prevail over the interests of justice, presented information from the *State-of-the-States Survey* showing that Nebraska had the fourth lowest rate of juror note-taking in the country (23% compared to the 69% national rate in state courts). The *State-of-the-States Survey* information combined with findings from empirical research documenting the positive impact of juror note-taking on jurors' ability to recall trial evidence prompted the Nebraska Criminal Defense Attorneys Association, whose membership was strongly divided on the bill, to change its official position from opposition to neutrality, and the bill itself was overwhelming passed by the Nebraska legislature.[52]

The Judiciary Committee of the Pennsylvania House of Representatives found the *State-of-the-States Survey* useful on two fronts. Survey information on juror compensation was

50. State v. Kipf, 450 N.W.2d 397, 415 (Neb. 1990).

51. Based on authors' personal communication with a Nebraska legislator.

52. This summary of the legislative history is based on a series of e-mails between January 24 and February 1, 2008 to the NCSC from Judge Jan Gradwol, a retired Nebraska judge who presided in the trial that resulted in the *Kipf* prohibition on juror note-taking. Judge Gradwol was one of the proponents of LB 804 who testified before the Nebraska Senate Judiciary Committee.

used to assess Pennsylvania's current jury compensation system which places an unusually great funding burden upon its county courts. During the same session, the committee passed a resolution urging the state Supreme Court to enact a rule permitting judges to give juries written jury instructions in criminal trials. The resolution specifically cited the *State-of-the-States Survey* finding that only Pennsylvania, Georgia, and Alabama prohibited criminal jurors from being given copies of the jury instructions.

In Wisconsin, the Supreme Court is considering a petition restricting attorney and public access to juror information after voir dire has been completed. The proposal cited the *State-of-the-States Survey* information concerning juror privacy concerns.[53]

Finally, on April 8, 2008 the Louisiana Senate Judiciary Committee favorably reported out a bill prohibiting courts from giving deliberating juries a written copy of the final legal instructions of the trial judge. *State-of-the-States Survey* information helped concerned practitioners successfully argue that the trend in the United States is for trial judges to give written copies of final charges to jurors in order to aid their recall of relevant legal requirements. The proposed legislation was not adopted by the full Senate.

C. Legal Education Programming

Gatherings of legal professionals and legislators concerned with jury issues have exhibited two recurring areas of interest to judges and lawyers: (1) improving the efficiency and effectiveness of jury selection; and (2) managing jury deliberations that become troubled due to, for example, juror misconduct or apparent deadlock.

Regarding jury selection, the perennial challenge in conducting voir dire is to elicit meaningful information within a reasonable time allotment about prospective jurors' abilities to maintain fairness and impartiality. An inherent tension exists between the major actors in the jury selection portion of a trial. The parties and their lawyers want to gain as much information

53. *In re Amendment of Rules of Pleading, Practice and Procedure: Wis. Stats. Ch. 756, Juries* (Jan. 3. 2008). (On file with the author.)

as possible about the attitudes and life experiences of each venire member. They also want to retain maximum flexibility and discretion to remove prospective jurors based upon that information. A trial judge, with dozens or hundreds of cases on her docket, wants to administer justice in a timely and efficient manner so that other cases can be given prompt attention. Many judges also insist that voir dire questions be reasonably related to issues that are likely to arise during trial so as not to intrude upon juror privacy. These competing professional interests are often not resolved to the satisfaction of anyone. Consequently judges and lawyers alike believe there is a great need for improvements in jury selection methods.[54]

At the 2008 Annual Convention of the American Association for Justice NCSC staff conducted a program on ways to replace judge-lawyer competition during voir dire with collaboration. The *State-of-the-States Survey* and the ABA *Principles* were contrasted to show how far actual voir dire practices differ from the gold standards espoused in the *Principles*.

There is also a need for education about the ways that judges respond to troubled deliberating juries, such as those with jurors accused of misconduct or who are deadlocked. To address these concerns, the National Center for State Courts and the National Judicial College recently teamed up to design and test judicial education curricula for presentation to judicial conferences around the country.[55] The learning objectives will include: (1) proficiency at obtaining high-quality information from prospective jurors while remaining sensitive to time limits and citizen privacy, and (2) gaining confidence to address juror needs or misconduct arising during final deliberations. The course offerings will be adjustable to meet the particular needs of a requesting jurisdiction. Each module will give judicial education directors the option to engage a program lasting from a half day or to a whole day. Components will include the *State-of-the-States Survey* and additional research on jury selection and managing deliberating juries.

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54. Gregory E. Mize & Paula Hannaford-Agor, *Toward a Better Voir Dire Process*, 44 Trial 50, 50 (March 2008); Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process* 47 JUDGES' J. 4 (2008).

55. This effort is made possible by a grant from the State Justice Institute and the largesse of the International Academy of Trial Lawyers Foundation.

Another example of judicial education programming using the *State-of-the-States Survey* occurred at the 2008 Annual Conference of the American Judges Association. In designing the educational components of the conference, planners took notice of the survey figures regarding the high frequency of citizen involvement with jury trials. They focused on the survey research showing: (1) there are approximately 148,000 jury trials conducted in state and federal courts each year; (2) close to 32 million citizens are summoned to courthouses for jury duty; and (3) over 1.5 million Americans are impaneled on juries each year. It is evident from this information that jury trials present a tremendous opportunity for judges to educate citizens and build public trust in our judicial system. Hence, the American Judges Association showcased a half-day program, entitled, "Jury Trials: Recurring Opportunities to Build Public Trust in Courts," demonstrating how portions of trial by jury present opportune moments to teach and inspire citizens about courts and the administration of justice.

D. Improving Pattern Jury Instructions

Judges and lawyers have repeatedly commented upon the need to make jury instructions both legally accurate and comprehensible to the lay juror. That chorus led the National Center for State Courts, the Supreme Court of Ohio, and the Ohio Judicial Conference to assemble representatives from 27 states for a National Conference on Pattern Jury Instructions in Columbus, Ohio, in April 2008.[56] Three objectives were achieved: (1) To provide pattern jury instruction chairs, reporters, and members with the latest research and information on improving the comprehensibility of pattern jury instructions; (2) To provide an opportunity for pattern jury instruction committees to exchange information about internal pattern jury instruction committee operations and management techniques; and (3) To establish a mechanism for future collaborative relationships among pattern jury instruction members and the development of pooled expertise and resources (e.g., website,

56. Made possible by a grant from the State Justice Institute and generous contributions from the ABA Section on Litigation and the Product Liability Advisory Council (PLAC) Foundation.

listserv, blog) from which pattern jury instruction committees can draw.

Attendees identified a number of areas for potential improvement in pattern jury instruction management. They were particularly intrigued by the session on communication technologies and their implications for efficient pattern jury instruction committee efforts. Conferees advocated creation of an online database of existing state pattern jury instructions that committee members could consult when drafting instructions in new areas of law and revising instructions to be more understandable to jurors. They also called for renewed empirical research on juror comprehension of instructions in order to assess the effectiveness of recently revised instructions and of providing written copies of instructions to jurors during deliberations.

III. Where Do We Go From Here?

The *State-of-the-States Survey* resulted in many revelations, not the least of which was the solid number of jury trials conducted annually in state courts. Previous estimates of the number of jury trials were limited to general jurisdiction courts.[57] The *State-of-the-States Survey* found that a considerable proportion of jury trials—perhaps as much as 40%—are actually conducted by limited jurisdiction courts. The volume of jury trial activity in these courts is certainly a surprise and suggests that recent trends to eliminate the right to trial by jury for low-level offenses and low-value civil cases in many jurisdictions has not been as widespread and as successful as previously imagined. It also helps to explain the relatively high summoning rates—15% of the adult American population each year—and the increasing proportion of Americans that report having served as trial jurors.

Another important finding from the *State-of-the-States Survey* is that, in spite of statewide efforts to regulate jury operations and trial practices in some jurisdictions, most jury operations and practices are still governed on a local, and even individual, basis. The use of general terminology to describe

57. BRIAN J. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS 102-03 (2001).

jury practices (e.g., term of service, statutory exemptions, and one-step versus two-step summoning procedures) tends to mask a great deal of local variation. As we discovered during the long, slow process of collecting data for the survey, the extent of continued local autonomy not only makes it difficult to collect data, but also makes it difficult to define terms and to compare data across jurisdictions. It also indicates the inherent challenge—and the likelihood of substantial local resistance—that states face in attempting to implement statewide changes in jury procedures.

A curious finding from the Judge and Attorney Survey is the extent to which judges and lawyers reported the use of various trial practices (e.g., juror note-taking, juror questions to witnesses, and written copies of instructions) that apparently conflict with existing court rules, policies, or custom. As a general matter, judges and lawyers are more likely to use these techniques in jurisdictions that prohibit them than to not use them in jurisdictions that mandate them. Some of these inconsistencies may be the result of mistakes or misunderstandings on the part of the individuals who completed the Judge and Attorney or the Statewide surveys. However, strong correlations among the different trial techniques suggests that, at least in some cases, judges and lawyers have concluded the benefits of these techniques, in terms of improved juror performance and satisfaction, outweigh potential disadvantages. This decidedly Ghandi-esque approach to jury improvement at a grassroots level is intriguing, to say the least.

The *State-of-the-States Survey* shows that jury operations and practices are prominent in statewide and local court improvement efforts. To some extent, local court efforts are affected by statewide initiatives, especially those involving mandated changes in jury procedures. But the level of local court activity, even in jurisdictions that had not undertaken a statewide jury improvement initiative, was considerable. A number of factors may be driving local court efforts. More sophisticated technologies can reduce staff time and associated costs as well as provide better management information to court administrators to assess performance and focus on problem areas. Improved jury yields essentially translate as reduced administrative costs per juror summoned for service. Jury sys-

tem operations provide citizens with their first impressions of jury service. Daily courthouse routines establish what citizens can expect from courts in terms of convenience, communication with court staff, demands on their time, reimbursement for out-of-pocket expenses, and respect for privacy.

Trial practitioners, jury boosters, and students of trial by jury should be encouraged by the increasing dialogue and research that has followed the release of the survey. It is reasonable to assume that legislative debates, pilot projects, and education programs will continue in the years ahead.

A. Future Research Possibilities

How can policy makers and administrators use the state-by-state data in this survey? We hope the comparative information and analysis will encourage courts that do not routinely collect and review data on their jury operations and practices to begin doing so. Courts that do not do so already, could begin to regularly track and compare their jury yield and juror utilization statistics against those of comparable courts, and use the information to identify areas needing improvement. This type of performance metric is invaluable for identifying relative strengths and weaknesses of summoning methods and formulating effective strategies for addressing shortcomings. With data from the *State-of-the-States Survey*, judges and court administrators can evaluate their own practices in comparison with their peers across the country.

The *State-of-the-States Survey* also provides direction to the National Center for State Courts' Center for Jury Studies concerning the types of activities that it should pursue to better assist state and local courts. For example, how effective are various techniques to improve the accuracy of addresses on the master jury list, thus enhancing the overall jury yield? Which voir dire methods best elicit candid and complete information from jurors? What implications do these methods have on juror privacy expectations? To what extent do jurors make use of decision-making aids when they are offered them during trial?

Other areas for future research include topics that the *State-of-the-States Survey* did not address, either because we believed that too few courts could easily report on these topics or because we overlooked the issue while designing the surveys.

The former category includes the extent to which courts collect and analyze information about the demographic characteristics of their jury pools and how well those jury pools reflect a fair cross section of their respective communities.[58] Questions concerning juror utilization were also omitted from the Local Court Survey but are critically important to court efficiency and citizen satisfaction with jury service.

The Judge and Attorney Survey did not include questions on trial outcomes and trial length. Nor did it seek opinions about voir dire and trial practices (regardless of whether these were used at trial). Importantly, the survey did not reach out to former jurors to gain their assessments of their jury service and suggestions for improvements. Without question, it would be enlightening to gain that information in a new outreach to judges, lawyers and, very importantly, recent jurors.

B. Future Work Agendas

The *State-of-the-States Survey* demonstrated how voir dire practices tend to be either judge dominated or lawyer dominated.[59] In this context, as discussed earlier, a competition often occurs between judges and lawyers during the jury selection portion of a trial. This dynamic can stand in the way of discerning potential juror bias in the efficient and effective ways suggested by the ABA *Principles*.[60]

The availability of *State-of-the-States Survey* data for each state now enables us to ponder the real world dynamics playing out between lawyers and judges during voir dire in our home jurisdiction and to compare those processes against the ideals espoused in the ABA *Principles*.[61] The coming together of the ideal and real creates a recurring opportunity for judges and lawyers to begin discussing what a more mutually desirable voir dire might look like. We suggest several issues and ques-

58. AMERICAN BAR ASSOCIATION *supra* note 4, pr. 10 A. 3 which provides that courts should "periodically review the jury source list and the assembled jury pool for their respective representativeness and inclusiveness of the eligible population in the jurisdiction."

59. *Supra* Figure 1.

60. AMERICAN BAR ASSOCIATION, *supra* note 4, at 13-17.

61. *Id*. Principle 11 suggests proper purposes of for-cause and peremptory strikes and recommends a workable standard by which a court might make a ruling on motions to strike for cause.

tions that dialogues might address. Can there be agreement among bench and bar in one's home jurisdiction that the "system" would be better served if we worked together to attain greater juror candor in cases? Would expanded inquiries about the life experience of venire members lead to increased discernment of citizen bias and incapacity to serve? If so, would the exercise of for-cause and peremptory challenges become more reason-based? More efficient?

As we pause to think carefully about the why's and how's of jury selection, more questions naturally arise. If a trial judge, following the teaching of *Batson v. Kentucky*,[62] is expected to protect the civic rights of prospective jurors and promote public trust and confidence in the courts, what is the role of the trial advocate in those regards? To the degree any potential juror observes that he or she is being struck from jury service for no seemingly rational reason, or for a discriminatory purpose, is public trust undermined? Do members of the trial bar have any obligation toward making jury selection a more rational process?

Can practitioners agree that a jury panel free of predispositions toward any party—even a lawyer's client—leads to a "better" jury? Do trial lawyers have a duty to explain an answer to any of these questions to their clients?

Are there voir dire practices or procedures that attorneys would like to see utilized more often in their jurisdictions? For example, an opportunity to ask at least a couple of individualized questions to venire members? Voir dire less dominated by judges, but still subject to meaningful judicial oversight? As in the new discovery provisions of the Federal Rules of Civil Procedure,[63] would it be advisable for opposing counsel to regularly "meet and confer" prior to trial regarding the use of a simple juror questionnaire or regarding filing a joint motion for approval of several voir dire procedures recommended in the ABA *Principles*? Are practitioners willing to give up some of their anchored customs in order to achieve a more information-filled voir dire?

62. Batson v. Kentucky, 476 U.S. 79 (1986).
63. FED. R. CIV. P. 26(f).

Do our judicial readers feel their local legal culture would do well to attempt new practices or procedures during jury selection? Would they prefer trial lawyers refrain from arguing their case prematurely during voir dire? Would they be willing to invite more lawyer participation in exchange for prompt and economical voir dire questioning by attorneys? Would they advocate promulgation of a court rule defining the meaning and standards for excusing a prospective juror for cause? Conversely what might judges be willing to give up in order to gain a more effective voir dire? Exclusive, judge-conducted questioning? Fewer questions posed to the entire panel? The list of pregnant questions can go on.

If these reflections and open questions resonate with readers, we hope they might inspire, if not lead, an action plan in their home jurisdictions to elevate the quality of jury selection practices. Action plans could include the launch of bench-bar conferences to refine needs and desires and to distill practical options. Volunteer judges and lawyers might design and implement pilot projects including:

- drafting of model voir dire questionnaires to be used in a sampling of cases and evaluated over a specified period of time;
- undertaking individualized voir dire in some courtrooms followed by an evaluation by host judges and shared with other judges and the trial bar;
- experimenting with balanced judge-lawyer voir dire questioning of prospective jurors; or
- trying out new procedures for the elimination of unfit venire members utilizing a clearly defined concept of "for-cause."

The possibilities are innumerable. Reader willingness to start such efforts is essential.

The National Center for State Courts has developed court performance measures, including assessments related to jury operations such as CourTools Measure 8 (Effective Use of Jurors).[64] The *State-of-the-States Survey* provides courts with analytical tools to help identify areas of weak performance and estimate the potential impact in terms of improved efficiency and reduced administrative costs. The National Center for

64. NATIONAL CENTER FOR STATE COURTS, COURTOOLS (2005), http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm. The NCSC CourTools are a series of court performance measures based on Trial Court Performance Standards. CourTools Measure 8 (Effective Use of Jurors) provides a detailed template that courts can use to calculate jury yield and juror utilization rates.

State Courts is using the *State-of-the-States Survey* to develop a *Jury Managers' Toolbox,* an online diagnostic tool to help jury and court administrators estimate the impact of improved efficiency on key jury performance measures and associated operational costs.

We also are attempting to develop an Urban Courts Workshop to provide urban and statewide jury systems an opportunity to share information about innovative approaches they have developed to address the unique issues associated with heavy volume jury systems. We need to document the various funding streams that support the American jury system. Our understanding of juries would benefit from a series of demonstration projects implementing the ideals of the ABA *Principles for Juries and Jury Trials*.[65]

In closing, we recite the old adage, "Round and round it goes, where it stops nobody knows." Enthusiasm for juries and jury trial studies is in full bloom. We hope practitioners and policymakers will continue to gain—and apply—new knowledge about jury trials in their home jurisdictions and beyond.

65. The Seventh Circuit Bar Association Jury Project Commission is a model for testing the merits of the ABA *Principles*. AMERICAN BAR ASSOCIATION, *supra* note 4. Volunteer judges and lawyers in that federal circuit used seven practices encouraged by the *Principles* and carefully analyzed their effectiveness. The project manual is online at http://www.7thcircuitbar.org/associations/1507/files/01 ProjectManual.pdf. At least two articles have addressed initial findings from the project. Stephan Landsman, *An Experiment in Larger Juries in Civil Trials*, 78 N.Y.ST.B.A. J. 21 (October 2006); Shari Seidman Diamond, *Juror Questions at Trial: In Principle and In Fact*, 78 N.Y.ST.B.A. J. 23 (October 2006).

Testing the Comprehensibility of Jury Instructions: California's Old and New Instructions on Circumstantial Evidence

*Peter Tiersma and Mathew Curtis**

In 2003 and 2005 the Judicial Council of California approved new pattern civil and criminal jury instructions. This article reports on research comparing comprehension of the new civil instruction on circumstantial evidence with comprehension of the old circumstantial evidence instruction. The authors, one of whom was a member of California's Task Forces on Jury Instructions, conducted a study in which research participants were given either the new or old instruction and then asked to state whether each of 16 different scenarios described direct or circumstantial evidence. The authors conclude that the new instruction is more effective than the old one at overcoming the common understanding of "circumstantial evidence" as "weak evidence." They argue that successful instructions on circumstantial evidence would emphasize the importance of strong as compared to weak evidence rather than attempting to educate jurors about the distinction between direct and circumstantial evidence.

Introduction

During the past few decades, the American legal system has paid increasing attention to improving the jury system.[1]

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1. *See* American Bar Association, Principles for Juries and Jury Trials (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf; G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead, Jury Trial Innovations (2d ed. 2006).

One focus of inquiry has been jury instructions. Standardized or pattern jury instructions began to appear in the 1930s and 1940s.[2] They are now commonly used throughout the United States.[3] There is little doubt that standard instructions save judges time and effort. They also tend to be accurate statements of the law. Yet studies suggest that jurors do not understand traditional instructions very well, especially when more difficult points of law are involved.[4]

Many states have endeavored to make their pattern instructions more comprehensible, while at the same time being accurate statements of the law. A notable attempt has been made by California, which revised all of its civil and criminal instructions with the specific goal of making them more user-friendly for jurors.[5]

The creation of new plain-language jury instructions has made it possible to investigate the extent to which instructions written to be more comprehensible and approved for use in the courts do, in fact, lead to greater understanding by jurors. We decided to examine California's new instruction on circumstantial evidence. We chose this instruction for a number of reasons. First, anecdotal and experimental evidence suggested that this instruction is particularly difficult for jurors to grasp. In addition, there appears to be a common belief among ordinary citizens that circumstantial evidence refers to weak or unreliable proof, rather than being simply an alternative way to prove a fact (which is how the law understands it). Finally, California's new plain language jury instruction on circumstantial evidence attempts to explain the concept by means of an example, so we could study whether the use of examples or illustrations promotes comprehension.

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2. ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 6 (1979).

3. *Id.* at 12.

4. *See*, *e.g*, Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998).

5. The new civil jury instructions were approved in 2003; the new criminal jury instructions were approved in 2005. Updated as of 2008, both are available at http://www.courtinfo.ca.gov/jury/juryinst.htm.

Based on results from our study, we conclude that the common understanding of the term "circumstantial evidence" does indeed interfere with the ability of jurors to correctly grasp the legal meaning of the concept. California's old instruction did little to counteract the jurors' misconceptions on this issue. Aided by the presence of an example, the new instruction is more effective at dispelling the common misunderstanding of the term. Even so, comprehension was far from universal. Given the difficulty of the concept, judges might be better served by not trying to distinguish between direct and circumstantial evidence, focusing instead on the basic notion that both types of evidence are perfectly valid methods of proof.

Background

The institution of the jury in the common-law system arose in medieval England. When they needed to decide a factual dispute, judges began to call twelve *juratores* ("persons who have been sworn") to court. They were summoned from the area where the crime or incident had happened, placed under oath, and ordered to tell the judges what had taken place. Unlike today's jurors, they were expected to have personal knowledge of the facts. Only much later did the notion arise that jurors should determine what happened based not on their own knowledge, but on evidence presented during trial.[6]

Originally, English judges gave no instructions, leaving it up to jurors to decide for themselves the rules or principles that would guide their decisions. This practice continued in the English colonies of North America. Allowing jurors to determine the law was viewed as a means of limiting the oppression that acts of Parliament could inflict.[7] After the Revolutionary War, the jury retained the power to decide the law. Thomas Jefferson and many of his contemporaries trusted the common sense of citizens, arguing that jurors should be able to decide not only

6. J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, 72-75 (4th ed. 2002); LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY (1999).

7. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 395 (1999).

the facts of a case, but also the rules of law that were necessary to reach a verdict.[8]

During the nineteenth century this state of affairs began to change. As the country became more industrialized, people began to place greater value on predictable legal principles. Consequently, courts started expressly instructing jurors on the law, particularly in commercial cases. The jury's prerogative to determine the law receded in criminal trials also, as consistency of outcome became a more pressing concern than the danger of harsh legislation. In the words of Justice Story: "every person accused as a criminal has a right to be tried according to. . .the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it."[9]

By the end of the nineteenth century, the Supreme Court held that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts. . . ."[10] Appellate courts began overruling cases if they believed the trial judge had misstated the law. The exact wording of the law grew in importance, and lawyers began to argue for instructions that favored their client's case. Consequently, trial judges devoted more time and energy to preparing instructions.[11]

Largely because of the effort needed to prepare instructions on a case-by-case basis, as well as reversals by higher courts because of errors in wording, a committee of judges and lawyers in California began drafting what are now called *standard* or *pattern* instructions during the 1930s and 1940s.[12] They eventually produced a set of instructions for the most common civil causes of action, and soon thereafter another committee created a set of pattern instructions for criminal cases.[13] The committees also monitored legal developments and kept the instructions current.[14] Many states followed this model. Today,

8. LEVY, *supra* note 6, at 69-76.
9. United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).
10. Sparf v. United States, 156 U.S. 52, 102 (1895).
11. William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 735-37 (1981).
12. Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1083 (2001).
13. *Id.*
14. *Id*. at 1083-84.

most state and federal courts in the United States use pattern or standardized jury instructions.[15]

Standardized instructions have proven very successful in saving the time of judges and lawyers. Instead of having to research cases and statutes to determine the elements of a tort or crime, judges can usually find an appropriate instruction in a book or computer database. Also, because these instructions are usually drafted by committees of judges and lawyers, they tend to be more accurate and more balanced statements of the law than the work product of a single judge would be. Thus, pattern instructions have reduced the number of appeals for instructional error.[16]

Another objective of the pattern jury instruction movement was to improve comprehension.[17] Unfortunately, accomplishing this goal has proven more elusive.

Research on Comprehensibility

The earliest substantial study in the United States on how well jurors understand instructions was conducted by Robert and Veda Charrow in the 1970s.[18] In the first of two related studies, the Charrows received the cooperation of 35 people who had been called to jury duty but had not yet served. The Charrows had previously recorded a set of 14 California pattern civil instructions on audio tape. They played the tape twice to each subject. Study participants were then asked to paraphrase the instructions; these paraphrases were tape-recorded and analyzed.

The Charrows divided each of the instructions into meaning-bearing parts or segments. They then analyzed each paraphrase to determine how many of these segments the participants had correctly included in their paraphrase. On average, only about one-third of the information contained in these meaning-bearing segments (.386) found its way into the paraphrases (the Charrows called this the *full performance* measure).

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15. NIELAND, *supra* note 2.
16. Schwarzer, *supra* note 11, at 737.
17. *Id.*
18. Charrow, *supra* note 4.

Using the same tape-recorded paraphrases, the Charrows conducted a further analysis of the data in which they counted only those segments that contained legally more important information, thus ignoring some of the less relevant segments of information in the instructions (they called this the *approximation measure*). Here, they found participants accurately paraphrasing somewhat better than half (.540) of these more significant aspects of the instructions.

The educational level of the participants in the Charrows' study ranged from 12th grade through the doctoral level. It was the only demographic factor that influenced the result in a significant way. As expected, higher educational levels correlated to greater comprehension. Factors like the order of instructions and sentence length had little or no effect on the amount of information in the instructions that was correctly paraphrased.

The Charrows did not provide participants with a written copy of the instructions—they simply read them twice to each participant. So they effectively tested both retention and comprehension. Nonetheless, their results suggest that traditional pattern instructions do a poor job in communicating important legal information to jurors (many of whom, even today, do not receive a written copy). After hearing the instructions twice, participants could repeat in their own words only about one-third of the information they had been given. Even when the Charrows limited their analysis to the legally more important information in the instructions, participants could remember and paraphrase, on average, just slightly more than half of the material that had been read to them.

Concentrating more closely on the issue of comprehension, the Charrows identified a number of linguistic features that seemed to make the instructions more difficult to process, including the use of technical terminology, convoluted word order, complicated sentence structure, and the use of passive verbs in subordinate clauses.[19] They then rewrote the instructions to eliminate some of these troublesome linguistic features and repeated their experiment with a different set of participants. The improved language resulted in an increase of 41% in

19. *Id.* at 1317-1325.

the full performance measure (from 31.9% to 42.7%) and an increase of 35% in the approximation measure (from 44.7% to 59.2%).[20]

The committee charged with drafting and updating California's standard instructions largely ignored the Charrows' research.[21] This was true even after the California Supreme Court, in *Mitchell v. Gonzales,* cited the study approvingly and suggested that the committee use the Charrows' conclusions to improve the language of an "admittedly confusing instruction" on causation.[22]

Of several studies on comprehensibility conducted since then, the most substantial and recent research is that of Bradley Saxton.[23] With the cooperation of the Wyoming courts, Saxton gave questionnaires to jurors when they were discharged from service on actual trials. Jurors reported that they had spent around 31% of the time during deliberations discussing the instructions, indicating that they took them quite seriously. Ninety-seven percent believed that they understood the instructions either "pretty well" or "completely."

Yet the reality was different from the jurors' self-reporting. When participants were asked true/false questions about specific legal rules on which they had been instructed, only about 70% of their responses were correct. Surprisingly, only 60% of the participants who had *already served* on a criminal jury correctly responded that the fact that the state brought a charge against the defendant was not evidence that he or she had committed the crime. And approximately 31% of these former criminal jurors believed that once the state produced evidence that the defendant committed the crime, the burden shifted to the defendant to prove otherwise.

Turning to the topic of circumstantial evidence, Saxton's research revealed that at least 35% of jurors did not understand (or may not have remembered) the instruction that circumstantial evidence should receive the same weight as direct evidence. Likewise, an earlier study of Michigan's instructions found that

20. *Id.* at tbls. 12, 14.

21. Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993).

22. Mitchell v. Gonzales, 819 P.2d 872, 878 (Cal. 1991).

23. Saxton, *supra* note 4.

only around 65% of former jurors knew that facts can be proved through circumstantial evidence.[24] Similarly, Strawn and Buchanan reported that in one of their experiments, 43% of participants were skeptical of or uncertain about circumstantial evidence despite instructions.[25]

In part, the low comprehension of instructions relating to circumstantial evidence may result from a common perception that it is a less valid or reliable type of proof. Vicki Smith has done extensive work on the ability of a judge's charge to dispel jurors' preconceptions that conflict with legal principles.[26] She has concluded that traditional standardized jury instructions, as a general matter, do not very well overcome incorrect prior knowledge.[27] She did find, however, that a judge's charge is more likely to dispel incorrect prior knowledge if it explains or points out how legal and ordinary concepts differ.[28]

California's New Jury Instructions

As mentioned, the committees that previously drafted California's pattern jury instructions were reluctant to take comprehensibility into account. Their guiding philosophy was that the only way to guarantee the legal accuracy of their work product was to repeat, word for word, the language of the relevant statute or judicial opinion.[29]

Oddly enough, the catalyst for change was the infamous murder case against O. J. Simpson. After Simpson was acquitted of killing his former wife, a popular perception arose in Cal-

24. Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 J. OF L. REFORM 401, 417 (1990).

25. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976).

26. Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 L. & HUM. BEHAV. 507 (1993).

27. *Id*. at 532.

28. *Id*. at 533.

29. Most of the information presented here about the California experience is based on the notes and personal experience of one of the authors (Tiersma), who from its inception was a member of California's Task Force on Jury Instructions. *See also* Nancy McCarthy, *Plain English Instructions are Coming to Juries*, CAL. BAR. J., July 2003, http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/July2003&sCatHtmlPath=cbj/07_TH_01_Plain-English.html&sCatHtmlTitle=Top%20Headlines.

ifornia that the criminal justice system (especially the jury) was not working very well. This caused the state's Judicial Council to establish a blue ribbon commission to study the situation.[30] The commission made its report in 1996. One of its recommendations related to jury instructions:

> The Judicial Council should appoint a Task Force on Jury Instructions to be charged with the responsibility of drafting jury instructions that accurately state the law using language that will be understandable to jurors. Proposed instructions should be submitted to the Judicial Council and the California Supreme Court for approval.[31]

Pursuant to this recommendation, the Judicial Council did indeed set up a task force, which was split into two subcommittees, civil and criminal. The two subcommittees proceeded in roughly the same fashion.

The civil committee started its work in 1997.[32] There were 18 members, mostly judges and lawyers, who were appointed by Chief Justice Ronald George.[33] The committee had the services of a staff attorney employed by the Judicial Council. The attorney conducted research and did much of the preliminary drafting. Members met in person several times a year to discuss proposed instructions. The instructions were projected to a screen from a laptop computer. The committee edited as a group during the course of the meeting, with changes being

30. "The Judicial Council of California voted to create the Blue Ribbon Commission on Jury System Improvement on October 27, 1995. The Chief Justice of California appointed the members in December of 1995, naming representatives from the judicial, executive, and legislative branches as well as professionals from the State Bar, the business community, and other citizen groups." http://www.courtinfo.ca.gov/jury/bluerib.htm.

31. J. CLARK KELSO, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT, Recommendation *5.8*, 98-9 (1996), *reprinted in* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1444 (1996).

32. We concentrate here on the civil instructions because they were the object of the Charrows' experiment, and also because the criminal instructions had not been finalized when we began our study. Charrow, *supra* note 4.

33. The committee originally included several members of the committee, which had drafted the state's old instructions. They resigned after attending a few meetings. Part of their stated reason for resigning was adherence to the philosophy that the instructions had to copy the language of statutes and judicial opinions verbatim. In addition, the BAJI committee was part of the Los Angeles Superior Court, which meant that copyright fees accrued to that court, rather than the state judicial system. The committee also had a member of the public who was not a lawyer. She stopped attending after a few meetings.

made directly on the laptop, so that everyone could monitor the result of the edits on the screen.

The original plan was to review all of California's current instructions, revising only those that presented comprehension difficulties. It was decided early in the process not to revise the old instructions, but to draft a completely new set from scratch. This decision led to a better product in the end, but it also made the project substantially more expensive and time-consuming.

Over the course of about six years, the committee drafted hundreds of new instructions. All of them were circulated for public comment. The committee received a large amount of feedback, not just from individual lawyers and judges (including several justices on the state supreme court), but also from lawyers representing trade and advocacy groups. On occasion lawyers who made comments hoped to slant the instructions in favor of the interests they represented, but for the most part they made valid points that led to revisions in the committee's work. Eventually, in 2003, the full set of new instructions was approved by the California Judicial Council for use in the courts.[34]

Old vs. New Instructions: Examples

We now present a few examples of old and new instructions, along with some comments on how they differ. In each case the old (BAJI) instruction is the version that was in effect at the time the new instructions were approved by the Judicial Council,[35] and the new (CACI) instruction is the version that was approved by the Council for future use.[36] To facilitate comparison, in some cases only part of the relevant instruction is quoted. Brackets have been omitted to promote readability.

34. Use of the new instructions is not required. Although the BAJI committee has been officially disassociated from the Los Angeles Superior Court, its members continue to revise the old BAJI instructions, and some Los Angeles judges continue to use them.

35. California Jury Instructions: Civil (BAJI) (9th ed. 2002) [hereinafter BAJI].

36. Judicial Council of California, Civil Jury Instructions (CACI) (2006) [hereinafter CACI].

Old: Instructions to Be Considered as a Whole[37]

If any matter is repeated or stated in different ways in my instructions, no emphasis is intended. Do not draw any inference because of a repetition.

Do not single out any individual rule or instruction and ignore the others. Consider all the instructions as a whole and each in the light of the others.

The order in which the instructions are given has no significance as to their relative importance.

This is not a particularly bad instruction, although the formal and highly impersonal style has the effect of distancing the judge from the jury. It is also likely that many jurors will not understand what it means to "draw an inference" from a repetition.

The new instruction is more conversational while preserving the legal meaning. Notice also that the judge uses the personal pronouns "I" and "you":

New: Duties of the Judge and Jury[38]

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

Another instruction given in almost every trial relates to evidence and trial objections:

37. BAJI No. 1.01.
38. CACI No. 5000.

Old: Statements of Counsel—Stipulation to a Fact—Evidence Stricken Out—Insinuations of Questions[39]

Statements of counsel are not evidence; however, if counsel have stipulated to a fact, or a fact has been admitted by counsel, accept that fact as having been conclusively proved.

Do not speculate as to the answers to questions to which objections were sustained or the reasons for the objections.

Do not consider any evidence that was stricken; stricken evidence must be treated as though you had never known of it.

A suggestion in a question is not evidence unless it is adopted by the answer. A question by itself is not evidence. Consider it only to the extent it is adopted by the answer.

The second paragraph ("do not speculate. . .") in particular is syntactically quite complex. Consider now the new instruction:

39. BAJI No. 1.02.

New: Evidence[40]

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

Sometimes an attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

Another important instruction relates to the burden of proof. Here is the old definition of "preponderance of the evidence":

Old: Burden of Proof and Preponderance of Evidence[41]

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

40. CACI No. 106.
41. BAJI No. 2.60.

The verb "preponderate" is a very unusual word. The new instruction completely dispenses with the term:

> ***New: Obligation to Prove—More Likely True Than Not True***[42]
>
> *When I tell you that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is trying to prove is more likely to be true than not true. This is sometimes referred to as "the burden of proof."*

Not only does the new instruction avoid the verb "preponderate" in favor of the much more understandable "more likely true than not true" language, but it differentiates the civil standard of proof from the criminal standard, which may be familiar to many jurors from television or previous jury service:

> *In criminal trials, the prosecution must prove facts showing that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove a fact need only prove that the fact is more likely to be true than not true.*

As noted above, Vicki Smith's research suggests that incorrect prior knowledge or misconceptions are best counteracted by addressing them directly.[43] That is what the instruction tries to accomplish by comparing the civil standard of proof with the more familiar "beyond a reasonable doubt" standard in criminal cases.

Although in some cases plain-language instructions may be longer than those written in legalese, the opposite may also be true. Consider the old instruction on the duty of care of drivers and pedestrians:

42. CACI No. 200.
43. Smith *supra* note 26.

Old: Amount of Caution Required in Ordinary Care—Driver and Pedestrian[44]

While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not necessarily require the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alert to and conscious of the fact that in the driver's charge is a machine capable of causing serious consequences if the driver is negligent. Thus the driver's caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his or her own physical body to manage to set in motion a cause of injury. Usually that fact limits the capacity of a pedestrian to cause injury, as compared with that of a vehicle driver. However, in exercising ordinary care, the pedestrian, too, will be alert to and conscious of the mechanical power acting on the public roadway, and of the possible serious consequences from any conflict between a pedestrian and such forces. The caution required of the pedestrian is measured by the danger or safety apparent to the pedestrian in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position.

In contrast, the new instruction gets to the point much more quickly:

New: Duties of Care for Pedestrians and Drivers[45]

The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.

44. BAJI No. 5.51.
45. CACI No. 710.

Instructing on Circumstantial Evidence

We have seen above that traditional jury instructions tend to create processing difficulties for jurors, and that the concept of circumstantial evidence is particularly hard for jurors to grasp.[46] One reason for this difficulty is that, legally speaking, both direct and circumstantial evidence are equally valid ways of proving a fact, in contrast to the common perception that circumstantial evidence is of little value. People often seem to equate circumstantial evidence with weak evidence. In reality, direct evidence can sometimes be quite weak (e.g., an eyewitness identifying the defendant as having been present at the scene of the crime, even though it was very dark and the witness was far away and not wearing her glasses). And circumstantial evidence can be quite strong (a reliable witness hears a woman scream "don't kill me," hears a shot in the next room, opens the only door to the windowless room, and clearly sees a man—the only living person in the room—holding a smoking gun with the woman lying dead on the floor).

Furthermore, the distinction between direct and circumstantial evidence can be a subtle one. Direct evidence results from a sensory perception (seeing, hearing, smelling something or someone), without requiring any inferential reasoning to establish the fact in question. Circumstantial (or indirect) evidence also rests on a sensory perception, but the fact in question can be established only via inferences based on that perception. Now consider that a person's intent is usually critical to convict someone of a crime. Suppose that a woman told someone, "I intend to kill my husband tomorrow." Is that statement direct or circumstantial evidence of her intent? Even experts can disagree.

Let's see how the old instructions attempted to explain this difficult concept:

46. Saxton, *supra* note 4; Strawn & Buchanan, *supra* note 25.

Old: Direct and Circumstantial Evidence—Inferences[47]

Evidence consists of testimony, writings, material objects or other things presented to the senses and offered to prove whether a fact exists or does not exist.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

This sounds more like a college philosophy lecture than a genuine attempt to explain a difficult concept to a group of ordinary citizens.

In our experience as teachers, we have found that when explaining a complicated topic, it is often very helpful to illustrate a point by giving students an example or two. This is the approach taken by the new instruction:

47. BAJI No. 2.00.

New: Direct and Indirect Evidence[48]

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

Testing Comprehensibility

It is not practical to test the hundreds of pattern instructions current in any jurisdiction. Nor is it necessary. Linguists have identified certain types of syntactic complexity that interfere with or reduce comprehension.[49] We also know that unusual words create difficulties in understanding, and we now have tools available, such as word frequency dictionaries, that help determine exactly how unusual a word is.[50] Nonetheless, even when instructions have been drafted using principles intended to make them more comprehensible, it seems a good idea to test a sample of such instructions to determine whether they are in fact conveying the law in a way that is correct and

48. CACI No. 202.

49. *See* PETER M. TIERSMA, LEGAL LANGUAGE 203-210 (1999).

50. A word frequency dictionary lists the absolute and usually also relative frequency with which a particular word occurs in a corpus of texts, and is thus a means of determining how common a word is in that corpus (and by extension, how common the word is in the language represented by the texts in the corpus). *Id*.

understandable. We have already explained why we decided in this project to focus on circumstantial evidence.[51]

Methodology

The participants in our experiment were 66 undergraduate psychology students at the University of Southern California (USC).[52] Most of the students were either white or Asian, and their average age was around 20 years old. There were significantly more females than males (the ratio was approximately 3 to 1), but this is typical for a college psychology department. None had served on a jury. Somewhat under 10% had taken a law course, but their responses were similar to those of the rest. The students participated in the study to obtain course credit.

Participants were asked to imagine that they were members of a jury. They were told that at the end of a trial, jurors must reach a verdict and that in order to do so, the judge gives them instructions on the law.

Participants were randomly assigned to receive one of two written versions of the test instrument. One version contained the old instruction on circumstantial evidence. The other version had the new instruction. Participants were each given a written copy of the instruction and were told they were free to refer to it at any time. The instruction was followed by 16 factual scenarios. For instance, the first scenario was the following:

> A witness, who is a college biology professor, testifies that she saw mountain lion tracks in the mud behind her house. This testimony is *direct evidence/circumstantial evidence* that a mountain lion had been behind her house.

For each scenario, participants were asked to identify the type of evidence in question by circling "direct evidence" or "circumstantial evidence." Of the 16 scenarios, eight described circumstantial evidence and eight described direct evidence (see Appendix A). The results are summarized in Table 1.

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51. *See supra* pp. 1002-03.

52. The number and nature of participants in a study depends on practical considerations such as the availability of participants and, more importantly, the need to achieve statistical significance. In this case, we were able to show that the new circumstantial evidence instruction was significantly more comprehensible than the old instruction using the results obtained from 66 participants. By way of comparison, the Charrows' study had 35 subjects. Charrow, *supra* note 4.

Table 1: Percentage of Correct Responses for Each Statement by Instruction Received		
Question	**BAJI (old)**	**CACI (new)**
Q1 (c)*	64	85
Q2 (c)	61	64
Q3 (d)**	09	12
Q4 (d)	27	45
Q5 (c)	27	55
Q6 (d)	36	70
Q7 (d)	67	76
Q8 (c)	73	67
Q9 (c)	85	85
Q10 (d)	58	73
Q11 (c)	15	30
Q12 (d)	36	64
Q13 (d)	56	36
Q14 (d)	76	97
Q15 (c)	94	88
Q16 (c)	36	55
All circumstantial evidence questions	46	59
All direct evidence questions	56	66
Total	51	62

*Correct answer was circumstantial evidence.
**Correct answer was direct evidence.

Analysis

The overall comprehension rate for both groups is 57% correct. The difference between the groups receiving the old instruction (51% of all questions answered correctly) and the new instruction (62% correct) is statistically significant.[53] The same pattern holds if we compare those questions where the evidence was circumstantial (46% correct for the old instruction versus 59% for the new instruction) with those where the evidence was direct (56% correct for the old instruction versus 66%

53. An independent-samples t test showed the mean score for the new instructions (M=62.5, SD=15.7) was significantly higher than for the old instructions (M=51.2, SD=16.2), $t(64) = 2.88$, $p<.01$.

for the new instruction). We have no explanation for why participants generally performed better when the scenarios presented direct evidence.

It is interesting to observe that the overall score of participants receiving the old instruction is just over 50% correct. Because there were only two possible answers to each question, this group of participants could have done as well by randomly guessing or by circling the same answer for each question.

Yet when examining answers to individual questions, we found a great deal of variation. Although a majority of participants who received the old instruction gave the wrong answer to just under half of the questions (7 out of the 16), they did relatively well on some of the other questions. For instance, 94% circled the correct response for scenario 15, 85% were correct for scenario 9, and 76% were correct for scenario 14. Thus, their individual responses were most likely not the result of pure guessing.

Subjects receiving the new instruction did significantly better overall (62% correct). Given that the participants were students at a highly selective research university, the overall score of 62% correct (after receiving plain-English instructions) may seem disappointing. It should be borne in mind, however, that the difference between direct and circumstantial evidence is conceptually difficult. Moreover, few people in ordinary life sit back to contemplate whether evidence is one type or the other. We normally tend to be far more concerned with the strength of the evidence, not its classification as direct or indirect.

Although the new jury instruction on circumstantial evidence does indeed appear to increase juror understanding of this difficult concept, questions remain. As mentioned above, one issue is why participants who received the old instructions performed quite well with respect to certain scenarios. In particular, they had high correct response rates for scenarios 9, 14, and 15. Why might this be the case?

We begin with scenarios 14 and 15, which share a common fact pattern:

> A witness testifies in court that she was walking down the street and heard a loud crash (metal against metal) behind her. When she turned around, she saw Mr. Smith drive past her with a panicked look on his face. There were no other cars driving on the street. The witness walked in the direction of where she heard the

> sound and, about 100 feet back, discovered that a car parked on the street had a large dent on the driver's door.

The highest correct response rate for the participants who received the old instruction was for scenario 15:

> The witness's testimony is direct evidence/circumstantial evidence that Mr. Smith caused the damage to the parked car.

Of the participants who received the old instruction, 94% correctly responded that the testimony was circumstantial evidence, as compared to a similar but somewhat lower 88% for those who received the new instruction.

Notice that the evidence presented in this scenario is not just circumstantial, but it also is not very convincing. The damaged car might already have had a dent in it. Perhaps Mr. Smith crashed into some other metal object. In addition, the witness's testimony involves *hearing*. It may be that people regard seeing as more reliable than hearing, which (as we explore below) may cause them to associate hearing with circumstantial evidence. Question 14 is based on the same fact pattern:

> The witness's testimony is direct evidence/circumstantial evidence that Mr. Smith was driving down the street.

Of the participants who had the old instruction, 76% correctly identified the testimony as direct evidence of the conclusion, while 97% of those who received the new instruction answered correctly. In this scenario the witness's testimony is based on what she *saw* (not what she heard) and there is no indication that she was under any visual impairment. Thus, the testimony is not just direct, but is relatively strong proof supporting the conclusion that Smith was driving down the street.

The last of the three scenarios for which the participants who received the old instructions had relatively high correct response rates is number 9. Here the underlying issue is whether Mr. Williams, who lives in Los Angeles, was in San Diego on July 1.

> Mr. Williams's boss testifies that Williams did not show up for work on July 1, which was a normal work day. The testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

In both groups, 85% correctly responded that the evidence in support of the conclusion was circumstantial. As with scenario 15, the evidence is not just circumstantial, being based on an inference, but it is weak because there are several possible com-

peting conclusions that might explain Mr. Williams' absence from work. He could have been sick in bed at home, or he might have gone fishing at a location other than San Diego.

Based on these examples, it appears that participants, whether they received the old or new instruction, performed well with scenarios involving either weak circumstantial evidence or strong direct evidence. Scenarios 9 and 15 presented weak circumstantial proof, while 14 involved strong direct proof.

We previously mentioned that there seems to be a popular misconception that circumstantial evidence is equivalent to weak or less reliable proof ("that's just circumstantial evidence" is often said in a derogatory manner). The correlate would be that direct evidence is generally associated with stronger or more reliable proof. This is inconsistent with the legal standard, which holds that circumstantial evidence can be quite strong in some cases, and that direct evidence can be relatively weak.

If this is indeed the popular understanding of the term "circumstantial evidence," we would expect that participants will receive the highest correct scores in response to scenarios where the legal and popular meanings of the term *circumstantial evidence* lead to the same conclusion (i.e., weak circumstantial evidence or strong direct evidence). This, of course, is the situation with the scenarios (9, 14, and 15), which we analyzed above. Of course, some participants likely reached the correct conclusion with respect to these scenarios because they understood and were able to apply the instruction. Others, however, seem to have responded correctly because—purely by happenstance—the popular misconception led to the right outcome in these cases.

Another question raised by the study is why participants performed so poorly on some of the other scenarios. We would expect that participants will perform poorly in scenarios where the legal and popular conceptions of circumstantial evidence come into conflict (and where the popular definition would thus lead to the wrong result). We would also expect that participants who receive the old instruction, which is less effective in educating jurors on the legal meaning, would be more susceptible to providing wrong answers in this situation. We

therefore turn to those scenarios that received the lowest correct responses. Here, participants performed much worse than they would by random guessing.

The first and most dramatic example of a low correct response rate involves scenario 3:

> A witness testifies that she heard some geese honking overhead. She looked up but could not see them because it was too dark. This testimony is *direct evidence/circumstantial evidence* that geese had flown by.

The correct response—that hearing geese honk is direct evidence that geese had flown by—was given by only 9% of those who had the old instruction and 12% of those with the new instruction.

As with scenario 15, this question involves *hearing* something. We hypothesized in that case that some participants believe that *seeing* something constitutes direct evidence, whereas hearing something (or perceiving it with another non-visual sense) constitutes circumstantial evidence. Interestingly, the old instruction addresses this very issue by declaring that evidence consists of anything "presented to the senses." But the instruction seems to have had little effect: participants who had the old instruction seem just as susceptible to this visual bias as those who had the new instruction.

Recall that the new instruction uses an example to clarify the distinction between the two types of evidence (seeing the jet plane versus seeing the trail that it leaves behind). The overall higher correct response rate for those who had the new instruction suggests that illustrations can indeed increase comprehension. But because the example involves *seeing,* participants may not have applied the lesson to other types of sensory perception.

The second lowest correct response rate was achieved with scenario 11:

> The issue in a trial is whether Mr. Williams, who lives in Los Angeles, was in San Diego on July 1. An employee of a cell phone service provider testifies that according to the company's records, Mr. Williams's cell phone placed a call at 11.57am on July 1st from a location in San Diego. The testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

Only 15% of the participants who received the old instruction knew that this example constituted circumstantial evidence of

Mr. Williams's whereabouts. In contrast, 30% of participants who had the new instruction answered correctly.

In this scenario we have quite strong evidence that Mr. Williams was in San Diego on the date in question, because cell phone records are usually very reliable. But as proof that Williams was in San Diego, it clearly is circumstantial. The conclusion depends on an inference based on cultural knowledge about current American society (that a person and his cell phone are not soon parted).

Because the evidence is indirect, it must be categorized—according to the instructions—as circumstantial. But because the proof is strong, participants relying on the ordinary meaning of the phrase *circumstantial evidence* will classify it as direct. This scenario thus seems to confirm Vicki Smith's suggestion that it is not easy to overcome prior knowledge.[54] The new instruction appears to do a somewhat better job in educating participants on the legal distinction between the two types of evidence, but it also falls short.

Our hypothesis also predicts low correct response rates for weak direct evidence, since the ordinary understanding will again conflict with the legal meaning. The next lowest correct response rates for participants who had the old instructions are scenarios 4 and 5. Scenario 4 follows:

> A witness testifies that she saw a bear behind her house. She also testifies that it was dark, that she did not have her glasses on, and that the animal was a fair distance away. This testimony is *direct evidence/circumstantial evidence* that a bear had been behind her house.

Only 27% of participants who had the old instruction answered correctly that this is direct evidence. By contrast, 45% of those with the new instruction answered correctly. Since the witness saw the bear, participants should have recognized that this was direct (though weak) proof of the bear's presence. Nonetheless, most participants thought it was circumstantial evidence.

The final scenario that we will consider is number 5:

> A police officer testifies that when he was at the scene of an accident, he measured skid marks that were 100 feet long. It is undisputed that Jill caused the accident and that her car caused the skid marks. This testimony is *direct evidence/circumstantial evidence* that Jill applied her brakes before the accident.

54. Smith, *supra* note 26 at 507.

Again, only 27% of participants who had the old instruction correctly identified the evidence as circumstantial, while 55% of those who had the new instruction responded correctly. The conclusion in statement 5 requires an inference that the presence of skid marks suggests braking, and is thus circumstantial. But the evidence of braking is relatively strong.

There is little doubt that participants are heavily influenced by the ordinary meaning of circumstantial evidence as referring to less reliable proof. The old instruction counteracted the ordinary meaning to a limited extent. The new instruction is more effective, but the ordinary meaning still has a strong impact.

Discussion

We can draw a number of conclusions from this study. With respect to the instruction on circumstantial evidence, the new instruction is more effective overall than the old instruction. As previously noted, overall 51% of responses from participants who had the old instruction were correct, as compared to 62% of responses from those who received the new instruction. There are some scenarios where the participants who had the old instruction did quite well, but in most cases this seems to have been because both the legal and the ordinary definition of circumstantial evidence supported the same result.

Regardless of the instruction received, participants performed substantially worse when their prior knowledge or preconceptions concerning the meaning of "circumstantial" and "weak" evidence conflicted with the legal definition. The distracting effect of the ordinary meaning was quite a bit stronger on those participants who received the old instructions. The new instruction generally did a better job counteracting this influence, but nonetheless the effect was substantial.

We believe that the superior results obtained by the new instruction are due both to its more ordinary phrasing and to the fact that it presents jurors with an example or illustration. Nonetheless, using only a single example that is based on seeing with the eyes may not be effective when the evidence is perceived through the ears.

Given the problematic nature of circumstantial evidence and the distracting effect of the ordinary meaning of the term, it is worth asking why courts—especially but not exclusively in criminal cases—seem determined to try to teach jurors to properly classify evidence as one type or the other. The need to categorize the evidence seems especially bizarre because courts then proceed to tell jurors that what really matters is the strength of the evidence, not its classification as direct or circumstantial. Thus, the real point of these instructions seems to be that it doesn't matter how evidence is classified, as long as it reliably proves the fact at issue.

It is therefore tempting to recommend that juries not be instructed on circumstantial evidence at all, relying instead on general instructions relating to the burden of proof and strength of evidence. Yet the existence of the popular misconception that circumstantial evidence is weak suggests that judges should try to counteract this preconception by drawing explicit attention to it.

Thus, judges might instruct jurors that despite what they may have heard from other sources, circumstantial evidence is as valid a way to prove a fact as any other type of evidence. What matters is how strong or weak the evidence is, not whether it is direct or circumstantial.

If a judge or jury instruction committee decides that it is essential to try to educate jurors on the legal distinction between the two types of evidence, it should be done in ordinary language. And it will be helpful to include some examples. The lesson from this study is that it is best to have more than one example, illustrating different modes of perception, such as hearing or smelling. In any event, the example should be similar enough to the facts at issue to cause jurors to draw the appropriate connection.

Finally, our results suggest that even when instructions are drafted in accordance with plain-language drafting principles, it is worth testing them to determine whether and how well jurors are likely to understand them.[55] The legal concepts that a

55. We are doing additional testing of the new California instructions, including additional work on circumstantial evidence. We encourage other researchers to do the same.

judge conveys to the jury can be quite complex, so it may not be realistic to expect perfect comprehension. Yet it is clear that we can do better than we have in the past.

APPENDIX A

Statements and scenarios used in the authors' study.

1. A witness, who is a college biology professor, testifies that she saw mountain lion tracks in the mud behind her house. This testimony is *direct evidence/circumstantial evidence* that a mountain lion had been behind her house.

2. A witness testifies that she saw a man enter a room wearing a rain coat and holding an umbrella, both of which were dripping wet. This testimony is *direct evidence/circumstantial evidence* that it had been raining.

3. A witness testifies that she heard some geese honking overhead. She looked up but could not see them because it was too dark. This testimony is *direct evidence/circumstantial evidence* that geese had flown by.

4. A witness testifies that she saw a bear behind her house. She also testifies that it was dark, that she did not have her glasses on, and that the animal was a fair distance away. This testimony is *direct evidence/circumstantial evidence* that a bear had been behind her house.

5. A police officer testifies that when he was at the scene of an accident, he measured skid marks that were 100 feet long. It is undisputed that Jill caused the accident and that her car caused the skid marks. This testimony is *direct evidence/circumstantial evidence* that Jill applied her brakes before the accident.

6. A police officer testifies that he saw a man throw a pistol into a deep lake. Divers later cannot find any pistol. The officer's testimony is *direct evidence/circumstantial evidence* that the man had a pistol.

7. A president of a private club testifies that the board has repeatedly decided that they would not admit racial minorities as members. The testimony is *direct evidence/circumstantial evidence* that the club has a membership policy that discriminates on the basis of race.

8. An executive in a large company testifies that no member of a racial minority has ever become a manager at the company, although many have applied for such a position. The testimony

is *direct evidence/circumstantial evidence* that the company discriminates on the basis of race.

We will now ask you to read two scenarios. Following each scenario there will be four questions regarding a statement made by a witness in the case. ***Assume that the witness in each statement is telling the truth***. After reading each statement, please indicate whether you think the statement involves direct evidence or circumstantial evidence by circling what you believe to be the correct answer. As before we also ask that you indicate the confidence you have that your answer is the correct answer and that you do not change your answer after you have made it. Remember, if you wish you may make reference back to the instructions at the start of this packet explaining the difference between direct and circumstantial evidence.

Scenario A

The issue in a trial is whether Mr. Williams, who lives in Los Angeles, was in San Diego on July 1.

9. Mr. Williams's boss testifies that Williams did not show up for work on July 1, which was a normal work day. The testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

10. A clerk in a hotel in San Diego appears as a witness at trial, has a chance to see Mr. Williams in the courtroom, and testifies that she is "pretty sure" that on July 1, Mr. Williams came into her hotel, asked about a room, and left. The testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

11. An employee of a cell phone service provider testifies that according to the company's records, Mr. Williams's cell phone placed a call at 11.57am on July 1st from a location in San Diego. The testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

12. A woman who went to high school with Mr. Williams, and who has been blind from birth, testifies that she was in San Diego July 1 to visit a friend. As they were eating lunch in a restaurant, she distinctly heard Mr. Williams's voice. The

testimony is *direct evidence/circumstantial evidence* that Williams was in San Diego on July 1.

Scenario B

A witness testifies in court that she was walking down the street and heard a loud crash (metal against metal) behind her. When she turned around, she saw Mr. Smith drive past her with a panicked look on his face. There were no other cars driving on the street. The witness walked in the direction of where she heard the sound and, about 100 feet back, discovered that a car parked on the street had a large dent on the driver's door.

13. The witness's testimony is *direct evidence/circumstantial evidence* that there was a crash.

14. The witness's testimony is *direct evidence/circumstantial evidence* that Mr. Smith was driving down the street.

15. The witness's testimony is *direct evidence/circumstantial evidence* that Mr. Smith caused the damage to the parked car.

16. Suppose that an expert witness testifies that some paint found on Mr. Smith's front bumper is identical to the paint of the damaged car, and that only 1 percent of all cars have this kind of paint. The expert's testimony is *direct evidence/circumstantial evidence* that Mr. Smith caused the damage to the parked car.

Helping the Jury: An Argument for Sending Summary Demonstrative Evidence into the Jury Room

*Ryan E. Ferch**

When it comes to allowing evidence into jury deliberations, courts have been inconsistent in the way they have treated demonstrative evidence. Some courts require that demonstratives be admitted into evidence and therefore must also go to the jury room during deliberations; others will not allow demonstratives to be admitted into evidence, and therefore prohibit such evidence from going to the jury. In between are courts in which demonstrative evidence may or may not be admitted into evidence and may or may not be allowed into the jury room. In this article the ways in which courts have treated demonstrative evidence is reviewed and evaluated from the perspective of treating jurors as active information-processing trial participants. The author argues that in line with other memory aids that have been increasingly made available to jurors in recent years, such as note-taking, questions of witnesses, plain English instructions, and written jury instructions, three specific types of demonstrative evidence—witness summaries, attorney summaries and requests for relief—should be given to juries for use in deliberations.

Introduction

Technological advances over the last 20 years have changed the landscape of demonstrative evidence presented at trial. Attorneys and witnesses often use elaborate PowerPoint

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presentations or detailed maps and charts, or display professionally prepared poster boards containing important information, including requests for damages. This increased use of demonstratives is aimed at presenting information more clearly to the jury and helping jurors understand the information presented.

Jurors who see demonstratives during trial may reasonably anticipate that they will also be able to consult those maps, charts, boards or other demonstrations during deliberations. Yet they may be forced to rely only on their recollections of the summary material presented in the demonstratives.

In this article I argue that three types of demonstrative evidence, which I refer to as summary demonstrative evidence, can assist the jury during deliberations and should be sent to the jury room.

The three types of summary demonstrative evidence I discuss are: (1) summary charts, diagrams, PowerPoint presentations or other demonstratives prepared by witnesses and shown to the jury to illustrate and explain the content of their testimony; (2) similar demonstratives presented by an attorney (usually in opening statement or closing argument) to illustrate and explain the evidence; and (3) summary charts explaining exactly what relief is being requested.[1] While there are many different types of demonstrative evidence, I argue that these three categories of demonstratives may be particularly useful to juries during deliberations. Because these types of demonstrative evidence are generally not admitted into evidence at trial they are rarely sent to the jury room. However, demonstratives of this type provide condensed information that can help jurors accurately recall evidence. I propose that courts send all three types of summary demonstratives to the jury room during deliberations using standards and procedures that maximize the benefits of the demonstratives while minimizing possible prejudicial effects.

Courts have reached contradictory conclusions about the three categories of summary demonstrative evidence. For example, the United States Court of Appeals for the Tenth Circuit

1. For ease of reference, I will refer to these types of evidence as witness summaries, attorney summaries, and relief requests.

held that summaries prepared by an expert were "well nigh indispensable to the understanding of a long and complicated set of facts."[2] By contrast, the Seventh Circuit reversed a lower court's decision to send a witness's memoranda to the jury, holding that the witness's reports were a "neat condensation of the government's whole case against the defendant. The government's witnesses in effect accompanied the jury to the jury room."[3]

Some courts allow juries to view attorney summaries of witness testimony.[4] Other courts conclude that there is no reason to send summaries of witnesses' testimony to the jury room because they are only a reflection of testimony already presented orally.[5]

Finally, when an attorney presents demonstrative exhibits, such as charts explaining damage calculations, some courts have allowed the charts to be sent to the jury room,[6] others have refused to do so.[7]

The primary argument against sending these three types of summary demonstrative evidence to the jury room is that they are overly repetitive and, therefore, their admission is prevented by the rules of evidence. Some might argue that summary demonstrative evidence falls under Rule 403's exclusion of "needless presentation of cumulative evidence."[8] However, summary demonstratives are not needless if they help condense

2. Conford v. United States, 336 F.2d 285, 287 (10th Cir. 1964).

3. United States v. Ware, 247 F.2d 698, 700 (7th Cir. 1957). *Accord* United States v. Pendas-Martinez, 845 F.2d 938, 945 (11th Cir. 1988); United States v. Brown, 451 F.2d 1231 (5th Cir. 1971).

4. Hobbs v. Harken, 969 S.W.2d 318 (Mo. Ct. App. 1998).

5. Douglas-Hanson Co., Inc. v. BF Goodrich Co., 598 N.W.2d 262 (Wis. Ct. App. 1999).

6. Allison v. Stalter, 621 N.E.2d 977 (Ill. App. Ct. 1993). In *Allison* plaintiff's counsel prepared a memorandum detailing and providing numbers for the plaintiff's claim for damages in an auto collision. The Illinois Appeals Court upheld the lower court's decision to send the memorandum to the jury room during deliberations because the decision was "within the court's discretion" and the memorandum "was based on evidence presented at trial. . .which the jury was free to accept or reject." *Id.* at 980.

7. Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993). In *Lester*, a personal injury case, the court determined that the calculations on a chart were "nothing more than the opinions and argument of counsel." *Id.* at 864. The court reasoned the jury might focus on counsel's argument in the chart and might "mistake the opinions and argument for facts proven in evidence." *Id.* The court concluded it was a reversible error to allow the jury to view the exhibit during deliberations. *Id.*

8. FED. R. EVID. 403.

and clarify complex evidence. If the evidence is complex, summary demonstrative evidence can actually help prevent confusion of the issues.[9] The rules of evidence leave the decision whether to allow the evidence into the jury room in the judge's discretion.

The remainder of this article is divided into four sections. Section I provides background describing demonstrative evidence and the many different categories of demonstrative aids. Section II reviews arguments raised by courts for not sending demonstrative evidence to the jury. Section III discusses psychological research about information processing, endorsing the view that jurors are active information processors,[10] and presents arguments for sending demonstrative evidence to the jury room. Section IV presents practical suggestions to guide courts in sending demonstrative evidence to the jury room. I conclude that allowing these three types of summary demonstrative evidence into the jury room enhances jury comprehension of trial information and contributes to the fairness of jury trials.

I. What Is Demonstrative Evidence and When Is It Allowed into the Jury Room?

Demonstrative evidence consists of all things that are not testimonial or documentary evidence.[11] Robert Brian and Daniel Broderick describe demonstrative evidence as "any dis-

9. *Id.*(stating, in part, that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence.") If summary demonstrative evidence is relevant, Rule 403 cannot prevent its admission as long as the evidence's probative value is to aid the jury in correctly understanding the facts presented at trial by preventing confusion or misleading of the jury.

10. *See* B. Michael Dann, "*Learning Lessons*" *and* "*Speaking Rights*"*: Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1247-61 (1993); Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations, in* JURY TRIAL INNOVATIONS 8 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 2d ed. 2006).

11. *See* MCCORMICK ON EVIDENCE § 212 (John W. Strong ed., West Pub. 5th ed. 1999) [hereinafter MCCORMICK]. McCormick describes demonstrative evidence as things such as weapons, writing, apparel, and distinguishes those things from assertions of witnesses about things. *Id.* As McCormick states, "[demonstrative] evidence includes all phenomena which can convey a relevant firsthand sense impression to the trier of fact, as opposed to those which serve merely to report secondhand the sense impressions of others." *Id.* Here McCormick is cited to demonstrate how confusing the definition of demonstrative evidence can be.

play that is principally used to illustrate or explain other testimonial, documentary, or real proof, or a judicially noticed fact."[12] Thus, demonstrative evidence includes all visual aids presented during trial. Brian and Broderick identify six types of common demonstrative evidence: (1) in-court demonstrations, re-creations, or experiments; (2) models and other tangible objects; (3) charts, diagrams and maps; (4) photographs, movies, and videotapes; (5) jury views; and (6) computer-dependent animations and simulations.[13] The demonstrative evidence that I focus on here generally fits in the charts, diagrams, and maps category defined by Brian and Broderick.[14]

Substantive evidence is relevant if it tends to prove or disprove the probable existence of a fact.[15] Demonstrative evidence makes substantive evidence more understandable, and thereby heightens the perceived effect of substantive proof.[16] Demonstrative evidence is relevant in a derivative sense. For example, in a law suit involving a car accident, a map of the intersection where the accident occurred, detailing the location of items such as parked cars, traffic signals, and trees is demonstrative evidence. The substantive evidence is the actual intersection where the accident occurred. The map is demonstrative. It has a derivative relationship that makes the substantive evidence more understandable. The map helps the jurors visualize the accident scene and better understand the substantive evidence presented.

A. Demonstrative Evidence Offered into Evidence

Attorneys face a decision under the rules of evidence when using demonstrative aids. They must decide whether to proffer the aid without submitting it into evidence or to propose that it be admitted. This decision can have implications for whether the aid will be allowed to go to the jury room.

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12. *See* Robert D. Brian & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 968-69 (1992). Brian and Broderick argue that McCormick mischaracterizes the category of demonstrative evidence. *Id.* at 1005.

13. *See id.* at 969.

14. *Id.* at 969-70.

15. *Id.* at 975. *See also* FED. R. EVID. 403.

16. *See* Brian, *supra* note 12, at 972.

Demonstrative evidence must first be relevant in order to be used.[17] Relevant evidence is generally admissible,[18] but demonstrative evidence must also be properly authenticated before it may be used.[19] The decision whether or not to admit demonstrative evidence, even when properly introduced, remains within the judge's discretion.[20] Once admitted, the demonstrative evidence may be used by the attorney during the course of trial to clarify and illuminate other pieces of evidence.

In the case of summary demonstrative evidence such as diagrams and charts, the party offering it must show that it fairly summarizes the substantive evidence. For example, in *State v. Evans*, a murder case, the prosecution prepared two exhibits summarizing the testimony of various witnesses.[21] The state appellate court observed that "[i]llustrative evidence is appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence."[22] Recognizing that summaries can be powerful persuasive tools, the court provided the following rule: "the court must make certain that the summary is based upon, and fairly represents, competent evidence already before the jury. . . . [T]he chart must be a substantially accurate summary of evidence properly admitted."[23] The court further stated that the trial court fulfills its duty of ensuring that charts are substantially accurate by "allowing the defense full opportunity to object to any portions of the summary chart before it is seen by the jury."[24] The court concluded that "[t]he jury is . . . free to judge the worth and weight of the evidence summarized in the

17. FED. R. EVID. 401 ("evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

18. FED. R. EVID. 402 (With a few exceptions, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible.").

19. *See* FED. R. EVID. 901.

20. *See* People v. Williams, 655 N.E.2d 997, 1001 (Ill. App. Ct. 1995); Ware v. State, 702 A.2d 699, 721 (Md. 1997); Clark v. Cantrell, 529 S.E.2d 528 (S.C. 2000); State v. Allison, No. 01-C-019112CR00363, 1992 WL 217740 (Tenn. Crim. App. 1992); Vollbaum v. State, 833 S.W.2d 652, 659 (Tex. App. 1992).

21. State v. Evans, No. 376614-4-I, 1998 WL 184909 (Wash. Ct. App. April 20, 1998).

22. *See id.* at *3.

23. *See id.* at *4.

24. *Id.*

chart" once a trial court has determined the demonstrative evidence is admissible.[25]

The Federal Rules of Evidence allow attorneys to present and judges to admit into evidence summary information in the form of a chart, a written summary, or a calculation, if the information comes from writings, recordings, or photographs that are so voluminous that it would be impractical for the attorney to attempt to present all of the information in court.[26] This rule is limited to a narrow category of voluminous evidence and therefore will not likely cover the types of summary demonstrative evidence discussed here. However, with implementation of appropriate safeguards, the judge has discretion to send such evidence to the jury room during deliberations.[27]

Arguing that courts should admit demonstrative evidence, Brian and Broderick make a compelling argument for changing the wording of Rule 401.[28] Such a change would make it easier to admit demonstrative evidence and, thereby send it to the jury room during deliberations.[29] However, as Brian and Broderick note, the practice of courts is to assume the relevance of demonstratives under Rule 401 and rule on their admissibility under Rule 403.[30] As applied in practice, the current rules give judges discretion to admit demonstrative evidence and send it to the jury room.

B. Sending Demonstrative Evidence to the Jury Room

Many courts treat demonstrative evidence as substantive and require it to be admitted into evidence before showing it to the jury. Other courts allow attorneys to use demonstrations during testimony or arguments without requiring it to be ad-

25. *See id.*

26. FED. R. EVID. 1006 (stating that "the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.") The Advisory Committee's note points out that "[t]he admission of summaries of voluminous books, records, or documents offers the only practicable means of making [the] content available to judge and jury." FED. R. EVID. 1006, Advisory Committee's Note. The implicit assumption is that summaries are only appropriate for admission when the information they summarize is so voluminous as to make it unable to be presented reasonably by an attorney at trial.

27. *See infra* Section IV.D.

28. *See* Brian, *supra* note 12, at 1018-1026.

29. *See id.*

30. *See id.* at 976 n.64.

mitted into evidence.[31] The theory behind this more relaxed standard is that demonstratives, such as charts, graphs, and summaries, are useful for communicating with a jury, whether or not they are admitted into evidence, and attorneys should be allowed to use them.[32] However, when courts allow the use of demonstratives not in evidence, they hesitate to allow them without restrictions. Some courts require that the jury be admonished that the demonstrative exhibits are merely for demonstrative purposes and should not be considered evidence in any sense.[33] In courts following this approach, demonstrative evidence is not admitted and, hence, might not go to the jury room.

Jurisdictions vary in their willingness to send demonstrative evidence into the jury room during deliberations. In general, items that have been properly admitted into evidence can be taken into the jury room.[34] Some jurisdictions even go a step further by requiring trial judges to send items admitted into evidence to the jury room.[35] But in general, the decision whether or not to send items to the jury room is left to the discretion of the trial court.[36] In making its decision the trial court balances the probative value of the evidence against any possible preju-

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31. *See, e.g.*, Conford v. United States, 336 F.2d 285 (10th Cir. 1964); Williams v. First Security Bank of Searcy, 738 S.W.2d 99 (Ark. 1987); Hobbs v. Harken, 969 S.W.2d 318 (Mo. Ct. App. 1998); C.T. Taylor Co., Inc. v. Melcher, 468 N.E.2d 323 (Ohio Ct. App. 1983); Reichman v. Wallach, 452 A.2d 501 (Pa. Super. Ct. 1982).

32. *See Conford*, 336 F.2d 285. *See also Hobbs*, 969 S.W.2d 318.

33. *See, e.g.*, State v. Evans, No. 376614-4-I, 1998 WL 184909 (Wash. Ct. App. April 20, 1998).

34. Bieles v. Ables, 599 N.E.2d 469 (Ill. App. Ct. 1992) (citing 75B AM. JUR. 2D *Trial* § 1665 (1992)). *See* State v. Fellows, 352 N.E.2d 631 (Ohio App. 1975). *See also* MCCORMICK § 217.

35. Evry v. U.S. Auto. Assoc. Casualty Ins. Co., 979 S.W.2d 818, 820 (Tex. App. 1998) ("[T]he trial court is required to send all exhibits admitted into evidence to the jury room during deliberations of the jury." (citing First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983))).

36. United States v. Warner, 428 F.2d 730 (8th Cir. 1970); Rossell v. Volkswagen, 709 P.2d 517 (Ariz. 1985); Modelski v. Navistar Int'l Trans. Corp., 707 N.E.2d 239 (Ill. App. Ct. 1999); People v. Montague, 500 N.E.2d 592 (Ill. App. Ct. 1986); Marsillett v. State, 495 N.E.2d 699 (Ind. 1986); Weule v. Cigna Property and Casualty Co., 877 S.W.2d 202 (Mo. Ct. App. 1994); Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993); Rob-Lee Corp. v. Cushman, 727 S.W.2d 455 (Mo. Ct. App. 1987); Hodgdon v. Frisbie Memorial Hospital, 786 A.2d 859 (N.H. 2001); State v. Grogan, 253 S.E.2d 20 (N.C. Ct. App. 1979); *Melcher*, 468 N.E.2d 323; *Reichman*, 452 A.2d 501; State v. Jensen, 432 N.W.2d 913 (Wis. 1988); Douglas-Hanson Co., Inc. v. BF Goodrich Co., 598 N.W.2d 262 (Wis. Ct. App. 1999).

dicial effect.[37] The court considers: whether the material will aid the jury in a proper consideration of the case; whether a party will be unduly prejudiced by submission of the exhibit; and, whether the material may be subjected to improper use by the jury.[38] Demonstrative evidence that has been admitted into evidence will generally be allowed to go to the jury room just like items of substantive evidence.

Some courts treat demonstrative evidence as a distinct class of evidence and will allow use of demonstratives as visual aids during trial, but refuse to allow the items into the jury room.[39]

There is no bright line rule for whether or not courts will allow demonstratives not in evidence into the jury room. There is very little judicial review of demonstrative evidence that is used during trial without being admitted into evidence. Because the demonstrative exhibit is not formally offered into evidence, the trial judge does not rule on its admissibility. This lack of ruling prevents review by appellate courts. But the few jurisdictions that have reviewed the issue are split on whether demonstratives that are not admitted evidence should be allowed to go to the jury room.[40] Courts that send only admitted evidence to the jury room refrain from allowing non-admitted demonstrative evidence to the jury room.[41] As one court stated, "[a]s a general rule . . . exhibits should not be sent to the jury room which have not been admitted."[42] These courts usually hold that it is reversible error to allow materials not admitted

37. *Montague*, 500 N.E.2d at 599; People v. Pace, 587 N.E.2d 1257 (Ill. App. Ct. 1992).

38. *Jensen*, 432 N.W.2d at 921-22; *Marsillett*, 495 N.E.2d at 710.

39. *See, e.g.*, United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980); United States v. Abbas, 504 F.2d 123, 124-25 (9th Cir. 1974).

40. *Compare Lester*, 850 S.W.2d at 864 (stating that the "court committed reversible error when it allowed the jury to have during its deliberations a [non-admitted] chart") *with Melcher*, 468 N.E.2d at 324 (concluding it was not a reversible error for the trial court to send a chart to the jury room that had not been admitted into evidence).

41. *See, e.g.*, *Warner*, 428 F.2d 730 (although the court cited the rule not allowing items not in evidence to be allowed in the jury room, it nevertheless concluded the trial court had committed a harmless procedural error by allowing an indictment not admitted in evidence to be viewed by jurors during deliberations); Billman v. State Deposit Ins. Fund Corp., 563 A.2d 1110 (Md. Ct. Spec. App. 1989); *Lester*, 850 S.W.2d at 864; *Grogan*, 253 S.E.2d 20.

42. *Warner*, 428 F.2d at 738.

into evidence into the jury room because the materials are presumed to be prejudicial.[43]

Other courts find that demonstrative materials provide an aid to the jurors and allow the materials into deliberations even if they are not admitted into evidence.[44] The trial court has discretion whether or not to send these types of materials into the jury room.[45] For example, courts have found summaries provided by attorneys to be practically indispensable to understanding complicated facts and permitted the summaries to go to the jury room.[46]

Before allowing the jury to consider summary demonstrative evidence, the court must conclude that the demonstration fairly and accurately reflects evidence already admitted into evidence and that the aid does not unfairly prejudice the opposing party. The jury is also instructed that the material is merely representative and not evidence.[47]

II. Why Courts Refuse To Allow Demonstrative Evidence into the Jury Room During Deliberations

The major reason courts give for refusing to allow juries to use demonstrative evidence—whether admitted or not—during deliberations is a fear that it might prejudice the jury.[48] In addi-

43. *See, e.g.*, *Billman*, 563 A.2d at 1116.

44. Although it may seem counterintuitive for courts to allow jurors to review items not admitted into evidence, some courts find the information provided by this evidence is useful enough that a jury should consider it during deliberations. *See, e.g.*, Williams v. First Sec. Bank of Searcy, 738 S.W.2d 99 (Ark. 1987). *See also* Conford v. United States, 336 F.2d 285 (10th Cir. 1964).

45. *See, e.g.*, *Williams*, 738 S.W.2d at 393; Allison v. Stalter, 621 N.E. 2d 977 (Ill. App. Ct. 1993); Weule v. Cigna Property and Casualty Co., 877 S.W.2d 202 (Mo. Ct. App. 1994); *Melcher*, 468 N.E.2d 323; Reichman v. Wallach, 452 A.2d 501 (Pa. Super. Ct. 1982).

46. *See, e.g.*, *Conford*, 336 F.2d at 287.

47. *See id.* at 287-88; *Williams*, 738 S.W.2d at 102.

48. *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1059 (N.D. Iowa 2005) ("[I]t is within the discretion of the Trial Court, absent abuse working to the clear prejudice of the defendant, to permit the display of demonstrative or illustrative exhibits . . . in the jury room during deliberations.") (quoting United States v. Downen, 496 F.2d 314, 320 (10th Cir. 1974)). Extending the Court's logic, if an exhibit is prejudicial, or has the potential to be prejudicial when used during deliberations, it should not be given to the jury. *See also* FED. R. EVID. 403. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") Therefore, even if demonstrative evidence is rele-

tion to a general concern about prejudice, courts also fear that juries may place undue emphasis on demonstrative evidence or that it might take on a life of its own outside of the court's control.[49]

The first argument against allowing demonstrative evidence into the jury room is that because the jury's fact finding should be based solely on evidence admitted during trial, allowing jury members to view non-admitted evidence might unfairly prejudice their decision.[50]

In a Maryland suit to recover money from a debtor, for example, 1,232 exhibits were presented to the jury during the trial.[51] Ninety-four of those exhibits were demonstrative exhibits not admitted into evidence during the trial, and were improperly allowed to go to the jury room.[52] The box containing the 94 exhibits was accidentally placed in the jury room with other boxes containing admitted evidence.[53] During five and a half days of deliberations the jury viewed a few of the exhibits from the box.[54] Upon being notified of the mistake, the trial court removed the box from the jury room. On review, the appeals court decided that during deliberations the jury should not be permitted to view demonstrative evidence not admitted into evidence because it might unfairly prejudice the jury's decision.[55] Relying on the principle that juries should only be allowed to consider evidence admitted during trial, the court reasoned that non-admitted evidence contaminated admitted evidence because proper evidentiary procedures were not in

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vant and may be useful, the trial court may decide to exclude the evidence from the trial, and from consideration in the jury room, if the court believes the exhibit would be prejudicial or may serve to confuse the jury.

49. *See* Holland v. United States, 348 U.S. 121 (1954), *reh'g denied*, 348 U.S. 932 (1955). *See also* Lester v. Sayles, 850 S.W.2d 858, 864 (Mo. 1993)(en banc).

50. *See* Billman v. State Deposit Ins. Fund Corp., 563 A.2d 1110, 1115 (Md. Ct. Spec. App. 1989; *Lester*, 850 S.W.2d. 863 (citing Zagarri v. Nichols, 429 S.W.2d 758,761 (Mo. 1968)).

51. *See Billman*, 563 A.2d at 1114.

52. *Id.* at 1111.

53. *Id.* at 1112.

54. *Id.*

55. *Id.* at 1116. This holding was reversed by the Court of Appeals of Maryland because the respondent (the original defendant Billman) failed to show "probable prejudice" that justified a new trial under the Maryland standard. State of Md. Deposit Ins. Fund Corp. v. Billman, 580 A.2d 1044, 1051-65 (Md. 1990). Nevertheless, the Court of Special Appeals' reasoning still illustrates a court's unfair prejudice logic.

place. Therefore, the court concluded the jury's consideration of such evidence in the jury room was prejudicial and found the trial court's failure to grant a mistrial reversible error.[56]

Second, some courts fear that demonstrative evidence not subject to the procedural safeguards of admission may unduly influence the jury.[57] For example, in an action to recover for injuries sustained in a traffic accident, a Missouri court prevented demonstrative evidence from going to the jury room based on an undue influence argument.[58] The court held that the jury should not be allowed to view in the jury room a damages chart prepared by the plaintiff's attorney for fear that the jury would place too much emphasis on the opinions contained in the chart and not enough emphasis on actual probative evidence provided during trial.[59]

Other courts simply feel that because demonstrative evidence repeats information already presented at trial it will overly influence jurors when compared to other evidence.[60] Courts have expressed concern that allowing the jury to view summaries of witnesses' testimony during deliberations is the same as allowing witnesses to accompany the jury to the jury room.[61] Other courts fear jurors will give undue weight to written transcripts of a witness's testimony especially when compared to memories of oral testimony.[62] Finally, some are concerned that a summary of a witness's testimony—such as a chart prepared by an expert witness—would be unduly repeti-

56. *See, e.g.*, *Billman*, 563 A.2d. at 1116.

57. United States v. Pendas-Martinez, 845 F.2d 938, 941 (11th Cir. 1988). *See also,* Dep't of Transp. v. Sharpe, 486 S.E.2d 619 (Ga. Ct. App. 1998) (citing Dep't of Transp. v. Benton, 447 S.E.2d 159 (Ga. Ct. App. 1994)); Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993) (en banc); Hobbs v. Harken, 969 S.W.2d 318 (Mo. Ct. App. 1998); Hodgdon v. Frisbie Memorial Hospital, 786 A.2d 859, 864 (N.H. 2001).

58. *See Lester*, 850 S.W.2d 858.

59. *See id*. at 864.

60. *See Pendas-Martinez*, 845 F.2d 938; *Hobbs*, 969 S.W.2d at 326 (citing O'Neal v. Pipes Enters., Inc., 930 S.W.2d 416, 421 (Mo. Ct. App. 1995)) (distinguishing the facts from O'Neal and allowing summary to go to the jury); *Hodgdon*, 786 A.2d at 864-865 (citing Norfolk and Western Ry. Co. v. Puryear, 463 S.E.2d 442, 444 (1995)).

61. *Pendas-Martinez*, 845 F.2d at 941 ("The government's witnesses in effect accompanied the jury into the jury room.") (quoting United States v. Brown, 451 F.2d 1231, 1243 (5th Cir. 1971)).

62. *See, e.g.*, *Pendas-Martinez*, 845 F.2d 938.

tive, also causing the jury to give it too much weight.[63] These courts rely on the procedural safeguards surrounding admission to protect the validity of the evidence.

The third argument for refusing to allow demonstrative evidence into deliberations is that the evidence will "take on a life of its own" in the jury room.[64] Courts fear that demonstrative evidence may take on a different meaning independent of the evidence which gave rise to the demonstrative.[65] For example, numerical figures and computations presented on a chart may be used in a manner inconsistent with the way they were used during trial.[66] This could allow the jury to essentially create new evidence outside of the protection of the court.[67] The Supreme Court recognized this danger in discussing the "net worth method," which requires assumptions in calculations and is used to prove that a defendant willfully attempted to defeat and evade income taxes.[68] The Court stated that allowing a jury to have the figures during deliberations posed a great danger because "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."[69] The court was concerned that the jurors might use demonstrative evidence to create new evidence.[70]

These rationales for prohibiting demonstrative evidence from being in the jury room all assume that such evidence will unfairly prejudice or improperly influence the jury. Psychological research about the ways in which people process new information shows that the potentially prejudicial effects of demonstrative material may be overstated.

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63. *See* Hobbs, 969 S.W.2d. at 326. The court continued that allowing a jury to hear a repetition of a witness's testimony would "invade a juror's duty to solely determine the fact according to their memory." *Id.* at 326.

64. *See* Holland v. United States, 348 U.S. 121, 128 (1954), *reh'g denied*, 348 U.S. 932 (1955).

65. *See id.*

66. *See id.*

67. *E.g.*, Modelski v. Navistar Int'l Trans. Corp., 707 N.E.2d 239 (Ill. App. Ct. 1999). In *Modelski*, the jury was permitted to view and use a tractor seat assembly used as demonstrative evidence during trial. *Id.* The appeals court determined that it was improper to allow the jury access to the seat assembly because the jury was able to conduct their own experiments outside the protection of the trial court and attorneys in determining the likelihood that the bolt assembly of the seat was faulty thereby causing the user to fall off. *Id.*

68. *Holland*, 348 U.S. at 124.

69. *Id.* at 127-28.

70. *See generally id.*

III. Why Demonstrative Evidence Should Be Sent To The Jury Room

Jurors, like other people, are active processors of information.[71] Jurors bring their expectations and biases with them to the courtroom and search for reasonable and causal explanations to make sense of the events described.[72] In this search for explanation, jurors process information to fill in gaps, they reject information that is inconsistent with their beliefs and expectations,[73] and they link testimony in ways that strongly influence their decisions before they even reach the jury room.[74]

As complex, active thinkers, jurors are processing and evaluating evidence—whether substantive or demonstrative—during trial. Demonstrative evidence is presented to help jurors comprehend the information presented. This same demonstrative evidence, if allowed into the jury room, could serve as a memory aid for the jurors as they discuss all of the relevant materials before reaching a final decision.

A. Information Processing

One model of human learning developed and tested by cognitive and social psychology is the schema. A schema is a general knowledge structure used for understanding.[75] People use schemas to help place and relate certain facts. A specific schema consists of a general frame with slots for particular information.[76] Schemas help the information processor understand and remember how actions take place.[77] For example, people have a basic general framework for meeting new people. This framework is a schema that could be represented as:

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71. Dann, *supra* note 10, at 1242; Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1861 (2001); Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 7 (2003).

72. *See* Diamond & Vidmar, *supra* note 71, at 1860.

73. *See* Diamond & Vidmar, *supra* note 71, at 1861 citing multiple studies supporting the notion that jurors are active decisions makers. *Id.* at 1861 nn.12-14 and accompanying discussion. Specifically, these studies demonstrate that jurors find it easier to remember information that is consistent with their theory than information that is inconsistent with their theory, and they tend to interpret ambiguous information as consistent with their previously constructed theory. *Id.*

74. Diamond & Vidmar, *supra* note 71, at 1860.

75. Douglas L. Medin et al., Cognitive Psychology 254 (3d ed. 2001).

76. *Id.*

77. *Id.* at 256.

Person:	_____
Job/Position:	_____
Role:	_____
Who he relates to:	_____
Purpose:	_____

This basic schema of person, job, role, who he relates to, and purpose is a general framework for learning new information that is used by a person whenever he needs to learn about a new person, whether in the context of a cocktail party or a court room. The blank slots represent information that the person will fill in to better understand the new person. Jurors use many schemas during the trial process. Jurors use the general schema above to learn about new people at trial. When applied in a courtroom setting, this schema might look like this:

Person:	Mr. Jones
Job:	Lawyer for the plaintiff
Role:	Speak for plaintiff
Who he relates to:	The judge and us (jury)
Purpose:	Win case by getting money from defendant

This basic schema is filled in with general assumptions about a trial—such as the assumption that the person wearing a robe behind the bench is the judge. The juror does not need to know much information to come to this conclusion and can use this general assumption until proven wrong. Jurors may use basic schemas to learn the small details of court, like the lawyer's names and roles. They use larger, more complex schemas when attempting to comprehend the entire case.

The Story Model of jury deliberations, pioneered by Pennington and Hastie, describes a larger, more complex mental framework for jurors' information processing.[78] The Story Model posits that jurors use the mental framework of a story to process the information presented at trial and to assign meaning to events that take place during trial and to those described in the evidence.[79] This approach enables jurors to organize material that is presented in disjointed question and answer ses-

78. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992).

79. *See id*.

sions that are distinctly different from the normal human learning environment.[80] Jurors attempt to assign meaning to the confusing and new events that are occurring during the trial.[81] They begin to construct a story of what happened, starting with a bare outline—much as an outline at the beginning of a text book describes the text within.[82] As the trial progresses, jurors fill in blanks in the story either with information presented during the trial or by inference based on their experience of how the world works.[83]

Demonstratives are intended to help jurors fill in the blanks. For example, a timeline gives jurors an outline for organizing the events the parties are arguing about and lets them place other information in context, such as where a person was on a particular day or the surrounding circumstances of an event. Likewise, charts, graphs or illustrations presented to the jury during a witness's testimony can help jurors recall and understand information already presented. These tools can help jurors to organize and understand new information.

By the end of a trial many jurors have constructed tentative stories of the events discussed during the trial. In the jury room the jurors work together as a group to construct the story that they believe best reflects the evidence presented at trial. Allowing jurors to have in the jury room summary demonstrative evidence that was presented to them during testimony or argument can help them in constructing a story that conforms to the evidence presented during the trial.

B. Allowing Jurors to Have Summary Demonstrative Evidence in the Jury Room

Scholars have argued for changes in the trial system aimed at helping jurors better understand the information they receive at trial.[84] The American Bar Association has adopted *Principles*

80. Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714 (1996). Broyles presents a hypothetical contrasting the question and answer method of the modern trial with a normal learning setting of a classroom. *See id.* at 714-15.

81. *See* Pennington & Hastie, *supra* note 78, at 189-90.

82. *See* Diamond & Vidmar, *supra* note 71, at 1862.

83. *Id.*

84. *See generally* Dann, *supra* note 10, at 1247–61 (listing and summarizing suggestions of multiple authors for changing the judicial system to accommodate the knowledge that jurors are active processors of information). *See* JURY TRIAL

for Juries and Jury Trials that incorporate many of these recommendations, including: giving jurors substantive preliminary instructions at the outset of a trial, allowing jurors to take notes and, in civil cases, to submit written questions, providing jury instructions in plain English, and in written form for each individual juror to follow along while the charge is being given and for use in deliberations.[85]

Empirical research has recently shown that these recommended changes may actually help jurors reach better decisions. For example, a 2003 study examined the effect of preinstructions, note taking, providing trial transcripts, and jury size on juror comprehension of evidence and outcomes.[86] The study found that "jurors provided with certain cognitive aids render more legally appropriate decisions than making decisions without aids."[87] These aids enabled jurors to better understand and recall trial evidence, which led to better deliberations and, therefore, better decisions.[88] Another study found "that use of multiple innovations" (including an exhibit notebook, note taking and a technical checklist) improved juror comprehension of complex mtDNA evidence.[89]

Sending demonstrative evidence to the jury room is in line with these recommendations. Summary demonstrative evidence such as charts, timelines, outlines, and illustrations can help jurors better understand and more easily recall the information presented during trial. Allowing the jury to use, during deliberations, demonstrative evidence that was presented during witnesses' testimony can help guard against juror confusion.

Summary demonstrative evidence can help clarify information presented and minimize juror confusion. By recognizing

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INNOVATIONS (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 2d ed. 2006).

85. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS 7, 8, 17-21 (2005), http://www.abanet.org/jury/pdf/final%20Commentary_july_1205.pdf.

86. Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184, 186 (2003).

87. *Id.* at 190.

88. *See id.*

89. B. Michael Dann, Valerie P. Hans, and David H. Kaye, *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?* 255 NIJ JOURNAL 2, 6 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/jr000255.pdf.

that jurors are active processors of information and allowing summary demonstrative evidence to go to the jury room during deliberations the judicial system can maximize the benefits of the jury system.

IV. How to Allow Summary Demonstrative Evidence into the Jury Room

A. Witness Summaries

Summary demonstratives used by witnesses during their testimony are arguably the least controversial form of summary demonstrative evidence. The witness's testimony has already been deemed admissible; the summary was already shown to the jury (presumably as a tool to aid in comprehension). Allowing such summary evidence into the jury room during deliberations would give juries a memory aid (similar to their own notes or the written copy of the judge's charge).

Such summary demonstrative evidence should be presented to the opposing party for review before the trial court is asked to exercise its discretion and send the demonstrative to the deliberating jury. Summary demonstratives approved by both the opposing party and the judge may be allowed into the jury room during deliberations as long as they are not overly repetitive.[90] The jury must be admonished that summary demonstrative evidence is not substantive evidence and, like jurors' notes, is to be used only as a memory aid.

Here is a hypothetical demonstrating how this might work. In a civil case involving allegations of price-fixing, the president of the plaintiff company would likely testify about his experience dealing with the defendant company and how the prices he paid changed over time. This testimony might be lengthy and complex, covering the nature of the business, its business model, how the company made purchases, the president's qualifications and past experience, and his experience in this case, among other information relevant to the case. During the testimony, illustrative charts might be used to help the jury

90. *See* FED. R. EVID. 403. The probative value of summary demonstrative evidence is to help the jurors understand complex testimony and prevent confusion. *See supra* Section I.

understand how the business is structured and operates. After the testimony, the plaintiff's attorney would review the summary demonstratives used during the testimony to make sure that everything included in the charts or illustrations, including information elicited by cross-examination, was actually covered in the testimony. The plaintiff's attorney would present the demonstratives to the opposing party, who would check for accuracy. If there were no objections, these demonstratives would then be submitted to the court with a request that they be supplied to the jury during deliberations.

B. Attorneys' Summaries

Attorney summary demonstratives would typically be prepared for use in an opening statement or closing argument. For example, an attorney's summary demonstrative might present an outline of damages the plaintiff is seeking broken down by category, including brief summaries of the testimony supporting each amount and the witness who testified to that information.[91] The plaintiff's attorney in the hypothetical price-fixing case might prepare a request for damages outlining the details of the price-fixing agreement, including the purchases, prices, and years of the alleged agreement as testified to by the com-

91. *See* Allison v. Stalter, 621 N.E.2d 977 (Ill. App. Ct. 1993); Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993)(en banc); C.T. Taylor Co., Inc. v. Melcher, 468 N.E.2d 323 (Ohio Ct. App. 1983). In *Taylor*, the "exhibit was a sheet of white paper, 26" x 32", upon which plaintiff's counsel wrote:

'Damages

1. Mis-order panels	1,468.00
2. Freight	154.16
3. Track Covers + Voltage	900.00
4. Mis-order Insulation	286.25
. . .	
11. Add motel costs	1,699.02
12. Add transportation costs	800.00
13. IRS penalty & Interest	2,850.00
	31,246.34
Dollars paid to Melcher	137,400.00
Pd. Out	–76,332.33
	61,067.67
Melcher	–25,000.00
Unaccounted for	36,067.67
Total	$67,314.01.'"

Taylor 468 N.E.2d at 324 n.1. The jury awarded damages in the amount of $52,701.75. *Id.* at 323.

pany's president and other witnesses called by the plaintiff. Unlike the company president's summary, this summary would be written by the plaintiff's attorney to provide a more complete picture of the case by covering testimony of multiple witnesses and summarizing much of the evidence presented at trial.

Demonstratives used during attorney argument are more problematic than those presented by witnesses. A demonstrative prepared solely for presentation during attorney argument is obviously more likely to be designed to incorporate adversarial themes and rhetoric. However, if properly controlled, even demonstratives presented during attorney argument should still be allowed to go to the jury room.

Attorney demonstratives representing information already testified to during trial can be as helpful to jurors as are witnesses' summary demonstratives. Using the damages example above, the attorney's summary demonstrative might be an annotated version of a damage expert's summary demonstrative. The attorney might include quotes from the expert's testimony supporting each piece of information on the chart.

For summaries of evidence, attorneys should be able to prepare charts or timelines for the jury that are shortened representations of information already presented. Like witnesses' summaries, these charts should be presented to and approved by opposing counsel before submission to the trial court. As with witness summaries, the judge reviews the attorney summary to ensure that it fairly and accurately represents information already admitted into evidence or testified to.

At least two arguments can be raised for hesitating to allow attorney demonstratives to go to the jury during deliberations. First, in a damage summary, as an example, not all evidence presented will be concrete.[92] The court can require attorneys to differentiate information concretely presented during trial from that presented through argument. Different colors could be used on a chart with a key denoting which color was

92. Unlike with lost wages, a punitive damage request is usually not for a specific amount and may not be based on a specific mathematical formulation. However, when a plaintiff presents economic evidence supporting a claim for punitive damages—such as a company's net worth, or its sales or profits—that evidence might be included as part of a damage summary.

concrete and which was not. Alternatively, argument could be set off by an asterisk or other marking feature to separate it in the jurors' minds. As with witness summaries, the trial court could admonish the jury that the demonstrative is not evidence. Second, production of charts can be expensive and might advantage a wealthier party. Where there is a disparity in resources, the trial court can require parties to conform to formatting guidelines that are financially feasible for both parties. While attorney summary demonstratives have the potential to be prejudicial, the opportunity to allow the jurors to make a properly informed decision in complex cases may outweigh the prejudicial potential.

C. Relief Requests

The essence of any attorney argument is the desired outcome. When jurors retire to the jury room, they are asked to make a factual finding that determines which side prevails. In order to accomplish this function, jurors must understand what the attorneys are asking the jury to do.

Therefore, a narrow category of information that is part of attorney argument should be reduced to summary form and allowed to go to the jury room to prevent confusion and improve jury decision making. A clear statement of the relief sought by each side should be sent to the jury room during deliberations.

There are two approaches to providing summary relief requests to the jury. Courts could develop and require a standardized form for such relief requests. The form would allow the attorney to present a bare-bones outline of the argument, similar to any other outline. It would include a section for the requested relief and a section for summarizing evidence supporting the request. In practice this form would look similar to attorney summary demonstratives discussed above, but the specific format would be created by the court. Alternatively courts could provide attorneys with specific guidelines for preparing written summary relief requests to be made available to the jury during deliberations. Both sides would follow the same guidelines. Submission of such relief requests to the court can accompany other pre-deliberation submissions such as proposed jury instructions. Accordingly such submissions can fit seamlessly into existing trial procedures. Whether parties are

provided with a court-prepared form or court-prepared guidelines, the resulting product will improve jurors' ability to use their own judgment to weigh each party's relief requests in light of the evidence presented.

D. Procedural Matters

The judge has discretion to decide whether admitted summary demonstrative evidence should be allowed to go to the jury room.[93] To aid the judge in making this decision, all of these suggestions require additional procedural safeguards. First, before submitting summary demonstrative evidence to the jury, both sides' demonstratives must be reviewed and approved by the trial court. The court assures that any demonstrative evidence that goes to the jury is factually supported, reflects information actually presented at trial, and is not prejudicial or argumentative.[94] Second, before summary demonstrative evidence will be made available to the jury during deliberations, the trial court can admonish the jury that the summaries are just that, summaries. They are provided as memory aids and they should not be given the same weight as substantive evidence provided during trial.[95] An admonish-

93. A small number of courts allow unadmitted evidence into jury room, but they are the exception, not the rule. *See supra* Section I.B.

94. *See* Williams v. First Security Bank of Searcy, 738 S.W.2d 99 (Ark. 1987) (stating the determining factor is "if the items is an accurate reflection of the testimony"). *See also* Conford v. United States, 336 F.2d 285 (10th Cir. 1964) (stating the court should be "satisfied [the summaries] accurately reflect other evidence in the case before sending them to the jury room."); Marsillett v. State, 495 N.E.2d 699 (Ind. 1986) (stating "whether any party will be unduly prejudiced by the submission of the material" as a criteria to be considered before sending items to the jury room.); Weule v. Cigna Property and Casualty Co., 877 S.W.2d 202 (Mo. Ct. App. 1994) (stating exhibits should be "marked identified, dated, and their contents testified to"); State v. Jensen, 432 N.W.2d 913 (Wis. 1988) (stating a court should consider "whether a party will be unduly prejudiced by submission of the exhibit" before sending an exhibit to the jury room.").

95. A potential jury warning might read:

> The [State] [Plaintiff] [Defendant] has introduced (a) demonstrative exhibit(s) in the form of [a chart, summary, calculation, etc.]. This information is presented:
>
> 1. to assist you as an aid in your understanding of (a witness') testimony here in court; and/or
> 2. to help explain the facts disclosed by the books, records, and other documents that are evidence in the case.
>
> This [chart, summary, calculation, etc.] is intended to assist you in remembering what the [document, witness] said. If the [chart, summary, calculation, etc.] is not consistent with the facts or figures shown by the evidence in this case, as you find them, you should disregard the [chart, summary, cal-

ment would properly characterize the summary demonstratives for the jury and frame how they should be utilized during deliberations.[96] Third, by requiring, or at least allowing, both parties equal opportunity to present summaries, the jury should not be unduly prejudiced by one party. These procedural safeguards should allow the jury to use summaries without being unduly prejudiced.[97]

These suggestions are predicated on the idea that the jurors' comprehension of the information presented is vital in making a responsible decision. If demonstrative evidence will not be sent to the jury room, the court should warn the jurors before the trial begins that they may see demonstratives, charts, or diagrams that will not be sent to the jury room and they should pay close attention to the exhibits as they are presented or write in their notes the information they consider vital. A brief instruction would prime the jurors to pay acute attention during the course of the trial and would also prevent confusion when the jury finds out the exhibits they relied upon are not allowed in the jury room.[98]

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culation, etc.] and determine the facts from the underlying evidence. *Adapted from* 10 Minn. Prac., Jury Instr. Guides, Criminal Jury Instruction 3.26.

Alternatively if the demonstrative evidence has been admitted into evidence the jury warning might read:

During the trial the (State) (plaintiff) (defendant) used [(a) chart(s), (a) summar(y)(ies) (or) (a) calculation(s)]

1. as an aid to your understanding of (a witness') testimony; and/or
2. to help explain the facts disclosed by the books, records, and other documents that are evidence in the case.

[(Charts), (summaries) (or) (calculations)] are based on the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Adapted from 10 Minn. Prac., Jury Instr. Guides, Criminal Jury Instruction 3.27.

96. Some empirical research has shown that jurors do not understand or recall some admonitions or instructions. *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997); Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287 (1998). However, poor comprehension or recall is not a reason not to instruct, but a reminder to improve clarity when instruction is given.

97. A similar procedure has been approved by at least one appellate court. *See* Swallow v. United States, 307 F.2d 81, 84 (10th Cir. 1962).

98. The following exchange shows what happens when jurors find out that information they considered important is not allowed in the jury room:

Juror #6: That's it? Everything on the chair?
Bailiff: Yeah, that's all that was admitted.
Juror #7: The . . .books of depositions weren't?

Conclusion

Allowing jurors to have summary demonstrative evidence while they are deliberating can maximize their ability to be reasonable fact finders. Courts, therefore, should allow jurors to review all three categories of summary demonstrative evidence discussed here—summary demonstratives presented during witness testimony; summary demonstratives presented during attorney argument; and, summary relief requests—during deliberations because they allow the jurors to consistently apply their common sense in reaching a decision. If proper procedural safeguards are employed, allowing summary demonstrative evidence into the jury room enhances jury comprehension of trial information, thus contributing to the fairness of jury trials.

Bailiff: Yeah. I guess that's not something you guys get to . . .look through.
Juror #7: Wow. That's pretty important
Juror #6: I was picturing a big pile [of exhibits].
. . .
Juror #3: I tried to write it down as best I could, but that board had the tiny, tiny stuff [writing]. They didn't leave it up long enough for me to write all the stuff in.

The above exchange happened in a trial that was included in the Arizona Filming Project in which deliberations were videotaped. The discussion occurred at the beginning of deliberations when jurors first received the exhibits from the court. The transcript was provided by Professor Shari Seidman Diamond and is on file with the author. For a complete description of the Arizona Filming Project, see Diamond, et al. *supra* note 71. Other publications drawing on data from the Arizona Project include, for example, Diamond & Vidmar, *supra* note 71; Shari Seidman Diamond et al., *Inside the Jury Room: Evaluating Juror Discussions During Trial,* 87 JUDICATURE 54 (2003); Shari Seidman Diamond, *Truth, Justice, and the Jury,* 26 HARV. J.L. & PUB. POL'Y 143 (2003); Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Jurors' Unanswered Questions*, 41 CT. REV. 20 (2004); Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927 (2006).

How Juror Internet Use Has Changed the American Jury Trial

*Ellen Brickman, Ph.D., Julie Blackman, Ph.D., Roy Futterman, Ph.D., Jed Dinnerstein**

Inevitably, the rise of the Internet has affected jurors' behaviors. When faced with new, stimulating information in voir dire or during trial, some jurors are turning to the Internet for background, clarity, or detailed information. In doing so, they are exposing themselves to potentially prejudicial media coverage and other extrinsic information that is outside the scope of what they would hear in the courtroom. Such information might include: inadmissible evidence; legal documents; information about the parties, crime scenes, and attorneys; and, definitions of legal and scientific terminology that may contradict judges' instructions.

In the face of this new juror behavior, judges and attorneys are encouraged to alter their techniques for handling exposure to information about the case or parties. Standard warnings to avoid media coverage tend to go unheeded. Jurors often do not even realize that Internet searching could be biasing.

This article examines the emerging problem of jurors' Internet research and the dangers it poses, and offers recommendations for reducing the likelihood of juror Internet research and mitigating its effects when it does occur.

Introduction

The explosion of the Internet in the past decade has changed American life. With an estimated 74% of North Americans now using the Internet (and a 130% usage growth rate from 2000 to 2008),[1] it has changed the way we communicate,

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1. Internet World Stats, http://www.internetworldstats.com/stats.htm.

learn, transact business, and run our personal lives. It has permeated every aspect of our society, including the American courtroom. The Internet, and the ways in which jurors may use it, is a force that must be reckoned with by the courts and by attorneys.

One hallmark of the trial process is that the court strives to control the flow of information to jurors: witnesses are named in advance; trial exhibits are submitted and approved by the judge; and, jurors are banned from obtaining information from outside the courtroom. In a sense, though, the very existence of the Internet is antithetical to the idea of a controlled flow of information. It is so easy to obtain enormous amounts of information with minimal effort that many people automatically search the Internet when confronted with a new name, subject, idea or other stimulus. In the face of ignorance—or curiosity—we "Google." We search, and we expect to find almost unlimited access to vast stores of information. This cultural expectation may be intruding on and interfering with the workings of the American courtroom.

The New American Courtroom: Jurors as Internet Researchers

Two anecdotes from our recent experience as trial strategy consultants illustrate the nature of this intrusion. The first is the 2007 re-trial of David Lemus, a high profile New York City case. He was convicted in 1992 of killing a nightclub bouncer, and sentenced to 25 years to life. After serving 15 years, new evidence resulted in Lemus being granted a new trial.

Jury selection for the re-trial began with an introduction to the case and some brief background questions. Before the lunch break, the judge instructed the panel not to discuss the case but did not instruct them not to read about the case. The break was going to be brief. When questioning resumed later, the panel was asked if anyone knew anything about the case. One juror said he had not heard of the case before, but the morning session had piqued his curiosity so he had used his cellular phone's web browser to learn more. Two others also reported conducting Internet searches during the break but, perhaps upon seeing the judge's reaction to the first juror's

search, said they had not actually read any of the search results. The judge rebuked and then dismissed the first juror, and sternly admonished the others to refrain from doing any research.

A few months later, in June of 2008 we saw this incident re-played in a criminal case involving officials of the carpenters' union, who were being tried on bribery charges. Voir dire began with a panel of sixteen jurors, who were dismissed at the end of the day and told to return in the morning. The beginning of the trial received some media attention that day, and the next morning, attorneys requested that the judge ask whether any of the jurors had heard or read anything about the case overnight. Two of the sixteen jurors said that they had conducted Internet searches. One had searched the defendants' names and the other had visited the union's website, though he claimed not to have read anything. He said that once at the website, he felt that he was doing something wrong so he stopped. Both jurors said they could remain fair and impartial. The judge instructed the panel to refrain from any further research, but left it up to the attorneys to make cause challenges if they saw fit. The first juror, who had searched the defendants' names, was already slated to be struck for cause for other reasons, and therefore attorneys did not pursue this issue with him. The second juror, who claimed he had not read anything, was questioned in detail. The attorneys concluded that he had in fact ended his research efforts without reading anything, and he eventually became a juror on the case.

These two incidents illustrate how the Internet has insinuated itself into the American courtroom. In both cases, voir dire questioning focused on exposure to pre-trial publicity. But, pre-trial exposure to traditional media coverage was only part of the problem. Several potential jurors thought nothing of conducting Internet searches of the case during court recesses.

A Little Extrinsic Information is a Dangerous Thing

The ease with which jurors can access information about a case from the Internet stands in stark contrast to the potential dangers of having them do so. Research has demonstrated that jurors' exposure to media coverage and other extrinsic informa-

tion about a case can be highly influential to their decision-making.[2] Field studies of pre-trial publicity in criminal cases, particularly high-profile ones, suggest that pre-trial exposure to media coverage of a case increases potential jurors' belief in the defendant's guilt.[3] Simulation research with mock jurors has demonstrated the same prejudicial effect of exposure to media coverage.[4] Moreover, both "real-world" and experimental findings suggest that while jurors—whether actual or mock—are indeed prejudiced by publicity, they are not aware that they are affected in this way. These jurors tend to believe, and to tell the court, that they are able to be impartial.[5]

Psychologists and others have theorized about the mechanisms by which exposure to pre-trial publicity affects verdicts. Edith Greene has suggested that media exposure can contribute to the formation of particular cognitive schemata, or frameworks for organizing information.[6] These schemata then influence the ways in which case information is heard and processed. Similarly, Neil Vidmar and Valerie P. Hans argue that pre-trial publicity shapes the way in which jurors later hear evidence: Jurors are more likely to attend to and remember evidence that supports pre-existing beliefs they may have formed about the case.[7] Vidmar also noted that pre-trial—or mid-trial—media coverage both affects and is affected by community sentiment about a case, including gossip, rumors, and pressure to conform to community opinion and to community normative values about justice.[8]

The challenge for a juror of setting aside extrinsic information, whether obtained pre-trial or mid-trial, is a difficult one. Judges instruct jurors not to rely on information they have learned outside the courtroom, but that admonition makes little

2. Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation,* 26 Law & Hum. Behav. 73, 86 (2002).

3. Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense,* 3 Psychol. Pub. Pol'y & L. 428 (1997).

4. Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments,* 18 Law & Hum. Behav. 453 (1994).

5. Christina A. Studebaker et al., *Assessing Pretrial Publicity Effects: Integrating Content Analytic Results,* 24 L. & Hum. Behav. 317, 318 (2000).

6. Edith Greene, *Media Effects on Jurors,* 14 Law & Hum. Behav. 439, 445 (1990).

7. Neil Vidmar & Valerie P. Hans, American Juries: The Verdict, 112 (2007).

8. *Id.*

difference. Despite these instructions, jurors tend to bring to deliberations any issues that they consider to be relevant to their decision-making process.[9] This is not the result of intentional disobedience to judicial instructions. Rather, jurors, like other people, are generally unable to disregard information that they know and that they consider to be relevant, whether they ought to or not.[10] Once heard, the information cannot be ignored.

Preventing Jurors from Obtaining Extrinsic Information: Traditional Approaches May Not Work

With the advent of the Internet and the ease with which it can be accessed anytime, anywhere, concerns about exposure to pre-trial or mid-trial information obtained outside of the courtroom and about juror use of such information take on a whole new dimension. Our two anecdotes about jurors who did Internet research during voir dire illustrate the challenges courts face in controlling jurors' access to information.

Before the Internet explosion, a judge could instruct a jury not to read newspaper articles or listen to television or radio news accounts of the case. While it was always recognized that some might ignore this admonition, or accidentally encounter news coverage of a trial or hear local rumors or gossip,[11] the instruction was usually easy to follow. Most cases that went to trial, civil or criminal, were not widely covered in the local or national media, so jurors were unlikely to hear about a case unless they made an active effort to do so. Only the most highly motivated juror would actually go to the trouble of searching newspaper archives, or seeking out more specialized publications (such as law periodicals) that might be covering a patent case, for example.

All of that has changed with the increasing reach of the Internet. In cases that generate moderate to high levels of publicity, it is almost impossible for jurors not to see news head-

9. Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics,* 87 VA. L. REV. 1857, 1863 (2001).

10. Shari S. Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury,* 54 BUFF. L. REV. 717 750-51(2006).

11. Vidmar, *supra* note 2, at 88.

lines pop up every time they turn on their computers and connect to their web browsers. Moreover, powerful search engines allow jurors to obtain information about a case from sources other than traditional media. In fact, it is almost ridiculously simple for them to do so: Witness the juror who used nothing but his cell phone during a lunch break to search for and read information about a case. Many potential jurors come to court with Blackberries, iPhones and other types of personal digital assistants ("PDAs") or cellular phones with web browsers. In the age of the mobile Internet, jurors have easy access to a veritable treasure trove of information about cases and some are clearly taking full advantage of it.

In the global village, all news is local

In the Internet age, jurors can easily find information about trials that have garnered little publicity. A year-old article in an out-of-state publication will show up in an Internet search just as easily as a current headline from the daily local paper. The Internet has truly transformed much of the world into a global village, and jurors are no longer limited to "local" news. Virtually every trial is newsworthy to someone and can therefore end up on the Internet where jurors can easily find it.

The scope of Internet intrusion into jury deliberations

Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggest that it is not uncommon. Luci Scott reported on several cases in which mistrials were declared when jurors researched the cases on the Internet and learned information which was not admissible at trial, such as what a defendant's sentence would be if he were convicted.[12] Recently, this issue arose in the second trial of Richard Scrushy, founder of HealthSouth.[13] After a lengthy high-profile federal trial in Birmingham, Alabama, Scrushy was acquitted of fraud charges in 2005.[14] In 2006, however, he was convicted of political corrup-

12. Luci Scott, *Internet-Surfing Jurors Vex Judges*, NAT'L L. J., December 4, 2002, *available at* http://www.law.com/jsp/article.jsp?id=900005533365.

13. Bob Johnson, *Ex-CEO Scrushy Asks Court to Throw Out Conviction,* ASSOCIATED PRESS, June 3, 2008 *available at* http://news.moneycentral.msn.com/provider/providerarticle.aspx?feed=AP&date=20080603&id=8722703.

14. U.S. v. Richard M. Scrushy, Case No. CR-03-BE-0530-S.

tion charges.[15] After this second trial, attorneys learned that some jurors had relied on information obtained from the Internet, including excluded information about Scrushy's earlier prosecution.

In a brief supporting their motion for a new trial, Scrushy's attorneys provided jurors' accounts of their use of extrinsic material.[16] The foreperson reported to the attorneys that he had visited the district court's website, printed an unredacted version of a superseding indictment that had not been provided to the jury, studied it extensively, and brought his annotated copy into the deliberations to help him lead the discussion. Other jurors reported that they had followed a local television station's daily blog about the case and had read an online news story on the case. One used the Internet to research the legal terms and criteria on which the judge had instructed the jury, and then shared her findings with the rest of the jurors during deliberations.

The trial judge rejected Scrushy's request for a new trial.[17] He questioned the credibility of some of the jurors' reports. Though he believed that some jurors had seen the unredacted superseding indictment, he did not think it created a reasonable possibility of prejudice to the defendant. He did not believe that there had been juror misconduct in this case, as he was satisfied that jurors did not intentionally seek out media information about the case.

Nonetheless, the range of information that the Scrushy jurors reported obtaining illustrates the broad scope of ways in which jurors' Internet usage can intrude on their deliberations. Exposure to publicity about the case was compounded by exposure to court documents, the opinions of bloggers, and legal definitions that were not pertinent to this case, which could have been confusing at best and misleading at worst.

The Scrushy jurors' Internet activities demonstrate that news accounts are only the tip of the iceberg when it comes to searches for extrinsic information. Here, we consider several other types of information including: background on the parties

15. U.S. v. Richard M. Scrushy, Case No. 07-13163-B.

16. Initial Brief of Appellant Richard M. Scrushy, Case No. 07-13163-B, 11th Fed. Cir.

17. Judicial Order R10-611, U.S. v. Richard M. Scrushy, June 27, 2007.

and events of the case; information on attorneys, judges, and witnesses; and, information on subject areas pertinent to the trial. All of these are ripe areas for jurors who are curious, and the reality is that some curious jurors will indeed search.

Background information about the parties In criminal cases, jurors may search for information about the defendant such as occurred in the *Scrushy* case.[18] In civil litigation, jurors may use the Internet to visit companies' websites, examine their financial statements, track their stock prices, and read about other litigation in which the company was involved. Notably, jurors can do all of these things without violating a typical judicial admonition not to read news reports about the case.

Background about case events Technology has made it possible for jurors to do their own detective work and research case events, while still following the "letter of the law" with regard to judicial instructions. For example, jurors in a criminal trial may be instructed not to visit the scene of the crime. This instruction, however, would not preclude use of an Internet-based satellite photo program (such as "Google Earth") that allows users to obtain a detailed picture of a particular block, street, or address, while seated at their own computers at home.

As new technologies emerge, jurors will undoubtedly have greater capabilities to conduct their own investigations should they so desire. These capabilities will challenge the courts in ever-changing ways with regard to preserving the controlled flow of information to jurors.

Information about attorneys, judges and witnesses For many Americans, especially younger people who have grown up with the Internet, the natural follow-up to meeting a new person either socially or in business is to search them on the Internet. It is reasonable, then, to assume that some jurors will turn to the Internet to learn more about the attorneys and judges whom they have just met in court and the witnesses they have heard. Such Internet research may be analogous to the way that jurors discuss amongst themselves various aspects of an attorney's ap-

18. *Supra* note 16.

pearance or demeanor. Because they are not permitted to discuss the case *per se*, jurors may focus on attorneys as an acceptable outlet for their desire to discuss what they have heard. Similarly, they may visit the websites of the attorneys' law firms and research personal and professional backgrounds as an outlet for their broader curiosity about what they are seeing and hearing in court. In fact, some law firms design their websites with jurors in mind, adding humor or other supposedly endearing qualities to their material in order to create positive impressions.[19]

Attorneys must also consider what personal information jurors might learn about them by searching their names. We strongly recommend that before going to trial, every attorney conduct a thorough Internet search on himself or herself to see what jurors might find if they were to do the same. The results can be sobering and disconcerting. Jurors might find attorneys' political and charitable contributions, which can reveal a great deal about the attorneys' values and whether they are similar to or different from the jurors' values. Personal information, such as the name of a spouse or partner, church or synagogue membership, and participation in sports events may also come up. For younger attorneys in particular, the searcher might be directed to any social networking sites of which the attorney is a member. All of this information has the potential to affect jurors' views of attorneys and consequently, of the parties they represent. Similar concerns arise with respect to witnesses and even to judges.

Information about subject areas pertinent to the trial Just as it is practically instinctive to research unfamiliar people on the Internet, so too do we turn to the Internet to familiarize ourselves with subjects that pique our curiosity or otherwise demand our understanding. There have been suggestions that jurors are no exception to this rule. As noted earlier, a Scrushy juror researched legal terms on the Internet.[20] Scott reported on jurors in other cases who researched legal definitions, and still others who

19. Henry Gottlieb, *Should You Design Your Firm's Web Site With Jurors in Mind?* N. J. L. J., January 2, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1167386817011.

20. *Supra* note 16.

researched medical terms and conditions that were pertinent to their case.[21]

Patent cases provide an excellent example of the dangers of this kind of investigative work by jurors. Internet-supplied definitions of key terms from patent claims may be entirely inconsistent with the ways in which those claim terms have been defined by the judge. Of course, the judge's definition of claim terms is the only one that may be applied. Thus, jurors who are working with extrinsically acquired definitions and knowledge may well reach conclusions that are antithetical to the interests of justice.

This is an area where an ounce of prevention is worth a pound of cure. If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.

Remedies: What Courts Can and Cannot Do

Much has been written about the problem of finding remedies for prejudice created by traditional media coverage.[22] Here, we consider how well those remedies might work for the types of Internet research described above, and suggest additional strategies for addressing these types of research. We also address the issue of mid-trial publicity to which empanelled jurors may be exposed (voluntarily or involuntarily) during the trial.

While some researchers have cited voir dire as the favored remedy for addressing the impact of pre-trial publicity,[23] others have found it less effective than changing the venue or importing jurors from other venues.[24] Other potential remedies for mitigating the prejudicial effects of pre-trial publicity include a delay in trial date, sequestration (to limit exposure to ongoing community bias), and the judicial admonition delivered to the jury at the start of trial. Because the admonition is both the sim-

21. *See* Scott, *supra* note 12.

22. Solomon M. Fulero, *Afterword: The Past, Present, and Future of Applied Pretrial Publicity Research,* 26 LAW & HUM. BEHAV. 1 (2002).

23. VIDMAR & HANS, *supra* note 7, at 116.

24. Fulero, *supra* note 22, at 1.

plest and the most often used, we consider this last remedy in greater detail below.

Judicial Admonition: Offering Reasons to Resist Temptation

Often, the admonition delivered by judges is clear and to the point, omitting any mention of the Internet entirely: *Avoid all media coverage and any other information relating to the case*. While some judges and some state's instructions specify that this includes avoiding Internet coverage of the case, even these admonitions could be more effective if they conveyed two key issues: first, an understanding that seeking outside information is indeed tempting and second, an explanation to jurors as to why it is so important to resist that temptation.[25]

The Internet is particularly tempting to jurors.[26] Judges can acknowledge that this feeling of temptation is both rational and natural. Jurors may have logical reasons for wanting to get information from the Internet. They may want to clarify something they heard in court but did not understand. They may wish to learn more about the defendant or the attorneys. Even general curiosity may lead jurors to search the Internet for a variety of topics related to their case.

Judges can acknowledge the temptations of Internet research, but then can explain to jurors *why* their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system. Jurors may feel that their searching is harmless and will not bias them, something that research has demonstrated is untrue.[27] An understanding of why this rule is not arbitrary should enhance jurors' commitment to adhering to it. Judges must explain that the fairness of the judicial system relies on the court being able to control the information to which jurors are exposed during trial.

One final addition to the judge's pre-trial instructions could diminish the potentially harmful effects of mid-trial pub-

25. New York's Criminal Jury Instructions include reference to the Internet both as a media source and as a research tool to be avoided. Jurors are also told why it is important for them to avoid getting outside information. The New York instruction, however, does not acknowledge that it could be tempting to use the Internet as a research tool. http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.wpd

26. See Scott, *supra* note 12.

27. *See* Vidmar, *supra* note 2.

licity or other information on the jury's deliberations: an instruction from the judge that if any juror sees another juror seeking extrinsic information or has reason to believe another juror has done so, he or she is obligated by law to notify the court.

Working to bolster this 'watchdog effect' should serve the legal system in two primary ways. First, jurors will be more likely to resist seeking information during the trial day on their Blackberries or personal computers if they fear that a fellow juror will observe them and subsequently notify the judge. Second, if a juror nevertheless obtains extrinsic information that juror should be less likely to convey that information to other jurors. This should provide an effective form of damage-control and diminish the possibility of more widespread contamination in the event that a juror is unable to resist the lure of the Internet.

Reducing Juror Motivation to Seek Clarification on the Internet

It is important for attorneys and judges to consider jurors' motivations in conducting their own research on unfamiliar terms, issues, or technologies. Sometimes jurors are simply curious to learn more, and sometimes they are trying to resolve competing explanations or theories offered by the two parties. Sometimes, they may simply be trying to understand something that confuses them. Especially if a case involves complex and difficult technology—a not uncommon scenario in patent cases, for example—jurors may turn to the Internet for a simple explanation if they did not understand the presentations they heard in court. The more they understand what they hear in court, the less motivated they may be to do Internet research for clarification.

To that end, attorneys should work hard to ensure that they are both persuasive advocates and effective teachers. Attorneys are encouraged to use clear language and a variety of still and animated demonstratives to help jurors fully comprehend what they hear in the courtroom, so that they will be less likely to look elsewhere for clarity.

Similarly, "plain-English" jury instructions may go a long way toward reducing jurors' needs or desires to research legal concepts on the Internet. Finally, allowing jurors to submit

questions to witnesses can provide another outlet for their curiosity or confusion. This too may help to prevent jurors from conducting Internet research on material they hear in the courtroom.

After taking the most complete and thorough approach to *preventing* extrinsic information from being accessed by the jury, the most prudent next step would be to prepare for when jurors access extrinsic information anyway. While there is no single, or simple, resolution to this issue, we offer two broad recommendations: *control* what you can with regard to what appears on the Internet, and *know* what is out there.

Managing Internet Information: Control What You Can

Much of the information that jurors will find if they do case-related searches is out of the control of the court and the attorneys. The United States, unlike many other countries, largely gives free rein to the media to cover ongoing trials,[28] although "gag orders" are used sometimes to halt the flow of current media coverage.[29] Our national commitment to freedom of speech means that news stories will be what they will be, as will blogs, online dictionaries, and many other sites that provide news or information to jurors who seek it.

In recognition of this fact, some attorneys have begun to "work the web," especially in high-profile cases. They have set up websites promoting their clients' positions in an effort to balance or counteract the impact of any negative media coverage. Martha Stewart, for example, posted information about her legal status on her website and accepted emails from the public about what they had read—a kind of informal opinion polling. They have also blogged: Joseph Lopez, an attorney for a convicted mob boss, blogged about the trial on an ongoing basis until the judge ordered him to stop.[30] While attorneys may engage in this kind of behind-the-scenes providing of information to the public, the breadth of easily available informa-

28. VIDMAR & HANS, *supra* note 7, at 108-09.

29. *See* Otto, *supra* note 4.

30. Stephanie Francis Ward, *Full Court Coverage: What Happens When Defense Counsel And Ordinary Citizens Blog About High-Profile Trials?* 94 A.B.A. J. 34 (Jan 2008), *available at* http://abajournal.com/magazine/full_court_coverage/.

tion on the Internet from other sources mitigates the impact of these litigation-inspired offerings.

It may be harder for attorneys (or judges) to work the web when it comes to information about them personally. Some information about individuals is in the public domain and cannot be removed or modified by the individual. However, attorneys and judges do have control over user-created materials such as personal web pages, firm (or court) websites and social networking sites. While it is hard to know, for example, how jurors might be affected by the knowledge that an attorney is single and seeking a partner, it is wise to err on the side of caution and remove such potentially prejudicial information.

Internet news coverage and blogs are completely outside of the court's control. The best that attorneys and judges can do is become familiar with what is out there, and know as much as possible about what jurors might be seeing. To that end, there is great value in ongoing monitoring of the Internet, from before the trial starts until it ends. Monitoring the media has always been an important aspect of trial strategy, but it has a new face now. It no longer involves identifying and tracking discrete news articles or television segments. The Internet, with its news updated by the minute and the running commentary of its bloggers, is a dynamic organism that is perpetually evolving. Search results can become obsolete in a matter of days, if not hours. This is not to suggest, however, that it is not worth the effort to monitor the media. Quite the contrary: we recommend that attorneys redouble their efforts to do so, assigning their most Internet-savvy team members to this task. By remaining familiar with what is on the Internet, attorneys can try to address any coverage that comes up that they believe is especially prejudicial.

A Final Warning: Beware the Blogging Juror

Our emphasis in this paper has been on what jurors may read on the Internet. However, it would be imprudent to ignore the fact that trial jurors occasionally contribute to the coverage of a trial. There have been several cases in recent years in which jurors were found to have blogged about a trial while

they were sitting on the jury.[31] For example, in July 2008, an alternate juror began blogging about a case. He discussed the proceedings each day, though he disguised witnesses' names and did not reveal the nature of the case. At one point, he even printed an excerpt of an exchange between an attorney and a witness. A few days after this alternate became a trial juror, his blogging came to the attention of the judge. He was instructed to stop and was dismissed from the jury. He posted an apologetic entry on his blog, explaining that because nobody but his friends and family read the blog and because he did not include any details about the case, he did not think his blogging would pose a problem.[32]

This anecdote suggests that attorneys are well-advised to question jurors in voir dire about whether they maintain personal blogs or follow others' blogs. Judges are well-advised to include admonitions against blogging about the trial or reading blogs that might have information related to the trial as part of their instructions not to talk about the case. Just as the Internet has changed the nature of jurors' access to information about a case, it has changed their ability to disseminate such information, in ways that will continue to pose new challenges to courts.

Conclusion

As trial consultants, we have witnessed the intrusion of the Internet into the American courtroom. Jurors are increasingly using the Internet to do background research on cases, learn more about the parties involved, and seek a better understanding of often complex and challenging material presented in the unfamiliar environment of the courtroom.

We have offered recommendations for reducing the likelihood of jurors researching case information on the Internet. These recommendations include: strengthening judicial admonitions about juror media exposure and educating jurors about why they should not do their own research; controlling personal and case-related information available on the Internet to

31. Vesna Jaksic, *A New Headache For Courts: Blogging Jurors*, NAT'L L. J. March 19, 2007, *available at* http://www.law.com/jsp/PubArticle.jsp?id=900005476512.

32. http://fuzzyraygun.com, see posting "Sorry," July 14, 2008.

whatever extent possible; and monitoring the Internet for pertinent information to remain aware of what jurors may be seeing. As technology advances and the Internet continues to permeate Americans' lives, the possibility that jurors will use it as a source of extrinsic information continues to grow. Courts and counsel will need to stay one step ahead of jurors by monitoring and controlling jurors' access to and use of extrinsic information. This is an emerging issue that is here to stay. As such, it must be reckoned with.

New Mexico's Success with Non-English Speaking Jurors

*Edward L. Chávez**

Since its territorial days New Mexico has encouraged participation of non-English speakers, particularly Spanish-speaking citizens, in its jury system. The New Mexico Constitution adopted in 1911, guarantees all citizens the right to participate on juries.

This article describes New Mexico's use of court interpreters to successfully incorporate non-English speakers into juries. Included are discussions of New Mexico's history and background in this practice, practical applications, problems, solutions, and associated costs.

Based on New Mexico's successful use of non-English speakers on juries, participation of non-English speaking jurors is encouraged for the rest of the United States. New Mexico's jury instructions for the pre-deliberation oath to be administered to court interpreters and guidance to the jury are included for reference, along with New Mexico's Non-English Speaking Juror Guidelines prepared by the Administrative Office of the Courts.

Introduction

In America, a jury verdict in a trial that adheres to all constitutional requirements represents one of the most important contributions the judiciary makes to our democracy because justice is a community project. In jury rooms throughout the country, the community directly participates in the community project called "justice." The American jury system empowers citizens to announce the standard of care they will demand in their communities;[1] the medical care they expect from their doc-

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1. Uniform Jury Instruction 13-1601 N.M.R.A. (2001) (civil uniform jury instruction on negligence).

tors;[2] the level of responsibility they expect from each other;[3] and the safety they expect from manufacturers who sell products in the community.[4] These citizens decide the guilt or innocence of an accused,[5] and are given the awesome power to decide whether a defendant who is found guilty of capital murder is to be sentenced to death.[6]

Because of these powers and responsibilities, juries must truly reflect the diversity of our communities. Whether they are rich, poor, educated, uneducated, professionals, or laborers, citizens over the age of 18, can and must participate in the American civil and criminal justice system. Citizens have a community responsibility to further our free society by promoting safety and security in our country, but they also have a concomitant responsibility to free an accused when the evidence presented at trial does not support a guilty verdict beyond a reasonable doubt. All adult citizens should participate, because above all, justice requires an unapologetic and undaunted courage to exercise one's moral genius. All people, no matter their station in life or their ability to speak and understand the English language have that moral genius.

New Mexico, like any other state in the United States, has a population of non-English speaking citizens. Non-English speaking citizens are people who cannot speak or understand the English language, speak only or primarily a language other than English, or who have a dominant language other than English, which could inhibit their understanding of legal proceedings.[7] This article argues that non-English speaking citizens should not be systematically excluded from jury service. In New Mexico, we provide interpreters for non-English speaking jurors to allow them to fulfill their civic responsibility and participate in the community project called "justice."

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2. Uniform Jury Instruction 13-1101 N.M.R.A. (civil uniform jury instruction on duty of doctors and health care providers).
3. Uniform Jury Instruction 13-1603 N.M.R.A. (civil uniform jury instruction on ordinary care).
4. Uniform Jury Instruction 13-1402 N.M.R.A. (civil uniform jury instruction on duty of suppliers).
5. Uniform Jury Instruction 14-6014 N.M.R.A. (criminal uniform jury instruction on sample verdict forms).
6. Uniform Jury Instruction 14-7033 N.M.R.A. (criminal uniform jury instruction on death penalty sentencing proceedings).
7. N. M. STAT. ANN. 1978, § 38-10-2(C) (1985).

Further, this article examines the history and background of why New Mexico allows those who are not fluent in English to serve on juries; the practical problems and solutions for assuring effective jury participation by non-English speakers; and, the cost associated with New Mexico's efforts. For those jurisdictions that may be interested in permitting non-English speaking citizens to serve on juries, New Mexico's Non-English Speaking Juror Guidelines and relevant jury instructions adopted by the New Mexico Supreme Court are included here.[8]

History of Non-English Speaking Jurors in New Mexico

Territory of New Mexico v. Romine is the first reported opinion to address the subject of non-English speaking jurors.[9] Romine appealed his conviction of first-degree murder because the jurors who convicted him did not understand English. The defendant argued that he had a right to a jury that spoke and understood English. He also argued that juries must be given written instructions, and that since the jury instructions, which were written in English, had to be translated into Spanish for the jury by an interpreter, this jury did not have the required written instructions. The court rejected these arguments by noting that for over 20 years juries in New Mexico had embraced both Spanish- and English-speaking members. At that time the preponderance of Spanish-speaking citizens in New Mexico was very large, "and in certain counties the English speaking citizens possessing the qualifications of jurors, [could] be counted by tens instead of hundreds."[10] The territorial court explained the fairness of allowing non-English speaking jurors to decide the defendant's guilt or innocence as follows:

> The practice under the territorial law has been uniform for a long series of years, and works as little injustice to any parties, whatever their language, as any system that could well be devised under the prevailing conditions. In all counties where the jury contains members representing each language, or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus,

8. *See infra* app. A.
9. 2 N.M. (Gild., E.W.S. ed.) 114 (1881).
10. *Id*. at 123.

> every one interested is as fully as possible informed of every proceeding, and no injustice is done.[11]

Although the structure of the interpretation services provided during this trial is not known, the common law practice of allowing non-English speaking citizens to serve on grand and petit juries became a state constitutional right when the New Mexico Constitution was adopted on January 21, 1911. Article VII, Section 3 provides that "[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages[.]"[12] The right to sit upon a jury was included with the right to vote and to hold public office.[13] That the rights to vote, hold office, and serve on a jury were considered extremely important is evidenced by the constitutional requirement that Article VII, Section 3 can only be amended if "in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment."[14] In contrast, other constitutional amendments only require a simple majority of those voting.[15]

Although Article VII, Section 3 is intended to grant all citizens the right to sit upon a jury, the right is not absolute.[16] The rights of the prospective juror who does not speak English must be balanced against other constitutional rights, such as the defendant's right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. Practical considerations may also be taken into account by the trial judge. For example, the availability of interpreters and inadequate funding for interpreters may permit the exclusion of a non-English speaking citizen from jury duty, but never will mere inconvenience allow such exclusion.[17] The responsibility of New Mexico courts is to:

> [M]ake every reasonable effort to protect a juror's rights under Article VII, Section 3 . . . and to accommodate a juror's need for the assistance of an interpreter because he or she is not otherwise

11. *Id.* at 123-124.
12. N.M. CONST. art. VII, § 3.
13. *Id.*
14. *Id*.
15. *See Id*. art. XIX, § 1.
16. State v. Rico, 52 P.3d 942, 945 (N.M. 2002).
17. *Id*.

> able to participate in court proceedings due to the 'inability to speak, read or write the English or Spanish languages.'[18]

What constitutes a reasonable effort depends on several factors, including:

> [T]he steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties.[19]

Ultimately, if a court interpreter is not available to provide interpretation services for a juror who is eligible to serve but for the fact that he or she doesn't speak English, the judge has the discretion to either postpone the trial until a court interpreter is available or to excuse the juror subject to recall.[20] As provided in New Mexico's Non-English Speaking Juror Guidelines, adopted on November 15, 2000, a judge does not have the discretion to excuse a non-English speaking juror simply because he or she cannot read, write, speak, or understand the English language.[21] Reasonable efforts have included providing a Spanish-speaking interpreter who is also fluent in American Sign Language to assist a juror who is both deaf and Spanish-speaking.

A non-English speaking juror can request excusal from jury service from the presiding judge because he or she is not comfortable using the services of an interpreter in the same way that any other juror can make such a request if he or she would not be comfortable serving as a juror.[22] For example, where a prospective juror is hearing impaired and wears hearing aids, but also needs an interpreter in American Sign Language, there have been several excusals based on incompatibility between the court interpreter's equipment and the non-English speaking juror's hearing aid.

Because the legal system is by nature adversarial, interpreters are subject to challenges like anyone else. There have occasionally been complaints about the use of court interpreters for non-English speaking jurors. As detailed later in this article,

18. *Id*. at 943.
19. *Id*. at 945.
20. *Id.* at 946.
21. *See infra* app. A § II(F).
22. N. M. STAT. ANN. 1978, §§ 38-5-10 & 38-5-11 (1991).

New Mexico uses a specific jury instruction to explain the interpreter's role, including the facts that the interpreter must be educated, schooled, and certified in his or her languages of expertise. The interpreter is required to swear during the oath that he or she will only provide translation services to the non-English speaking juror and will not otherwise participate in the trial or jury deliberations. These facts alone eliminate most insecurities and complaints.

Cost of Reasonable Accommodations

New Mexico has a rich, deeply rooted history as a multilingual, multi-cultural border state. A review of court records for the last three years reveals that court interpreters in New Mexico have been used to assist jurors in the following languages: Apache, Arabic, American Sign Language, Cantonese, Chinese, Farsi, French, German, Gujarati, Hindi, Italian, Japanese, Keres (Native American), Korean, Laotian, Navajo, Spanish, Tagalog, Russian, and Vietnamese. Spanish is the most common language requiring interpreters, representing about 57 percent of non-English speaking jurors. Vietnamese is in second place, representing approximately 20 percent of the demand for court interpreter services.

Despite the many languages that require the services of court interpreters, for the most part, only a small percentage of the juror pool requires such services. For example, the Second Judicial District Court, located in Albuquerque, the largest district court in New Mexico, only required court interpreter services for 30 out of 4,533 qualified jurors from July 1, 2007 through April 1, 2008. This represents 0.662 percent of the juror population in this judicial district. However, in the Third Judicial District Court in Las Cruces, which is in close proximity to Mexico, the number of non-English speaking jurors has risen dramatically. This phenomenon shows no signs of dissipating. For the months of January, February, and March 2008, 114 non-English speaking jurors appeared for voir dire in the Third Judicial District Court. During those three months, eleven trials went all the way to jury verdict with non-English speaking jurors fully participating.

The preferred procedure is to have certified court interpreters assist non-English speaking jurors during all phases of the trial.[23] A certified court interpreter is a person who has met the certification requirements of the New Mexico Administrative Office of the Courts and who has "a sufficient range of formal and informal language skills in English and another language so that he is readily able to interpret, translate and communicate simultaneously and consecutively in either direction between a non-English speaking person and other parties[.]"[24] The interpreter both interprets spoken words and translates written words.

New Mexico currently has 269 interpreters who interpret nine different languages. New Mexico's 269 interpreters are mostly in private practice and are not court staff. There are only five or six actual court staff interpreters, and they are for the most part located in Albuquerque and Santa Fe. One position in Albuquerque is split by two interpreters (job-sharing). New Mexico is a member of a consortium through the National Center for State Courts that works to resolve issues involving language interpreters, including expanding the number of available interpreters and what languages can be interpreted. There are currently 40 states involved in the consortium, and the number of participating states continues to increase. New Mexico recruits, trains, and tests its interpreters and administers the interpreter's exam, which is the same nationwide for consistency.

Payment of the court interpreter is the largest expense, since most interpreters provide their own equipment.[25] At present, spoken language certified court interpreters are paid $46.00 per hour and certified sign language interpreters are paid $60.00 per hour. Looking at the 30 non-English speaking jurors needed in Albuquerque for nine months in 2007 and 2008, the total expense for interpreter services was $8,176.50, or an average of $273.00 per juror. The total expense breaks down as follows: 42 hours to interpret during juror orientation at a

23. *See infra* app. A § III(A).

24. N. M. STAT. ANN. 1978, §§ 38-10-2(B), 38-10-5 (1985).

25. Jurors are paid minimum wage per hour (presently $6.50; on July 24, 2008, the hourly rate will increase to $6.55) plus mileage. Jurors are not paid per diem in New Mexico. N.M. Stat. Ann. 1978 § 38-5-58 (1991).

cost of $1,932.00, and 98.25 hours for jury selection at a cost of $4,519.50. Three non-English speaking jurors out of the 30 called for jury service were selected to serve during trials. The interpretation services were for 49.5 hours at a cost of $2,277.00. Two of the trials were simple drug possession cases and the third trial was a civil trial lasting only 17 hours.

Best Practices

Anecdotal reports suggest that non-English speaking jurors have had a positive experience while serving on New Mexico juries. Sandra Caldwell, an interpreter in Las Cruces, New Mexico, has been the primary source for the anecdotal evidence. However, trial judges with whom I have spoken have invariably told me that English-speaking jurors who have served with non-English speaking jurors also report positive experiences. In fact, some people have commented to Sandra Caldwell that it is rather anti-climatic to observe a trial with non-English speaking jurors because it is actually not very different from a jury trial with all English-speaking jurors. A positive experience is only possible if court staff consistently implement important procedures and are respectful of all jurors.

The most significant requirement is that all court personnel, including the trial judge, trial court administrative assistant, jury staff, bailiff, interpreter coordinator, and interpreters receive adequate training and work as a team in assisting non-English speaking jurors. Intensive training takes place at the outset of employment for judges and other staff. Jury staff must be trained to identify and track non-English speaking jurors from the outset and notify all appropriate parties when a non-English speaking juror is called to serve. Therefore, it is extremely important that prospective jurors be asked in the Juror Qualification Form whether they read, write, speak, and understand the English language. If the answer is no, they must be asked which language they speak, read, write, and understand. The Jury Summons in New Mexico also contains, in bold, shadowed, conspicuous print, the following notification: "New Mexico does not exclude non-English speaking jurors from service. If you need an interpreter, one will be provided to you at no cost. If you need this service, please contact jury staff at

(phone number)." The court staff uses this information to coordinate with an interpreter and notify other court staff that a non-English speaking citizen has been called to jury duty.

It is essential that court staff also be trained to examine juror qualification forms as soon as they are received to identify those citizens who might require the services of an interpreter. Courts must track non-English speaking jurors early in the jury selection process to allow sufficient time to schedule interpreter services. Last-minute attempts to secure interpreter services may be difficult, especially when an interpreter is necessary for both litigants and one or more jurors. It must be kept in mind that when an interpreter is needed for an accused, the accused is entitled to communicate privately with his or her attorney. The same interpreter cannot interpret for both the accused and a juror to avoid the risk that privileged communication will be inadvertently revealed to the non-English speaking juror. This is only one reason why multiple interpreters should be in place when interpretation services are needed for both the defendant and a juror or witness.[26]

Once the judge and the court staff have received intensive training, the system operates as smoothly as it does when there are no non-English speaking jurors. However, public education is also critical. The Court Services Division of the Administrative Office of the Courts has made a jury orientation video shown to all people summoned for jury duty. This video includes a segment on interpreters for non-English speaking jurors in the jury pool and is closed-captioned in Spanish. During orientation, everyone who has received a jury summons, which can mean up to 1,500 people at a time, comes to the court to learn about the rights, procedures, and obligations of jury duty. From questionnaires sent to prospective jurors, court staff receives information regarding potential excusals due to language issues. During orientation, court staff makes an announcement advising prospective jurors that if anyone is more comfortable speaking in a language other than English, interpreters can be made available. All prospective jurors are citizens, so to some

26. *But see* State v. Nguyen, 144 N.M. 197, 185 P.3d 368 (N.M. Ct. App. 2008) (holding that absent a showing of prejudice, a defendant is not deprived of a fair trial when a court interpreter is used for both the defendant and a juror).

extent they are functional in the English language. Information about interpreters is primarily made available when prospective jurors come in for orientation, but also comes from the prospective jurors themselves. People who serve as non-English speaking jurors play a role in getting information out to the community at large.

Aside from occasional local coverage about specific cases there has not been much coverage in the popular press about the use of non-English speaking jurors. An article in *USA Today* appeared on February 4, 2000[27] after the Supreme Court upheld Article VII, Section 3 of New Mexico's Constitution guaranteeing all citizens the right to sit upon a jury to "never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages[.]" There was also an NPR interview that aired during its *Weekend Edition Sunday* program on February 27, 2000 on this subject.[28] Public education has been the exclusive responsibility of the judiciary.

Logistics

The type of equipment used for interpretation services is key to minimizing disruption during the trial and to preserving the confidentiality of jury deliberations. Wireless audio equipment with headphones is preferable during the trial itself. This permits the juror to sit in the jury box while the interpreter is in a different area of the courtroom where his or her presence will be the least disruptive. The interpreter does not need to be in close proximity to the juror, except for sight translation of exhibits. However, because this equipment transmits sound via radio waves, it should not be used in the jury deliberation room due to the risk that someone might intercept the discussion. During deliberations a wired system offers the security needed, but it requires that the interpreter and non-English speaking juror sit close to one another. The length of wire on the equip-

27. Guillermo X. Garcia, *N.M. Carpenter Becomes First Non-English Speaking Juror*, U.S.A. TODAY, Feb. 4, 2000 at 04.A, *available at* http://pqasb.pqarchives.com/USAToday/search.html.

28. *Available at* http://www.npr.org/templates/story/story.php?storyId=1070887.

ment dictates the distance at which the interpreter and the juror must position themselves. Despite close proximity, the interpreter should not sit at the table with the jurors to avoid appearing to be a thirteenth juror.

Although debatable, in my opinion, the same interpreter should be used for both trial and jury deliberations. While it might appear prudent to have different interpreters for each phase of the proceedings because of concerns about the interpreter appearing to be a thirteenth juror, to be effective and accurate, it is often critical that the interpreter have detailed knowledge about the facts of the case. A simple example is when a juror makes a statement during deliberations such as "the cousin testified . . . ." If the interpreter does not know the cousin's gender, at least in Spanish, the interpretation cannot be accurate. This information can be significant if more than one cousin testifies.

To adhere to ethical behavior and maintain the interpreter's professional role, interpreters must follow certain protocols with other jurors. The interpreter must only communicate with the jury in his or her role as interpreter, otherwise remaining as invisible as possible and declining to speak directly with other jurors, except to explain a technical problem with equipment.[29]

Jury Instructions

The Non-English Speaking Juror Guidelines[30] suggest that prior to jury deliberations, the trial judge should, on the record and in the presence of the jury, instruct the interpreter not to interfere or participate in any way during jury deliberations.[31] In addition, the guidelines recommend that after jury deliberations, but before the verdict is announced, the trial judge should question the interpreter on the record about whether the interpreter abided by the oath given not to participate in the deliberations.[32] The guidelines also allow a party to request that the

29. *See* Rule 23-111 (B)(9) N.M.R.A., Court Interpreters: Code of Professional Responsibility.

30. *See infra* app. A.

31. *Id*. § III(C)(5).

32. *Id*. § III(C)(6).

jurors be questioned regarding whether the interpreter improperly participated in the deliberations.[33] In *State v. Pacheco*, the New Mexico Supreme Court set forth the mandatory steps to follow when an interpreter assists a non-English speaking juror. The court stated:

> First, prior to excusing the jury for deliberations, the trial court must administer an oath, on the record in the presence of the jury, instructing the interpreter not to participate in the jury's deliberations. *See* NES Guidelines, § III(C)(5). We also require that the interpreter be identified on the record by name, that the interpreter state whether he or she is certified, and that the interpreter indicate whether he or she understands the instructions. In addition to instructing the interpreter, the trial court must also give an instruction to the jury about the interpreter's role during deliberations. . . .
>
> After deliberations, but before the verdict is announced, the trial court is required to ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations. The interpreter's response must be made part of the record. Furthermore, at the request of any party, the trial court must allow jurors to be questioned to the same effect. Finally, the trial judge must also instruct the interpreter not to reveal any part of the jury deliberations until after the case is closed.[34]

In addition to the oath given to an interpreter at the beginning of the proceedings, the court offered a pre-deliberation oath for the interpreter and a pre-deliberation instruction to the jury.

Pre-Deliberation Oath to Interpreter

> Do you solemnly swear or affirm that you will not interfere with the jury's deliberations in any way by expressing any ideas, opinions, or observations that you may have during deliberations, and that you will strictly limit your role during deliberations to interpreting?[35]

The court directed that the instruction be read before deliberations whenever a non-English speaking juror is serving on the jury.

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33. *Id*.; State v. Pacheco, 155 P.3d 745 (N.M. 2007).
34. *See infra* app. A § III(C)(6); *Pacheco* at 754.
35. *Pacheco* at 755.

Pre-Deliberation Instruction to Jury

Ladies and gentlemen, we have at least one non-English speaking juror who is participating in this case. The New Mexico Constitution permits all citizens to serve on a jury whether or not English is their first language. You should include this [these] juror(s) in all deliberations and discussions on the case. To help you communicate, the juror(s) will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1) The interpreter's only function in the jury room is to interpret between English and [the non-English speaking juror(s) native language].
2) The interpreter is not allowed to answer questions, express opinions, have direct conversations with other jurors or participate in your deliberations.
3) The interpreter is only allowed to speak directly to a member of the jury to ensure that the interpreter's equipment is functioning properly or to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.
4) No gesture, expression, sound or movement made by the interpreter in the jury room should influence your opinion or indicate how you should vote.
5) If you can speak both English and [the language of the non-English speaker], we ask that you speak only in English in the jury room so the rest of the jury is not excluded from any conversation.
6) Leave all interpretations to the official court interpreter [who is trained and certified by the court]. The interpreter should be the only one to interpret conversations inside the jury room and testimony in the courtroom.
7) Any deviation from these rules should be immediately reported by submitting a note identifying the problem to the judge or court personnel.[36]

Conclusion

Every day in courtrooms throughout the United States, juries are made up of a mix of citizens, those with a professional degree serving with those who do not have a high school diploma; those who are comfortable speaking in groups with those who are shy, reserved, or even inarticulate. So, why should a citizen who has limited English proficiency be automatically excluded from fulfilling a critical civic responsibility? Is it less efficient to allow non-English speaking citizens to par-

36. *Id.* at 755.

ticipate in the jury system? Yes. Does it require more effort from judges and staff? Yes. Does it require more rules and jury instructions? Yes. The question remains whether less efficiency, more effort, and more instructions justify the systematic exclusion of non-English speaking citizens from our jury system. New Mexico has answered the question "no." The problems caused by allowing non-English speaking citizens to participate in a jury system are not insurmountable and the cost is not prohibitive. New Mexico's experience with non-English speaking jurors has been pleasantly effective. Not only should our non-English speaking citizens enjoy the privileges of citizenship, they should share in the responsibilities. Patriotism requires service to one's community, and like voting, jury service is an important civic responsibility.

APPENDIX A
Non-English Speaking Juror Guidelines

Supreme Court of New Mexico
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Administrative Office of the Courts
Non-English Speaking Juror Guidelines[37]

37. The Guidelines printed here are taken directly from *Pacheco*, Appendix C, 141 N.M. at 351-56, 155 P.3d at 756-61. The most current version of the guidelines can be found at http://www.nmcourts.gov/newface/court-interp/guidelinesand policies_for_non-english_speaking_jurors.pdf/.

I. INTRODUCTION

These guidelines are intended to assist in the efforts of the New Mexico Judiciary to incorporate non-English speaking (NES) citizens into New Mexico's jury system. Because each local court has unique needs and limitations, these guidelines may not be applicable in all courts. Accordingly, these guidelines should not be considered mandatory directives that must be followed in all cases. However, all courts are encouraged to implement the standards set forth below to the fullest extent possible.

II. NON-ENGLISH SPEAKING JUROR ASSISTANCE SERVICES

A. Scope

Article VII, Section 3, of the New Mexico Constitution provides that "[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or

Spanish languages." To comply with this constitutional mandate, all courts should strive to incorporate all New Mexico citizens into our jury system regardless of the language spoken by a prospective NES juror. Because most potential NES jurors speak Spanish as their primary language, these guidelines seek to implement statewide standards for accommodating prospective jurors who speak Spanish. However, where financially and logistically possible, all courts are encouraged to implement these guidelines for other languages.

B. Court Interpreters

Upon request by an NES citizen called for jury duty, all courts should appoint a court interpreter to assist the NES juror or prospective juror. In the absence of a specific request for a court interpreter, all courts should independently determine whether a juror or prospective juror is in need of a court interpreter. To make this determination, a court may consider conducting a limited interview of the juror or prospective juror to assess whether the juror or prospective juror is capable of understanding the proceedings in English.

C. Jury Summons

The New Mexico jury summons form should include a statement in Spanish notifying citizens called for jury duty that assistance is available for those who cannot understand English. The Spanish notice should also provide a telephone number that prospective NES jurors may call for further assistance. The Administrative Office of the Courts (AOC) is responsible for producing jury summonses for local courts that will include an appropriate Spanish notice. The AOC will coordinate with local courts to ensure that an adequate number of trained court personnel are available to respond to calls for assistance from prospective NES jurors.

D. Juror Questionnaire

The AOC is responsible for preparing a Spanish version of the juror questionnaire used by local courts. The AOC is also responsible for distributing copies of the Spanish version of the juror questionnaire to all local courts. All local courts should provide a Spanish version of the juror questionnaire upon re-

quest from any prospective juror. All local courts should also make arrangements to have court personnel available to provide an oral, Spanish translation of the juror questionnaire and to otherwise assist prospective NES jurors who cannot read Spanish.

E. Juror Orientation Materials

The AOC is responsible for distributing to all local courts copies of the Spanish version of jury orientation materials approved by the Supreme Court. To the extent that local courts may provide English language jury orientation materials to prospective jurors, those courts should also make arrangements to provide oral, Spanish translations when needed. Alternatively, courts are encouraged to produce written translations of juror orientation materials.

F. Jury Selection

All courts should make arrangements to have a court interpreter available for prospective NES jurors during the jury selection process. Upon arriving for jury selection, the court should introduce the court interpreter appointed to assist prospective NES jurors and advise prospective NES jurors that they should alert the interpreter if they have any questions during the process. The transcript of proceedings need not include the foreign language statements of the court interpreter or prospective NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for a prospective NES juror.

Although a court interpreter may provide interpretation services for more than one prospective NES juror at a time, a court interpreter ordinarily should not be used to interpret for both a litigant and a prospective NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for both the litigant and the prospective NES juror. Subject to availability, courts are encouraged to avoid using the same court interpreter for jury selection and trial in the same case.

Prospective NES jurors are subject to peremptory challenges and challenges for cause the same as any other prospec-

tive juror. However, a prospective NES juror may not be challenged or excused simply because that juror is unable to read, write, or speak the English language. Moreover, the trial court should not excuse a prospective NES juror who asks to be excused simply because he or she cannot read, write, or speak the English language. Exercising its discretion in ruling on an objection to the service of any NES citizen, the court should consider all facts and circumstances pertaining to service by this juror, as the court would do in ruling on an objection to service by any citizen. In the event that a court interpreter will not be available to provide interpretation services for a prospective NES juror who would otherwise be selected to serve on the jury, the presiding judge may either postpone the proceedings until a court interpreter is available or excuse the juror from service for that proceeding only, provided that the prospective NES juror is recalled for jury selection for the next scheduled proceeding. If an interpreter cannot be obtained after reasonable effort, the prospective NES juror may be excused permanently.

G. Trial Proceedings

All courts should make arrangements to have a court interpreter available for all NES jurors during all trial proceedings. The transcript of proceedings need not include the foreign language statements of the court interpreter or the NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for an NES juror. Although a court interpreter may provide interpretation services for more than one NES juror, a court interpreter ordinarily may not provide interpretation services for both a litigant and an NES juror or for a witness and an NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for the litigants, witnesses, other court participants, and NES jurors. Subject to availability, courts are encouraged to avoid using the same court interpreter for the trial and for jury deliberations.

H. Jury Deliberations

All courts should make arrangements to have a court interpreter available for all NES jurors during all jury deliberations. One court interpreter may provide interpretation services for more than one NES juror at a time during deliberations. To the extent that documentary exhibits are submitted to the jury for consideration during deliberations, the court interpreter assigned to assist NES jurors may provide an oral translation of the written material. With respect to jury instructions submitted to the jury, courts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions.

III. Court Interpretation Standards for NES Jurors

When providing the court interpretation services to NES jurors and prospective jurors as outlined above, all courts should strive to meet the following standards:

A. Certification and Availability Standards

1. Certified

All courts should use certified court interpreters to assist NES jurors during all jury selection, trial, and deliberation proceedings. Certification is governed by the provisions of the Court Interpreters Act, NMSA 1978, §§ 38-10-1 to -8 (1985), as administered by the AOC. Except as otherwise provided below, an uncertified court interpreter should only be used if the requirements of NMSA 1978, Section 38-10-3(B) (1985), are met. In the event that a court must use an uncertified court interpreter, the court should consider briefly examining the uncertified court interpreter to establish the qualifications of the interpreter.

2. Uncertified

All courts may use uncertified court interpreters to assist NES jurors and prospective jurors in completing the juror questionnaire. Uncertified court interpreters may also be used during the jury orientation process.

3. Availability

All courts should maintain a list of locally available certified and uncertified court interpreters and submit an updated copy of that list to the AOC by May 1st of each year. For those courts that do not have an adequate number of locally available certified or uncertified court interpreters available to assist NES jurors and prospective jurors, the local court administrator or chief judge should coordinate with the AOC to compile a list of certified and uncertified court interpreters who are available from other areas. The AOC should also assist local courts in the training of local court personnel to assist NES jurors and prospective jurors with the juror questionnaire, jury orientation, and with questions arising outside the context of formal court proceedings.

B. Written Translation Standards

1. Qualification Materials

The AOC will provide all courts with a written, Spanish translation of the juror qualification form and questionnaire translated by a certified court interpreter.

2. Trial Materials

Written materials that are submitted to the jury for consideration during trial or jury deliberations should be orally translated by a certified court interpreter or translated in writing by a certified court interpreter. If a certified court interpreter is not available, the court may use an uncertified court interpreter to orally translate written materials if the requirements of Section 38-10-3(B) are met.

3. Machine Translation

A number of services are available on the Internet and elsewhere that provide free or low-cost translation of written materials from English into a number of other languages. Because machine translation may not be accurate, courts should not use machine translation for written materials that are to be used in formal court proceedings, such as jury instructions or documentary exhibits. Although courts may consider using machine translation for other informational and local orientation materials submitted to jurors and prospective jurors, all courts

are cautioned against relying exclusively on machine translation without human verification of the accuracy of a machine translation.

C. Use and Performance Standards

Because of the demanding and sensitive nature of the services provided by court interpreters appointed to assist NES jurors and prospective jurors, all courts are encouraged to use and instruct court interpreters in accordance with the following standards.

1. Hours of Service

All courts should strive to limit the amount of time that a court interpreter interprets for an NES juror or prospective juror to avoid court interpreter fatigue. Ideally, two court interpreters should be used as a team to provide interpretation services, and each interpreter should avoid interpreting for more than 30-45 minutes without a rest period. Because this may not be logistically feasible in all circumstances, every court should remain sensitive to the risk of court interpreter fatigue. Whenever a court interpreter suspects that the quality of interpretation may become compromised because of fatigue, the interpreter should advise the trial court judge of the need for a period of rest.

2. Oath of Interpreter

Before a court interpreter begins to provide interpretation services for an NES juror or prospective juror during jury selection or trial, the trial judge should administer an oath to the court interpreter in accordance with NMSA 1978, Section 38-10-8 (1985).

3. Pre-Interpretation Interview

Prior to providing interpretation services for an NES juror or prospective juror, with the knowledge and permission of the court, the court interpreter should briefly interview the NES juror or prospective juror to enhance the effectiveness of the interpretation by becoming familiar with the speech patterns and linguistic traits of the NES juror or prospective juror.

4. Courtroom Explanation of the Role of the Interpreter

Prior to the commencement of proceedings, the trial court judge should explain the role of the court interpreter to those present in the courtroom by explaining that the interpreter was appointed by the court to assist jurors or prospective jurors who do not understand English. The judge should also explain to the jury that the interpreter is only allowed to interpret and that the jurors may not ask the interpreter for advice or other assistance. The judge should also explain that, for those English speaking jurors who may understand the non-English language spoken by the court interpreter, the jurors should disregard what they hear the interpreter say and rely solely on the evidence presented in English.

5. Pre-Deliberation Instructions

Prior to excusing the jury for deliberations, the trial judge should, on the record in the presence of the jury, instruct the court interpreter who will be providing interpretation services for an NES juror that the interpreter should not interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations but should be strictly limited to interpreting the jury deliberations. The trial judge should also ask the court interpreter to affirmatively state on the record that the interpreter understands the trial judge's instructions.

6. Post-Deliberation Instructions

Following jury deliberations but before the jury's verdict is announced, the trial judge should ask the court interpreter on the record whether the interpreter abided by his or her oath to act strictly as an interpreter and not to participate in the deliberations. The interpreter's identity and answers should be made a part of the record. At the request of a party to the litigation, the jurors may also be questioned to the same effect. The trial judge should also instruct the court interpreter not to reveal any aspect of the jury deliberations after the case is closed.

7. Equipment

With the assistance of the AOC, all courts should make arrangements to provide equipment for use by a court interpreter

who will be providing interpretation services for NES jurors. The AOC will develop standards and seek funding to acquire adequate equipment for use by court interpreters throughout the state who will be providing interpretation services for NES jurors and prospective jurors. The equipment should allow interpreters to provide interpretation services for multiple persons with minimum disruption of the court proceedings.

To the extent that the AOC and local courts are unable to provide court interpreters with interpretation equipment, all court [personnel] should assist court interpreters with the logistical arrangements for providing interpretation services whenever possible. Accordingly, prior to jury selection or trial proceedings, court personnel should identify the number of NES jurors or prospective jurors scheduled to appear in court. This information should be provided to the appointed court interpreter so that the interpreter can make arrangements for the appropriate equipment and seating arrangements. The interpreter should obtain the prior approval of the trial court if special equipment and seating arrangements are needed. The bailiff should inform counsel if any seating changes have been made to accommodate NES jurors or prospective jurors.

IV. COURT INTERPRETATION COSTS

A. Jury and Witness Fee Fund

All costs associated with administering these guidelines and providing services for NES jurors and prospective jurors should be paid from the Jury and Witness Fee Fund. To the extent that such costs are initially incurred at the local court level, local courts may seek reimbursement from the Jury and Witness Fee Fund.

B. Interpreters in Civil Cases

The costs for a court interpreter to provide interpretation services to an NES juror or prospective juror in civil cases should be paid by the court through the Jury and Witness Fee Fund.

C. Interpreter Compensation

Court interpreters appointed to provide interpretation services for NES jurors or prospective jurors should be paid at a fixed rate in accordance with the approved fee schedule established by the AOC. However, all courts are free to employ a certified interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

V. COURT INTERPRETER RECRUITMENT AND TRAINING

A. Administration

The AOC is responsible for the recruitment and training of court interpreters to provide interpretation services for NES jurors and prospective jurors. Consistent with the New Mexico Judicial Branch Personnel Rules, local court personnel are encouraged to train for and become certified as court interpreters.

B. Special Training

The AOC, in consultation with the Court Interpreters Advisory Committee, *see* NMSA 1978, § 38-10-4 (1985), will develop supplemental training standards for court interpreters who will provide interpretation services for NES jurors and prospective jurors. These standards should be incorporated into the general certification process for all new court interpreters.

EFFECTIVE DATE:
Guidelines are effective November 15, 2000

_____
John M. Greacen
Director, Administrative Office of the Courts

_____
Date

Lessons Learned from Jurors' Questions About Evidence During Trial

*by Anthony J. Ferrara**

Although controversial, New York State judges have discretion to allow jurors to submit written questions to witnesses. This article recounts one judge's experiences allowing jurors to submit written questions in New York City criminal court trials over the last two years. Relying on three case examples, summaries of the testimony are presented along with specific questions asked, and content of discussion with counsel about the questions, demonstrating that jurors' questions are relevant, reasonable and help to clarify or avoid confusion.

Introduction

> Members of the jury, the court thanks you for your dedicated service as jurors, for the care, concern, attention and concentration that you have given to your deliberations. The court thanks each and every one of you.
>
> Neither this court, nor any other court, could function without a jury such as yours. The jury is the touchstone of "freedom under the law" which all of us hold so dear. Your service as jurors is one of the highest duties any citizen can be called on to perform. In the fulfillment of your service as members of a jury, you have reflected the best traditions of a free society.[1]

These words come from the standard jury instructions in the New York City Criminal Court's Procedure Manual for Judges. Shortly after I became a judge, I presided over my first

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1. Checklist, Introduction, General Instructions, Voir Dire, Preliminary Instructions & Final Instructions for Jury Trials 75 (Hon. Joel L. Blumenfeld & Brian H. Lowy eds., 14th rev. 2008), http://homepage.mac.com/brianlowy/Jury_Charges/FileSharing7.html.

trial and read these words to a jury after they returned a verdict. The case was tried in Manhattan Criminal Court, where the most serious charges are Class A misdemeanors, tried before six member juries with up to two alternates. The trial took about a week. Shortly after the jury started deliberating they sent out a series of questions asking for testimony to be reread and legal instructions to be repeated. I wondered, were they listening to the proceedings? Why so many questions? Why were they unable to absorb the testimony? The case involved a straightforward claim of a daylight assault ably presented by the prosecution and defense. My final instructions were concise. After several read-backs and further instruction, the jury eventually reached a verdict but it seemed to me that something was missing from the process. About a year later, I received a copy of the report of the Jury Trial Project.[2] I read it with interest and decided to allow jurors to take notes during the trial and to ask questions, two innovations that were supported by caselaw and within my discretion.[3] It seemed to me that we are all taught to write things down, especially if they are important, so we will not forget; and, if we do not understand, to ask a question. These two things were preached to us starting in grade school; so why is it we throw that common sense out of the window in jury trials?

Since that decision, I have conducted a dozen jury trials allowing jurors both to take notes and to submit written questions. I supply each juror with a spiral bound steno pad and a pen; each pad is clearly marked by juror number. The pads are kept at the court overnight. Most of the jurors chose to take notes; several jurors in each trial asked questions. Juror note taking did not extend trials. While allowing juror questions extended each trial a bit, the trials moved more smoothly because the advocates were able to clear up misconceptions as they arose, rather than responding to juror notes during deliberations. In each case there were few or no requests for read-backs

2. FINAL REPORT OF THE COMMITTEES OF THE JURY TRIAL PROJECT, *available at* http://www.nyjuryinnovations.org

3. People v. Hues, 92 N.Y. 2d 413 (1998) (note-taking); People v. Holman, 47 A.D. 3d 518 (N.Y. App. Div. 2008); People v. Knapper, 230 A.D. 487 (N.Y. App. Div.1930) (juror questions within discretion of the court); 22 N.Y. COMP. CODES R. & REGS. tit. 22 § 220.10 (2008) (note-taking); (CJI2d[NY]Jury - Note-taking), http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Note-taking.pdf.

of testimony or legal instructions, and in each case the jury reached a verdict. From this I have concluded the time has come to recognize the logic of allowing these practices and to make them the norm, rather than the exception.

When we involve jurors in trials, they provide us with insight into the operation of our system of justice. By their questions, jurors teach us valuable lessons. Here are some recent trials over which I presided where jurors asked questions, and the lessons learned. In each case, prior to jury selection I gave the attorneys a copy of Judge Stanley Sklar's model instruction from the Unified Court System Pamphlet "Jury Trial Innovations in New York State"[4] and explained the ground rules: questions would be solicited upon completion of each witness' testimony, discussed at side bar and if allowed, each attorney could ask follow-up questions. I believe that allowing jurors to ask questions focused them on the testimony, encouraged them to examine evidence carefully, enhanced their retention of important information and improved the quality of justice dispensed.

Case #1 Sexual Abuse

John Guest was charged with sexual abuse in the third degree, forcible touching and harassment in the second degree.

The story according to the prosecution: Cheryl Tourist, her husband John and their adult children spent their winter holiday in Manhattan, staying at a boutique hotel near Times Square. On the morning they were departing, Mrs. Tourist returned to their room to make sure nothing had been left behind. As she entered the elevator she encountered a nicely dressed middle aged man, wearing a distinctive cap, later identified as the defendant, John Guest. As she entered he said to her: "I don't think you want to be on this elevator with me." The doors closed, and as she reached to press the button for her floor he grabbed her breast through her clothing. She got off the elevator and fled to the lobby. As she was reporting the incident to her husband, the elevator door opened and Mr. Guest stepped out. Mrs. Tourist shrieked: "That's the man." Mr. Tour-

4. *See* JURY TRIAL INNOVATIONS IN NEW YORK STATE, http://www.nyjuryinnovations.org/materials/JTI%20booklet05.pdf. Judge Sklar's recommended instruction is included here as Appendix A.

ist bounded across the lobby, and grabbed the defendant who looked in Mrs. Tourist's direction and stated: "I did not touch that woman." Before the police arrived the defendant pointed to Mrs. Tourist and yelled: "You are a whore. She is trying to extort money." The police arrived, investigated and subsequently arrested the defendant. At the precinct, while processing the defendant and prior to searching him, Officer Fast, the arresting officer, asked the defendant: "Do you have anything sharp in your pockets?" The defendant responded: "Yes, my penis." Later while the defendant was being fingerprinted, the officer testified that he blurted out (not in response to any question): "I am a writer from California, and I am writing a book. All of this will be in my book."

The defense painted a different picture, arguing there was no evidence, such as surveillance videos, to confirm Mrs. Tourist's story. In his opening, the defense attorney sketched his future attack on Mrs. Tourist's identification of the defendant and emphasized reasonable doubt.

The first witness was Sergeant Garcia, the first officer to arrive at the scene. She had testified at the suppression hearing a few months earlier. Sergeant Garcia testified first because Mr. and Mrs. Tourist lived out of state and could not attend court that day. Sergeant Garcia said that when she arrived at the hotel she spoke with Mrs. Tourist. Neither attorney elicited the substance of that conversation.

The sergeant testified on direct that she had recently inspected the elevator and there were no surveillance cameras. On cross examination, the defense impeached Sergeant Garcia with her testimony from the suppression hearing where she stated she did not recall if she ever examined the elevator on the date of the arrest. Defense counsel also elicited from the sergeant the process used to voucher evidence, and the importance of vouchering evidence.

Jurors asked these three questions after Sergeant Garcia's testimony.

> **Juror Question #1**: What was the basis for stating that you examined the elevator when you testified at the prior hearing?

In this trial, the defense attorney was adamantly opposed to juror questions and initially objected to each one. The prosecutor did not object to this question, pointing out that the hearing testimony was that the witness could not recall if she looked at the elevator. I allowed the question. The witness answered that at the hearing she could not recall if she had examined the elevator, so she went back before trial and looked and did not see any. This produced further examination by defense counsel pointing out that she never checked to see if there was video surveillance in the lobby or other public areas.

Lesson: This juror's question made it possible to clear up juror confusion about the timing of the sergeant's examination of the elevator.

> **Juror Question # 2**: I understand the process of saving and preserving evidence. Was anything vouchered of relevance?

Defense counsel agreed the question was relevant "while preserving my general objection to allowing juror questions." When I asked: "Do you want me to ask the question?" He answered: "Yes, you may ask it." The answer, of course, was nothing had been vouchered.

Lesson: Some jurors see the point, even when it is subtly made; others do not. The answer to this juror's question made the point for everyone.

> **Juror Question #3**: Did the sergeant ask the witness to describe what transpired in the elevator and if so what did the lady say?

Both sides objected to this question as it called for hearsay. The prosecutor pointed out he purposely avoided eliciting the content of the conversation because it was hearsay and defense counsel offered that the testimony would improperly bolster the "victim's" anticipated testimony. I sustained the joint objection, read the question and explained to the juror that the question might be answered during Mrs. Tourist's testimony (which occurred when she testified). I reminded the jurors that they had been advised at the outset: "your questions, like those of

the lawyers are governed by the rules of evidence, and I may have to change or even not ask your questions."[5]

In retrospect, I believe that this question was legally permissible. The pattern jury instruction concerning witness identification highlights the concerns of a false identification in a one witness case such as this and touches on this very issue:

> [I]n evaluating the accuracy of identification testimony you should consider such factors as . . . .
>
> Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question?
>
> What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?[6]

Furthermore, in *People v. Huertas,*[7] the Court of Appeals allowed a victim to testify to the description the victim gave to the police (later in the trial Mrs. Tourist would be properly allowed to testify to what she said to Sergeant Garcia). In *People v. Figueroa*, the Appellate Division relied on *Huertas* in allowing limited police testimony as to " the description the victim had provided of his assailant since it was relevant to the victim's ability to observe and remember the events in question, which was at issue at trial."[8] In addition, depending on the amount of time that elapsed between the events in the elevator and the interview, as well as Mrs. Tourist's emotional state at the time she spoke to the officer, the description might fall under the "excited utterance" exception but such admission would require a proper foundation.[9]

Lesson: From a judge's point of view, sustaining a joint objection to a question is always the safest course. But, if the juror's question is proper, as it appears was the case here, should the court still ask the question? Upon reflection, if I had it to do over, I would ask the question.

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5. *See infra* app. A.

6. (CJI2d[NY] Identification – One Witness), http://www.nycourts.gov/cji/1-General/CJI2d.Identification-One_Witness.pdf.

7. 75 N.Y.2d 487 (1990)

8. 35 A.D.3d 204 (1st Dept., 2006).

9. RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 8–604 (11th ed. 1995 & Supp. 2008).

Officer Fast testified about the arrest and the defendant's station house statements. After cross-examination a juror asked this question:

> **Juror Question #4**: The plaintiff brought up the defendant's seemingly incriminating comments while being processed by Officer Fast. It is important to know if Mr. Guest's rights were read to him by the arresting officer. Was his rights read to him?[10]

The prosecutor objected because the defense motion to suppress the statement was denied. The defense did not object. At sidebar, I ruled that the pre-trial denial of the defense motion to suppress did not relieve the People of their burden of proving that the defendant's statement was spontaneously volunteered.[11] I also informed the jury that this evidence was properly testified to by the witness, and that at the end of the case the court would give further legal instructions concerning this issue, and ultimately that it would be for the jury to decide what weight to give this evidence. I then asked the question of the officer. He explained that he had not read *Miranda*[12] warnings to the defendant because he did not intend to question the defendant. He asked whether he had anything sharp in his pocket because the officer was about to reach into the defendant's pockets as part of the routine arrest process. The officer also explained the defendant blurted out his statement about being an author and planning on including everything in his book.

Lesson: Certain terms like "Miranda warnings" and "reading rights" are well known. Their legal definitions are not as widely understood. In this instance, the juror's question allowed for appropriate clarification of the legal rules.

The next day I proposed to the parties that I charge the jury on the voluntariness of defendant's statements.[13] This became unnecessary because the defendant took the stand and admitted both statements offering his explanation for each.

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10. Jurors' questions are transcribed here as submitted, including any grammatical or punctuation errors.
11. People v. Cefaro, 23 N.Y.2d 283 (1968).
12. *See* Miranda v. Arizona, 348 U.S. 436 (1966).
13. Custodial but Spontaneous Statements and Miranda Rights (CJI2d[NY] Confessions).

The story according to the defendant: John Guest, a small man in his fifties, took the stand, admitted both statements and offered an explanation. He explained that his response to the question about whether there was anything sharp in his pants was sarcasm. He also explained that never having been arrested before he felt frightened by the arrest and blurted out his intent to put all this "in my book" as a way of assuring he was not manhandled by the police. He said that he had not been in the elevator with the victim. He further explained that as a world traveler, he had heard and read about scams where "prostitutes" falsely accused guests of assaultive behavior and their pimps then extorted large payments as "hush" money. Hence his statement in the lobby that he did not know the woman, that he thought she was a whore and her pimp (actually her husband) was trying to extort money.

The defendant was acquitted on all the charges.

Case #2: Assault

Dan Disco was charged with assault in the third degree and attempted assault.

The story according to the prosecution: Three young women—Julie, Kim and Carmen—went out clubbing to celebrate Kim's birthday. At a trendy Manhattan club they met Dan and his two friends, Jim and Robert. Carmen "hooked up"[14] with Jim. The three girlfriends used Julie's digital camera to record the spicier moments taking place on and off the dance floor. At about three in the morning the club started to empty and both groups left.

Julie testified that during the evening she spoke with Dan but thought he was a creep and made excuses to avoid him. Upon leaving the club, she stopped a few feet outside to use her cell phone. While she held the phone to her ear, Dan ran towards her from out of nowhere, head-butted her, and caused her to slam the back of her head against a metal grate. Julie was cut and started to bleed heavily. She recalled Dan smiling at her and then running away. She became hysterical and lunged at him but missed. Dan disappeared from her sight. Julie immediately flagged down a patrol car, and described Dan to a police

14. Although this term was never fully explained by any witness, there was testimony that Carmen and Jim were kissing.

officer showing a photo of Dan taken earlier that evening. Dan was arrested nearby. The police took Julie to the hospital for treatment where she asked them to photograph her injuries; they refused. Upon completion of her examination, a juror submitted the following questions:

> **Juror Question #1:** Is it normal or routine for police to prevent victim from taking pictures which show evidence of injury? When she was at the club and hospital she said she was hysterical. Can you define what "hysterical" meant, i.e. crying, angry?

Both attorneys objected to the first question because the witness was not competent to testify as to police procedures. The prosecutor noted he would have his officers address this issue. I decided, and the parties agreed, that I would instruct the jury that the question would not be asked because the witness was not able to testify as to police procedures. Neither side objected to the second question.

After the parties returned to court I read the first question. Juror #1 spontaneously stated in open court, before I could explain why the question would not be allowed, "I made a mistake. I realize she cannot answer that." In response to the second question, Julie repeated her testimony as to how upset she was by the bleeding wound to her head.

Lesson: Jurors' questions seek clarification of evidence and not advocacy for either side.

> **Juror Question #2**: Who was Julie talking to on the phone at 2:45 AM?

Curiously, neither attorney (each a novice accompanied by a supervisor) had asked this question. Neither objected to this question.

I asked the question. Julie answered that she had called her boyfriend because he was in Manhattan and they thought they might meet up. She did not give her boyfriend's name; he did not testify; and he was not mentioned again.

Lesson: An overlooked opportunity is an opportunity lost. This juror focused on a potential key witness, who may have heard the commotion.

The police officer at the scene testified. He generally corroborated the victim, but did not recall if she asked him to pho-

tograph her injuries. He did recall accompanying her to the hospital. The prosecutor asked the police officer to explain police procedures as to taking photographs of injuries. The officer explained that he believed pictures of injuries were only taken in "assault one or two cases not in assault three cases." This case involved a misdemeanor assault, assault in the third degree.

Upon completion of his testimony each of the two alternates submitted questions. They did not consult with each other before submitting them.

> **Juror Question #3**: Please clarify the difference between second and third degree assault and why photo would be required in only one case.
> **Juror Question #4**: Can you clarify between 1st degree, 2nd degree, and 3rd degree assault?

The prosecutor had no objection but the defense objected fearing that an answer might lead the jury to trivialize this case.

I instructed the jury that crimes are classified by degrees, that second degree is higher than third degree and first degree is higher than second and then asked the officer why a photo would be required in only one type of case. The police officer testified that at the time he thought photographs were needed only in assault cases where a weapon was involved, and that he now knew this was incorrect.

Lesson: Given the chance, jurors will let advocates know when explanations are necessary.

The story according to the defendant: The defendant explained that he and his friends were out for a night on the town. They drove his car into Manhattan, parked near the club and expected to meet other friends there, but wound up in the wrong club. They were having a good time, so they stayed. He met Julie, they talked, danced for a while and got along well. Later that evening he saw her on the street. He thought that she was looking in his direction, so he approached and leaned in to kiss her on the cheek. She pulled away and bumped her head. He said that he laughed out of nervousness and embarrassment. He explained he would never have laughed had he known she was hurt. He said that he never saw any blood. He also agreed that Julie got angry and rushed towards him. When she did that, his friends told him to go down the street while

Julie's friends tried to calm her. The police came and he was arrested.

At the close of the defendant's testimony, two jurors asked questions.

> **Juror Question #5**: Why did you drive your car if you knew you were going out clubbing and drinking and do you usually do this? 33rd and 10th (where defendant testified he parked the car) is at least 5 blocks away. None of you were sober were you? Who was going to drive the car?

Neither side objected. The defendant answered that he purposely parked in a space where he knew he could leave it for the next day (a Saturday), because he planned to take the subway to his cousin's apartment in Astoria and spend the night there.

Lesson: Jurors are sensitive to all surrounding circumstances that might impact a witness's credibility.

> **Juror Question #6**: Did it ever cross your mind to help/comfort Julie seeing her upset or bloodied state?

Neither side objected. The defendant's state of mind was clearly relevant. The defendant answered that when Julie came at him in anger, he tried to get away from her and he was unaware of the state of her injuries at that time. He added, had he known, of course he would have tried to help her, and that he was now very sorry she was hurt.

Lesson: Jurors want to know what "type of person" each key actor in a case is—especially the defendant.

Emphasizing the absence of independent proof of injury to the forehead or side of Julie's head, defense counsel argued in closing that there was nothing to support her assertion that the defendant forcefully butted her head with his head. The defense also highlighted that photos of the defendant, taken at his arrest by the police, showed no injuries to his head or face.

The jury acquitted after 45 minutes of deliberations.

Case #3: Attempted Assault/Resisting Arrest

Danny Castro, a resident at a men's shelter, was charged with multiple counts of assault, attempted assault and resisting arrest arising out of a dispute with a shelter employee, Mr. Simon.

The story according to the prosecution: Mr. Simon testified that after denying Mr. Castro access to the cafeteria because Mr. Castro had already eaten, Mr. Castro became belligerent. Mr. Fagan, a security guard, escorted Mr. Castro from the area. A few minutes later Mr. Simon, seated at his post outside the cafeteria, reported what had occurred to Mr. Brown, the shelter director. As Mr. Brown and Mr. Simon were speaking, Mr. Castro returned to the cafeteria entrance and again lunged toward Mr. Simon. Mr. Brown intervened to protect his employee, and as he and Mr. Castro struggled, they fell to the floor. Mr. Castro scratched the director and tried to bite him (shouting out that he had AIDS and would infect Mr. Brown). When the shelter police arrived, and tried to arrest Mr. Castro, he resisted. Shelter police are technically "peace officers."

The prosecution called Mr. Fagan, the security guard, first followed by Mr. Brown, Mr. Simon, and the arresting officers. The jury did not deliberate because upon completion of the prosecution's direct case, the defendant pleaded guilty to resisting arrest.

One issue in this trial underscored the utility of juror questions. Both Mr. Simon and Mr. Fagan drew separate sketches of the area where the assault took place. Mr. Fagan drew his sketch during cross-examination at the request of defense counsel. When the prosecutor called Mr. Simon to testify, he asked Mr. Simon to draw a sketch. The sketches were simply awful. The witnesses placed objects, doors, stairs, offices and entrances in different locations. After the second handwritten diagram was admitted into evidence and Mr. Simon's testimony finished, one juror asked the following questions:

> **Juror Question #1:** The map drawn by Mr. Simon is still unclear. Can we take a closer look at it? Is this the map we are now to consider correct? Why does Mr. Simon have a different idea of layout of the area? Is it just the 1st map upside-down?

Neither side objected to these questions, but each agreed they were not really properly asked of the witness. Instead the parties agreed to allow both diagrams to be shown to each juror side by side. I gave an instruction that when they deliberated, it

would be up to them to determine what weight to give to the diagrams.

The prosecutor never offered a scaled diagram, or photographs of the scene. The defendant made no attempts to clarify the discrepancies.

Lesson: Juror questions inform advocates of the jurors' concerns.

Conclusion

The jury is the touchstone of "freedom under the law." Our goals as judges should be engaging the jury's attention, assuring careful attention to the evidence, clearing up confusion as soon as possible, and improving the quality of justice dispensed. I think these brief summaries show that allowing jurors to ask questions contributes to meeting these goals.

Overall, my experience has been:

- Jurors ask focused questions that are relevant and reasonable.
- Jurors do not use the opportunity to ask questions to become advocates.
- It is always better to address confusion when it arises than to wait for notes sent out during jury deliberations (when it is sometimes too late).

In sum, we should pay special attention to what jurors say and respond to their concerns. What better way is there than allowing them to ask questions?

APPENDIX A

Judge Stanley Sklar's Suggested Instruction on Juror Questions[15]

Under our system, it is the lawyers' job to ask questions of a witness. I may at rare times also ask a witness a question.

Your job as jurors is to carefully consider all of the testimony and other evidence and come out with a fair verdict based on the evidence. So jurors usually do not question witnesses. In a rare instance a juror may, however, want to ask a question to clarify something the witness said. I will allow you to ask a clarifying question if you follow these rules.

Any question must be written down on a piece of paper and given to the court officer for my review. Please include your name or juror number. Do not give the court officer your question immediately. Often a question that you would like to ask is promptly asked by one of the lawyers. However, if the lawyer doesn't ask your question right away, you may submit your question. Before submitting a question you must not discuss the proposed question or its wording among yourselves.

You should only ask questions to clarify a witness's testimony. For example, you may hear a term used that you have never heard of and feel the need to know its meaning. Your question should also be relevant to the issues in this trial so that we don't get bogged down. When you ask questions, remember that you are an impartial judge of the facts. This means that you must not in any way express your opinion of the witness or the case. You must not try to be an investigator or a detective, or try to help any party. Like me, you should let the lawyers, who have lived with the case for a long time, try the case as they see it. You should not feel that you have to ask a question.

I will review all questions with the lawyers. Your questions, like those of the lawyers, are governed by the rules of evidence, and I may have to change or even not ask your questions. If so, don't be offended, or hold it against any party, or speculate as to what the answer to your question might have been.

If I allow the question, then I will ask it. The lawyers will be allowed to ask follow-up questions.

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15. JURY TRIAL INNOVATIONS IN NEW YORK STATE, *supra* note 3 at 14.

Finally, while you may give the answer to a question such importance as you believe is appropriate, you must not give the answers to any of your questions any greater or lesser importance, just because you asked the questions. Remember that you are NOT [emphasize with voice] one of the lawyers, and you must remain neutral fact-finders throughout the trial. You must consider ALL [emphasize with voice] of the evidence fully and fairly to arrive at a true and just verdict.

Bridging Theory and Practice: A Roundtable on Court Responses to Domestic Violence

*Carolyn Turgeon**

In November 2006, the Center for Court Innovation brought together 20 national experts for a daylong roundtable devoted to exploring how courts should respond to domestic violence, particularly in those cases where incarceration is not a realistic option due to the facts of the case or the severity of the behavior. Participants included judges, prosecutors, defense counsel, victim advocates and researchers from around the country. Brooklyn Law School professor Elizabeth Schneider served as moderator.

The roundtable grew out of a Center for Court Innovation study finding that domestic violence offenders who were randomly assigned to a batterer program were just as likely to reoffend as those not assigned to a program.[1] In light of these findings, the Center convened this diverse group of experts in an attempt to bridge theory and practice and consider what concrete steps courts might take to intervene in low-level domestic violence cases more effectively. Participants were asked

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1. Melissa Labriola et al., Testing the Effectiveness of Batterer Programs and Judicial Monitoring: Results From A Randomized Trial (2005), www.http://www.courtinnovation.org/_uploads/dopcuments/battererprogramseffectiveness.pdf.

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to consider current court responses to the problem and to brainstorm new approaches as well as new avenues for research.

Current Justice System Responses to Domestic Violence

As an introduction to the roundtable discussion, it is useful to review the relevant literature about batterer programs, judicial monitoring, intensive probation, domestic violence courts, and enhanced victim advocacy. Following this review is an edited transcript of the roundtable discussion.

The past two decades have been a period of great experimentation and innovation in court systems nationwide.

Batterer Programs

Since the late 1970s, a growing number of courts have come to rely on batterer programs as their sanction of choice in domestic violence cases, especially when the legal issues in a case preclude the imposition of jail.[2] Some support these programs in the hopes that they will rehabilitate offenders and prevent further re-offending. However, the main findings from the Center for Court Innovation's randomized trial in the Bronx are consistent with those of three other recent trials, none of which found that mandating offenders to a batterer program produced lower rates of re-abuse.[3] Moreover, the research literature has also yielded little support for the rehabilitative effectiveness of one over another specific type of batterer program model, including cognitive-behavioral, psychodynamic, or couples counseling.[4]

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2. *See, e.g.,* Juliet B. Austin & Juergen Dankwort, *Standards for Batterer Programs: A Review and* Analysis, 14 J. INTERPERSONAL VIOLENCE 152 (1999); Carann S. Feazell et al., *Services for Men Who Batter: Implications for Programs and Policies*, 33 FAM. REL. 217 (1984); Edward W. Gondolf, *Batterer Intervention: What We Know and Need to Know*, 12 J. INTERPERSONAL VIOLENCE 83 (1997).

3. ROBERT C. DAVIS ET AL., DOES BATTERER TREATMENT REDUCE VIOLENCE? A RANDOMIZED EXPERIMENT IN BROOKLYN (2000), http://www.ncjrs.gov/pdffiles1/nij/grants/180772.pdf; Franklyn W. Dunford, *The San Diego Navy Experiment: An Assessment of Interventions for Men Who Assault Their Wives*, 68 J. CONSULTING & CLINICAL PSYCHOL. 468 (2000); Lynette R. Feder & Laura Dugan, *A Test of the Efficacy of Court-Mandated Counseling for Domestic Violence Offenders: The Broward County Experiment*, 19 JUST. Q. 343 (2002).

4. Larry Bennett & Oliver Williams, *Controversies and Recent Studies of Batterer Intervention Program Effectiveness*, NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, http://new.vawnet.org/category/Main_Doc.php?docid=373; AMANDA B. CISSNER & NORA K. PUFFETT, DO BATTERER PROGRAM LENGTH OR

Others, skeptical of the therapeutic value of batterer programs, embrace them in the belief that they can provide a viable punitive option to hold domestic violence offenders accountable for their violent behavior.[5] Batterer programs may well have potential in this regard, although here too the existing evidence is mixed. Several studies suggest that while many courts seek to use batterer programs to hold offenders accountable, most courts do not consistently impose further sanctions on those who are noncompliant.[6]

Interestingly, the Center for Court Innovation study did find that a batterer program mandate had a beneficial impact on victim satisfaction;[7] however, in the absence of a reduction in re-abuse, this finding is difficult to interpret. It may indicate that victims whose partners are mandated to a program think that their partners will change; alternatively, it is equally plausible that the victims recognize that the batterer program does not make them safer but want the offenders punished appropriately by having to attend it as an added sentencing requirement. Indeed, nearly half (49 percent) of the victims who were *dissatisfied* with the sentence expressed that their dissatisfaction arose because the sentence was not severe enough. (The remaining 51 percent offered a number of reasons for their dissatisfaction.)

APPROACH AFFECT COMPLETION OR RE-ARREST RATES? (2006), http://www.courtinnovation.org/_uploads/documents/IDCC_DCAP%20final.pdf.

5. PHYLLIS FRANK, WHY THE N.Y. MODEL FOR BATTERER PROGRAMS DOES NOT TREAT, FIX, CURE, REHABILITATE OR OTHERWISE GET INDIVIDUAL MEN TO STOP ABUSING WOMEN (2006), http://www.nymbp.org/principles.htm; Ellen L. Pense & Coral McDonnell, *Developing Policies and Protocols, in* COORDINATED COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND (Ellen L. Pence & Coral McDonnell eds., 1999).

6. J.C. Babcock & R. Steiner, *The Relationship Between Treatment, Incarceration and Recidivism of Battering: A Program Evaluation of Seattle's Coordinated Community Response to Domestic Violence*, 13 J. FAM. Psychol. 46 (1999); ELAINE M. HOWLE, BATTERER INTERVENTION PROGRAMS: COUNTY PROBATION DEPARTMENTS COULD IMPROVE THEIR COMPLIANCE WITH STATE LAW, BUT PROGRESS IN BATTERER ACCOUNTABILITY ALSO DEPENDS ON THE COURTS (2006), http://www.bsa.ca.gov/pdfs/reports/2005-130.pdf; MELISSA LABRIOLA ET AL., COURT RESPONSES TO BATTERER PROGRAM NONCOMPLIANCE: A NATIONAL PERSPECTIVE (2007), http://www.courtinnovation.org/_uploads/documents/Court_Responses_March2007.pdf.

7. Labriola, *supra* note 6.

Judicial Monitoring

Judicial monitoring involves having domestic violence offenders return to court regularly to verify their compliance with program mandates, restraining orders or other court-imposed conditions. In theory, such monitoring enables the judge to respond swiftly and consistently in cases of noncompliance and reinforce that the court takes domestic violence seriously.

Although judicial monitoring has proven highly effective with drug offenders,[8] there is little research examining the effectiveness of judicial monitoring with respect to domestic violence offenders. Perhaps the most suggestive study focused on four specialized domestic violence courts in San Diego that included judicial monitoring components.[9] The study reported two central findings when comparing the periods before and after implementation of the domestic violence courts. First, after implementation, there was increased attendance at required program sessions and an increased ability to detect and respond to violations of court orders; and second, the re-arrest rate within one year of the initial arrest dropped from 21 percent to 14 percent. The authors attribute but cannot conclusively link these positive findings to the domestic violence court practice of requiring offenders to attend post-dispositional hearings for compliance monitoring.

Three other studies also suggest that judicial monitoring may have positive effects, although none comprise a rigorous, carefully controlled test. One points to the role of mandatory compliance hearings in producing increased batterer program completion rates.[10] In this study, conducted at the Pittsburgh (Pa.) Domestic Violence Court, batterer program completion rates were assessed before and after the court introduced a

8. ADELE HARRELL ET AL., FINDINGS FROM THE EVALUATION OF THE D.C. SUPERIOR COURT DRUG INTERVENTION PROGRAM (1998), http://www.urban.org/url.cfm?ID=407783; Douglas B. Marlowe et al., *Are Judicial Status Hearings A Key Component Of Drug Court? During-Treatment Data From A Randomized Trial*, 30 CRIM. JUST. & BEHAV. 141 (2003).

9. DOMESTIC VIOLENCE COURT: EVALUATION REPORT FOR THE SAN DIEGO COUNTY DOMESTIC VIOLENCE COURTS. SAN DIEGO, CA: SUPERIOR COURT SPECIAL PROJECTS UNIT (2000).

10. EDWARD W. GONDOLF, THE IMPACT OF MANDATORY COURT REVIEW ON BATTERER PROGRAM COMPLIANCE: AN EVALUATION OF THE PITTSBURGH MUNICIPAL COURTS AND DOMESTIC VIOLENCE ABUSE COUNSELING CENTER (DACC),(1998), http://www.mincava.umn.edu/documents/gondolf/pccd/pccd.html.

mandatory court appearance 30 days post-sentence. The program completion rate rose from just under half to 65 percent. As with the San Diego study, it is unclear whether other simultaneous changes may have contributed to the improved compliance outcomes. Also, this study only reports a clear effect on program completion rates, not on re-offending.

Another study suggested that longer periods of court control may lead to lower re-offending rates.[11] And yet another study found that offenders whose cases took longer to dispose—signifying a greater number of pre-disposition court appearances—had a significantly lower re-arrest rate.[12]

While these studies all suggest that judicial monitoring makes a difference, a recent quasi-experiment conducted at the Bronx (N.Y.) Misdemeanor Domestic Violence Court found that ongoing judicial monitoring did not reduce recidivism.[13] Although the monitoring examined in this study was not ideal (there was a lack of clear, immediate and consistently applied consequences in response to noncompliance), the Bronx study offers a cautionary note and suggests that there is a need for more research on monitoring.

Intensive Probation Monitoring

Intensive probation can also be used to monitor compliance and increase offender accountability. Probation officers can enforce court orders, review offender compliance with court-mandated programs and order additional sanctions when offenders are found noncompliant. Faye Taxman, professor of criminology and criminal justice, has argued that surveillance alone is not enough and that probation supervision must be accompanied by evidence-based therapeutic practices that engage offenders in a process of change and consistently apply sanctions in response to noncompliance.[14]

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11. Davis, *supra* note 3.

12. RICHARD R. PETERSON & JO DIXON, EXAMINING PROSECUTORIAL DISCRETION IN DOMESTIC VIOLENCE CASES, Presented at the Annual Meeting of the American Society of Criminology (Nov. 2005).

13. Michael Rempel, et al., *Does Judicial Monitoring Deter Domestic Violence Recidivism?: Results of a Quasi-Experimental Comparison in the Bronx*, 14 VIOLENCE AGAINST WOMEN 185 (2008).

14. Faye S. Taxman, *Supervision – Exploring the Dimensions of Effectiveness*, 66 FED. PROBATION 14 (2002).

Findings concerning the effectiveness of probation supervision are inconclusive.[15] A recently published study evaluating the effectiveness of a specialized domestic violence probation unit in Rhode Island found that it produced significantly lower rates of re-offending compared with probationers receiving traditional supervision.[16] This effect, however, appeared only among "low risk" offenders with less extensive criminal records.

An Urban Institute study of a judicial oversight project in Milwaukee found that one effect of heightened monitoring was a dramatic increase in probation revocations and a reduced re-arrest rate.[17] The authors, however, link the lower rate of arrest to the higher rates of probation revocation and re-incarceration, which led the offenders to have less of an opportunity to commit a new offense.

Court Collaboration with Victim Advocates

Since the term "advocacy" can encompass many activities, undertaken at both systematic and individual levels, it is often unclear what is meant by domestic violence victim advocacy.[18] Margaret Bell and Lisa Goodman tell us that, "At its best, advocacy for battered women in the justice system consists of four overlapping components: (a) assistance in planning for safety, (b) provision of emotional support, (c) provision of information about and access to community resources and (d) provision of information about and accompaniment through the legal process."[19]

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15. Lawrence W. Sherman et al., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING? (1998), http://www.ncjrs.gov/works/; Joan Petersilia, *A Decade of Emperimenting With Intermediate Sanctions: What Have We Learned?* 23 PESPECTIVES 39 (1999); Doris Layton Mackenzie, *Evidence-Based Corrections: Identifying What Works*, 46 CRIME & DELINQ. 457 (2000).

16. Andrew R. Klein and Ann Crowe, *Findings From an Outcome Examination of Rhode Island's Specialized Domestic Violence Probation Supervision Program: Do Specialized Supervision Programs of Batterers Reduce Reabuse?* 14 VIOLENCE AGAINST WOMEN 226 (2008).

17. ADELE HARRELL ET AL., EVALUATION OF MILWAUKEE'S JUDICIAL OVERSIGHT DEMONSTRATION (2006), http://www.urban.org/url.cfm?ID=411315.

18. CAROL BOHMER ET AL., VICTIM ADVOCACY SERVICES IN URBAN PROGRAMS: A DESCRIPTION BY STAFF AND CLIENTS OF SERVICE PROVISIONS AND GAPS, (2000), http://www.ncjrs.gov/pdffiles1/nij/grants/182368.pdf.

19. Margaret E. Bell & Lisa A. Goodman, *Supporting Battered Women Involved with the Court System: An Evaluation of a Law School-Based Advocacy Program*, 7 VIOLENCE AGAINST WOMEN 1377, 1381 (2001).

Research indicates that most victims appreciate the support and assistance of advocates, particularly in helping them to navigate the court process.[20] It may also boost their opinion of the larger system or at least their willingness to participate in it. In one study, three-quarters of the domestic violence victims who had received advocacy services indicated that it had increased the likelihood that they would report future violence. In a study of the Quincy (Mass.) Domestic Violence Court, victims reported high levels of satisfaction with advocates, yet wondered if the advocate's role was really just to get information for the prosecution.[21]

There have been a few evaluations of the long-term impact of victim advocacy. Studies have found that: two years post-intervention, victims who worked with advocates experienced less violence, depression, fear and anxiety than those who had not; and, that shelter-based advocates and legal advocates have positive effects, particularly in supporting victims in leaving their batterers.[22] Clearly, this represents a promising area for future practice and research; courts and prosecutors may be in a unique position to link victims with advocates due to the direct contact with victims that often arises in conjunction with a criminal court case.

Specialized Domestic Violence Courts

Many of the practices discussed above are employed in specialized domestic violence courts. A domestic violence court hears exclusively domestic violence cases, with screening mechanisms established by the prosecutor or court clerks to identify eligible cases.[23] In 2000, there were over 150 such courts nation-

20. Alisa Smith, *Domestic Violence Laws: The Voices of Battered Women*, 16 VIOLENCE AND VICTIMS 91 (2001).

21. EVE BUZAWA ET AL., RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE SETTING (1999), http://www.ncjrs.gov/pdffiles1/nij/grants/181428.pdf.

22. Bell, *supra* note 19; Lianne V. Davis & Meera Srinivasan, *Listening to the Voices of Battered Women: What Helps Them Escape Violence,* 10 AFFILIA 49 (1995); EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988).

23. Robyn Mazur & Liberty Aldrich, *What Makes A Domestic Violence Court Work? Lessons From New York*, 42 JUDGES' J. 5 (2003); EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002); Julia Weber, *Domestic Violence Courts: Components and Considerations*, 3 J. CENTER FOR FAMILIES, CHILDREN & CTS. 23 (2000).

wide.[24] Today there are many more. Most domestic violence courts share two key goals: improving defendant accountability and enhancing victim services.

There have been few rigorous evaluations of domestic violence courts, but much of what does exist has been encouraging. More than conventional courts, domestic violence courts have succeeded in linking complainants to advocacy and services.[25] Domestic violence courts are perceived by complainants as producing fairer outcomes and as being generally more satisfactory than conventional courts.[26]

Interestingly, while complainants appear to be satisfied overall, the research literature suggests that satisfaction hinges not only on the outcome of the case, but on a broad range of factors, including the complainant's perception of having been treated fairly, personal motivation to end the relationship, and even the criminal history of the offender.[27] This implies that the court experience itself is only a small percentage of the complainant's total experience with the case.

The introduction of a domestic violence court has also been found to result in significant reductions in case dismissal rates,[28] to increase the pursuit of cases with lower charges, to increase the percentage of defendants mandated to batterer programs and to increase the frequency and regularity of judicial

24. SUSAN L. KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY (2000), http://www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf.

25. Harrell, *supra* note 17; KRIS R. HENNING & LISA M. KLESGES, EVALUATION OF THE SHELBY COUNTY DOMESTIC VIOLENCE COURT: FINAL REPORT, SHELBY COUNTY, TN (1999) (unpublished manuscript, on file with author) ; LISA NEWMARK ET AL., SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTING AND IMPACT FROM THE KINGS COUNTY EXPERIENCE (2001), http://www.courtinnovation.org/_uploads/documents/SpecializedFelonyDomesticViolenceCourts.pdf.

26. DEBORAH A. ECKBERG & MARCHY R. PODKOPACZ, DOMESTIC VIOLENCE COURT IN MINNEAPOLIS: THREE LEVELS OF ANALYSIS, Presented at the Annual Conference of the American Society of Criminology (May 2002); Angela R. Gover et al., *Combating Domestic Violence: Findings From an Evaluation of a Local Domestic Violence Court*, 3 CRIMINOLOGY & PUB. POL'Y 109 (2003); GERALD T. HOTALING & EVE S. BUZAWA, VICTIM SATISFACTION WITH CRIMINAL JUSTICE CASE PROCESSING IN A MODEL COURT SETTING (2003), http://www.ncjrs.gov/pdffiles1/nij/grants/195668.pdf.

27. Henning, *supra* note 25; Hotaling *supra* note 26.

28. Robert C. Davis et al., *Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee,* 22 JUST. SYS. J. 62 (2001); Harrell, *supra* note 17; Henning, *supra* note 25; Newmark, *supra* note 25.

monitoring,[29] as well as to increase the incidence of jail sentences.[30]

The impact on re-offending, however, remains ambiguous. Three studies found no effect on re-offending.[31] One of these studies suggested that the lack of an effect might have been partially attributable to the court's increased knowledge of defendant behavior, which made it more likely that the court would learn of re-offending.[32] Three other studies found small to significant reductions in re-offending.[33] A seventh study found that the domestic violence court produced a reduction in re-offending, not because the offenders were less likely to commit new crimes when the opportunity arose to do so, but because the offenders were more likely to be in jail on probation revocations.[34] These different results may reflect differences in the effectiveness of the various domestic violence courts that have been studied or may simply reflect inconsistencies in the research methodologies used to date.

The Roundtable

Given the complexity of domestic violence, both as a family and legal problem, it is not surprising that the conversation that took place over six hours in the Center for Court Innovation's Manhattan offices in November 2006 was wide-ranging. Batterer programs were the starting point for the discussion. Many participants questioned the primary purpose of batterer programs: are they meant to be rehabilitative and change the behavior of individual offenders or are they mechanisms for holding the offenders accountable? Even if batterer programs do not reduce recidivism or protect victims, can it be argued

29. Harrell, *supra* note 17; Newmark, *supra* note 25.

30. Jane E. Ursel & Steve Brickey, *The Potential of Legal Reform Reconsidered: An Examination of Manitoba's Zero Tolerance Policy on Family Violence*, *in* POST-CRITICAL CRIMINOLOGY 56 (T.O'Reilly-Flemming ed., 1996).

31. ADELE HARRELL ET AL., FINAL REPORT ON THE EVALUATION OF THE JUDICIAL OVERSIGHT DEMONSTRATION (2007), http://www.urban.org/url.cfm?ID=411498; Henning, *supra* note 25; Newmark, *supra* note 25.

32. HARRELL ET AL., *supra* note 31.

33. Gover et al., *supra* note 26; HARRELL ET AL., *supra* note 31; SAN DIEGO, CA: SUPERIOR COURT, *supra* note 9.

34. Harrell, *supra* note 17.

that they send an important larger message (both to victims and the larger society) that all abuse has consequences?

Participants discussed at length whether domestic violence courts and batterer programs have a role to play in re-setting social norms around domestic violence. As Andrew Klein analogized, "An alcoholic will continue to drive drunk, but drunk driving laws created a whole different social norm about drinking in this country." Phyllis Frank argued that conducting "research on what makes people change behavior leaves us with defining domestic violence as a behavior that can be treated and for which we can look to therapy." Instead, she said, "the challenge for us is to think: how do you do massive social change?" Consultant Mary Haviland countered that "the only way that we're really going to have an effect on the issue is if we're changing men," and Liberty Aldrich acknowledged the reality that court cases involve specific people, saying that "we still have to operate on the individual level."

These and similar tensions informed much of the day's conversation. While some felt, like Haviland, that the justice system should focus on men and their behavior, Michael Rempel held up the drug court model as an example that productively combines accountability with treatment. Others felt that resources should be directed to victims instead, even exclusively. One re-occurring theme or issue throughout the day was the role of the victim and how she could be more engaged and empowered by the court system. Participants discussed how much attention and how many resources should be directed at victims as opposed to, or instead of, the offenders. Some felt that funneling resources to victims should be a more significant focus. Some suggested making offenders more directly accountable to victims, while others lamented the victims' frequent willingness to stay with their abusers, and wondered if focusing attention on victims' mindsets instead of batterers' would make more sense, or if there was a way to not only better enforce orders of protection but to mandate the separation of the two parties altogether.

Participants looked closely at the effectiveness of the tools currently available to courts for responding to low-level domestic violence offenders: probation, judicial monitoring, pretrial monitoring and victim-centered responses. And while Lynette

Feder argued for more rigorous research and evidence-based practices, the Honorable Timothy P. Lawliss pointed out that "Monday morning I have to decide something and I can't wait for these studies."

Participants then moved to brainstorming about new solutions, including community service as a sentencing option and electronic monitoring devices to keep the offenders away from the victims. Despite these new ideas and the growing evidence that batterer programs do not reduce recidivism, most participants were not ready to do away with batterer programs and other existing methods of punishment. More robust monitoring, it was argued, could make a significant difference. The impression held by some was that compliance with programs was not taken seriously by justice officials, and that a shift in cultural attitudes could help offenders take their mandates more seriously as well.

Almost everyone at the table agreed that new research was necessary to produce a more rigorous understanding of what works and what does not. The day ended with a vigorous discussion of what a research agenda might look like as practitioners, activists and researchers move forward in a collaborative attempt to intervene more effectively in domestic violence cases.

Why Do We Use Batterer Programs?

SCHNEIDER: I think that there has been a need for people over the last 30 years to believe that batterer intervention programs make a difference. We're now confronting the limitations of that belief.

HARRELL: I think we have to back up a minute if we're going to be serious about batterer treatment. Smoking and drug abuse treatment literature only began to make breakthroughs when it started really pinpointing what leads to changed behavior. If we're serious about looking at batterer treatment, we have to ask what we can do to make batterers want to change.

FRANK: The whole idea of figuring out how to do research on what makes people change their behavior assumes that domestic violence is a behavior that can be treated through

therapy. Some of us believe that domestic violence is rooted historically in a sexist culture. Men believe they can control the lives of women in the privacy of intimate relationships. If we assume that there is not a treatment for men who feel entitled to control women, it would have us asking different kinds of questions. Could we start thinking outside this box and come up with something else? If we compare sexism to racism and the way that racism has been built into the structure of every institution in the United States, the challenge becomes how do we change those institutions? How do we challenge people to make massive change?

KLEIN: I think courts do help set norms. Drunk driving laws created a whole different social norm about drinking in this country. Batterer programs may not protect the individual victim, but they can have a larger effect.

SCHNEIDER: Domestic violence advocates have talked about the parallel to drunk driving for a long time. Though many deaths still result from drunk driving, over the last two decades it has become a social norm to talk about designated drivers, to be aware of drunk driving, to question someone who's been drinking and plans to drive. I don't think we've had that same kind of norm shifting around domestic violence.

HARRELL: I wonder about the decline we've seen in domestic homicide, if there isn't some relationship to norm shifting.

ALDRICH: Although I agree with all of the social change theory, as courts we're responding to individual cases. I don't think I'm comfortable saying that we should give up on thinking on the individual level. We have to operate on the individual level.

HAVILAND: I think people who are doing this work are at an interesting crossroads. For a long time many advocates did not work with men at all; they saw it as pulling resources away from women's groups. I think that is really starting to change. The only way that we're really going to have an effect on this issue is if we're changing men and attitudes toward women.

Is Probation the Answer?

LEIDHOLDT: I think that probation is a very valuable tool in the arsenal. I have represented hundreds of perpetrators and/or accused perpetrators as well as hundreds of victims, and I think probation can make a big difference if the judge clearly and emphatically points out the consequences of violating the terms of probation.

SCHNEIDER: Here's something I just want to throw in. You know, whatever the problems are with batterer intervention programs, they at least do have some kind of agenda. Relying on individual probation officers to get involved with both the batterer and the woman requires a level of sensitivity and knowledge about domestic violence that does not come easily.

MOSLEY: In my experience, it makes a big difference who the probation officer assigned to the court is. I used to get complaints from victims that the probation officers would treat them unfairly, and that they did not feel safe to communicate freely about what was happening in the house. The victims viewed the officers as an arm of the criminal justice system, as coming from the judge, and there was a lot of confusion. We in the court were making all these promises, but when things were actually happening at home, victims were afraid to report them.

LEIDHOLDT: It's a little bit like child welfare administration. We see instances where case workers can be responsive to the needs of victims and can assist victims in achieving safety, but we also see instances where it can be a tool of the state in its most authoritarian and irrational guise. I do believe that probation can be a viable tool, but it has to be backed up by a certain philosophy. Batterers believe the judge is in control. They don't respect the victim, but they do respect the judge, and they can respect the probation officer as well. But the probation officer has to be trained and screened and monitored.

MOSLEY: What about clearance checks of probation officers? What about somebody in the administration of probation doing compliance checks?

KLEIN: One problem is that we are dealing with this whole misdemeanor population that may be too dangerous to remain on probation. One thing all the studies show is that non-completers of programs are much more likely to offend again than those who complete. So probation violators give us

an excuse to put offenders in jail that we don't have otherwise. Probation can be a dynamic risk screening instrument and we don't use it enough. In Milwaukee, the recidivism was less for those in a program because half of them had their probation revoked. You don't have to wait for him to do it again to realize he is serious.

What Role Does Judicial Monitoring Play?

REMPEL: In our study in the Bronx we found that the nature of the monitoring was weak so it didn't offer a real test of the efficacy of monitoring. So in thinking about future directions, we would like to identify a place where there is a rigorous approach to monitoring, where there are consistent consequences for noncompliance and the monitoring is frequent and intensive. In the drug court model, monitoring typically is every week at the beginning of participation.

LEVENTHAL: In my felony court I bring back offenders every couple of months, after they've been convicted and are out of jail on probation. I also bring back parolees. Within a month of their release they come back in front of me. I go over conditions of parole, I talk about responsibility and at the end I tell them that I'm still watching them.

FRANK: The problem is that I think maybe 10 percent of judges are acting in ways that are ethical and reasonable and sound. We decided five years ago to change the meaning of the word "outcome" in a batterer program. Rather than counting how many men got "fixed," we started counting what the judge did when the men didn't comply with the order. We checked in regularly until final adjudication. The judges began doing more because we were asking what happened.

LEIDHOLDT: I totally agree. At Sanctuary for Families we have aggressively targeted bad judges and gotten rid of two of them. I think as a movement we have to. With some judges training doesn't make a difference. I don't know that we have, as a movement, really addressed this problem.

FEDER: As a researcher, if I could come into a jurisdiction with a great judge and great judicial monitoring and do an experimental design, that would be extremely useful. If we were able to show that, yes, Judge Leventhal spent 25 percent more time on his cases, but in return Judge Leventhal had a lower

recidivism rate, which then reduced the cost to taxpayers. . .that is what they are doing now in the prevention literature. Really good prevention programs cost a lot, but to the extent that they save a lot down the long run they are very cost effective.

REMPEL: I think we need to give ourselves testable hypotheses to begin to talk about the role of the judges. I wonder if we could really write down what good judicial practices are because I don't believe that we have evidence-based judicial practices now.

LAWLISS: It's hard to say what judicial action works or doesn't work because we don't have the data now to even say what they are doing. So how can we say the judge is a good judge or a bad judge because he does A versus B when we don't have that information?

Could Increased Use of Pretrial Monitoring Improve Outcomes?

BUZAWA: I think that we are often negligent before defendants even get to court. What may be helpful is if they automatically put in a restraining order, so that monitoring could begin right at the time of arrest, prior to trial.

LUCIBELLO: In New York there is very little use made of pretrial release conditions and it's usually not until the disposition stage that there is any sort of meaningful constraint put on the defendant and his ability to exert control and authority over the victim. I think we would have enormous defense bar uproar should we try to institute pretrial release conditions.

MOSLEY: Before the hurricane in New Orleans, they had a very interesting pretrial diversion model. Because they have a lengthy period of time between a complaint and the actual filing of the charges, they traditionally engage in pretrial probation with all types of conditions.

ALDRICH: In many cases, pretrial sanctions tend to end up being alternatives not to incarceration but to prosecution.

REMPEL: There is research that actually indicates that pretrial monitoring may be effective in terms of reducing early noncompliance. So I think it is something that is definitely worth considering in connection with the early frontloading of services to the victim.

Is There Any Role for Treatment?

KLEIN: Although you are not supposed to be talking about drugs and alcohol, the problems are almost always related to drugs and alcohol. Too often we think that either you go to a batterer program or go into treatment. God forbid you go into two different programs at once.

ALDRICH: I think many practitioners feel that there are some batterers who have serious mental health issues that contribute to their criminal behavior. I really think it is important to distinguish between thinking about batterer programs as treatment of offenders and using therapeutic interventions, like mental health counseling or drug treatment, with certain subsets of offenders.

SCHNEIDER: I have serious questions about whether or not we can identify meaningful sub-categories, which we may not want to do. When we have a culture in which violence against women is promoted and learned from childhood, trying to distinguish the abuse we are talking about from other types of abuse or other contributing factors becomes very difficult.

AUCHTER: I think we are dancing around two issues: the extent to which we want our response to be punitive and the extent we really want change in behavior—and you can't do that by whipping people.

What Alternatives are There?

HAVILAND: I think we could look at community service and some of the issues around bail and detention. I think batterer programs have sort of taken up that space.

REMPEL: Community service isn't going to involve the amount of resources that some other things will because it's already in place. You could also build in a monitoring component by having offenders do a day of community service per month over six months or something like that. There would be some questions though about whether you would put domestic violence offenders on a work crew with someone who had engaged in low-level theft.

SCHNEIDER: What I like about this idea is that I think that community service makes the point that battering harms the community.

DYER: I work at a woman's shelter one night a week and spend a lot of time talking with victims. As a result, we require on all of our probation and deferred sentences that offenders pay child support. If the offender is indigent, he has to do community service. And if he has money, he has to make a donation to the woman's shelter. Depending on his resources, it can be as much as $5,000 or as little as a hundred dollars. I also think we sorely need civil legal assistance for victims. That is the thing we are missing the most in Texas. Right now the best advice I can give to most victims is sell all you have and borrow all you can and that is pathetic.

HARRELL: I have actually been wondering if there was any way to give that money to the victim in terms of compensation or to empower her by having some financial resources that he would ordinarily be paying for the batterer program.

LAWLISS: Why couldn't we award the women for pain and suffering? This could involve a tremendous amount of money and inflict far more pain than incarceration. It could be above and beyond child support. Yes, many domestic violence offenders don't have a lot of funds, but if you garnish their wages for the next five years that may have a larger deterrent effect. My problem with the batterer programs is that I don't think the abuser's problem is sensitivity. I think that this is the way he's figured out how to succeed in the world and we are not going to get him to change his behavior until the cost benefit analysis in his mind changes. We do this by making the cost greater than the benefit. I think this is part of what we did with DWI and why we have had the society change. I am trying to inflict more negative consequences on batterers, and money is something everyone cares about.

KLEIN: Here's my fantasy. In Massachusetts you don't graduate high school unless you get a certain score. If batterer programs are going to teach these men something then you should have pre-tests and post-tests and if they haven't learned anything let's flunk them. We also have some other tools that we don't use. I just did a book on enforcement of the federal firearms prohibition. There are big signs in West Virginia that say "beat a woman, lose your gun." Probation in Maricopa County, Arizona, has a wonderful unit that goes out and tries to

disarm probationers. Very effective. Do you want a dangerous person to have a gun?

AUCHTER: I just want to throw out the idea of the motivational interview, which is something they do in Canada. I spoke with a number of people a year or so ago who would sit down with a guy, who wasn't even court referred yet and begin an interview process that led them to that first stage of acceptance. What that whole process involved I am not sure.

DYER: Some of the people in Dallas are using monitor devices that go off when a batterer gets near a victim. Some of the victims don't want them, but they are being used. Officers are often able to arrest the defendant before violence has occurred because he has violated the stay away order.

FEDER: I get very nervous about electronic monitoring for him. Some women want him back, you know. What if we changed our focus and instead gave women mobile stress alarms? If at any point her situation becomes dangerous, she could hit that and they would send a police car immediately.

BELKNAP: In Boulder, abusers were assigned to go one evening and listen to a panel of survivors speak. At one I saw a young woman speak whose father abused her mother really badly. At another a woman whose sister and her children were killed by her sister's husband told her story. And these guys have to sit there and listen to it.

How Can Courts Better Respond to Victims?

LUCIBELLO: We have found that the earlier an advocate talks to a victim after an arrest has taken place, the more positive the prosecutorial results. In New York State, it should happen within 24 hours of arrest.

WILLIAMS: There are women who are going to go back to the batterer and batterer intervention sometimes gives women hope that I don't want them to have. Whether she has left and come back or stayed all along, there are women who remain for 30 years in relationships with men who are violent. What do we do about that?

DYER: Victims beg us to send the men to programs. Maybe he's already gone through counseling or other interventions. We know everything is a process and this is one of the steps they can check off.

ALDRICH: The victims we have interviewed liked the fact that the offenders were sentenced to a batterer program. It has no impact on their safety, but maybe it has an impact on their future interactions with the criminal justice system.

WILLIAMS: We want more reporting of domestic violence and for victims to have confidence in coming to court. Victims don't just say, "I am going to leave him now." It might take a while before a victim is ready to leave and the research shows that the longer the supervision of the court the better off they are.

HAVILAND: The court experience is usually not at all cathartic for the victim because she doesn't have any impact on the process. Batterer programs might be the only concentrated time when batterers get lectured on the effects of what they are doing. The outside culture is promoting violence against women and this one hour a week for 26 weeks straight might be the only time in which the victim's view of the world is validated.

SCHNEIDER: We have extremely little research on that and it is incredibly important. What research we have suggests that survivors do feel legitimized by being in court situations where a person in authority—frequently, but not always, another man—is saying to him, "This is wrong."

BELKNAP: One thing I have been grappling with in the last seven years is the aspect of intimate partner abuse that is controlling and psychological and emotionally damaging. A lot of these abusers learn they are not going to get arrested for this kind of abuse, which isn't physical. I don't know what you do about that part. I think it's such a huge part of these women's victimization and I am increasingly concerned about how we even address it.

LAWLISS: I would like to say at least one politically incorrect thing. For violence to occur both people have to be in the same place at the same time. Some instances of violence are caused by one person making a decision to track down the other person wherever they are, but other times people voluntarily get together and then the act of violence occurs. All outside parties might wish that the victim would decide to stay away from the perpetrator, but the victim doesn't make that decision. Couldn't we develop a program that would help educate the

victim to see the negative consequences of her decision? That is not to say she is causing the violence, but if there is an order of protection and she chooses to cohabitate voluntarily, then obviously that is going to increase the likelihood of violence.

WILLIAMS: To me, the biggest thing that I have learned in the years I've spent in the field is that it's not so clear to us what victims actually want. I think it's important to shape our responses around that rather than just what we professionals think.

FEDER: I'm going to really make it messy now. There is a study called the Cambridge Somerville Youth Study, where this medical doctor in the 1920s actually came up with the idea that if we could only take boys from really bad neighborhoods and bad home environments and give them intensive case management, someone who is like a big brother to them and help not just the boy but the family and run interference with the schools, it would make a difference. And so they randomly assigned some boys to case management and did not assign other boys. They followed them up six years later and found no difference. Forty-two years later they found that in almost every category the men who had the case managers/big brothers did worse, whether you looked at the rate of suicide, alcohol, drug use, physical health, psychiatric hospitalization or unemployment. And here's the point that I come to. In the 42 year follow-up when the researcher asked these individuals so do you think your case manager/big brother made a difference, almost all of them thought it was the best thing that ever happened to them. So sometimes we have our own anecdotal experiences, but we may not be able to generalize them. We are not the best judges of what works and doesn't.

LEIDHOLDT: What victims may want while they are in an abusive situation may differ radically from what they really want or need. It's a process. When you have kids with somebody or you have been economically dependent, kept from getting an education or having a job, you're going to need some pretty heavy duty supports in order to leave.

FEDER: The only point I was trying to make is that just taking what the victim says is not enough.

SCHNEIDER: I think really what you're saying is that from an empirical standpoint, what the victims may say they want and what impact it actually has may be different.

HARRELL: One of the most difficult problems I come across is how different the perspective of an advocate can be from the perspective of the victim. I think it's one of unresolved problems in this field and deserves more study.

BUZAWA: Experience shows that many women choose to stay with their abusers. But we have to consider: we live in a world that is still very scathing to single women and many women are making a decision between the lesser of two very significant evils. It's often not about love, but about survival, maintaining the family.

What Interaction Should Probation Have with Victims?

WILLIAMS: I think it would be great if probation officers and battered women could communicate with one another about what is going on. There is a parole organization that has done some great things in terms of interacting with the victim early on and asking what she would like to see happen. We had one battered woman who talked about how she and her husband went to the parole officer and in front of the officer she said to him, "Go ahead and say what you said to me a little while ago." One of the things that she reported was that it was important to have somebody who had some authority and could offer some consequences there.

KLEIN: The good news in the Rhode Island study is that the victims who were contacted by probation were three times more likely to call the police when the batterer violated the no contact order. And so, in fact, my lesson from this is that if you have limited probation resources forget about the guys, concentrate on the victims. Contact the victims. That seems to make a big difference.

HARRELL: We also found that victims really liked probation contact. So I am wondering if we should forget batterer programs and instead work with probation agencies to have that lifeline to victims. If something goes wrong they know they can get help immediately and maybe not even have to call the police and go through all of that. Maybe forgetting batterer programs and strengthening the victim's ability to use the sys-

tem would facilitate progress. Maybe if you are not going to change this behavior you can at least give her a way to get out.

What Should Researchers Look at Next?

SCHNEIDER: I just want to highlight the value of having activists and researchers and people who work on the ground all sitting together. It made me think about how I did a study on domestic violence 15 years ago and how one of the things that came up was the sense that activists were not necessarily shaping research agendas and researchers were not necessarily involved in activist work. One of the things I would like to have us think about is a research agenda that might take into account these two orientations.

LUCIBELLO: I think it would be worth looking at whether or not providing wraparound services to victims improves criminal prosecutorial results because in Brooklyn we sense that people are getting many, many more services, but we don't necessarily sense that these services improve their cooperation with the criminal case.

LEIDHOLDT: I think we need to think about success in terms of three factors. One certainly is recidivism and the offender's attitudes. One is whether or not the victim would feel comfortable accessing the justice system again and the extent to which the victims' civil rights are being protected in the court context. And finally, the impact we're making on community perceptions and norms. I think we have to look at all of these factors.

WILLIAMS: I think we need to rely on both quantitative and qualitative research. There are a range of things that we need to look at to understand why men behave the way they do and what things will motivate them. I have seen many men who have multiple women, different children with different women. There are a lot of questions about trauma, the violence they grew up with in their environment that becomes how they start to see the world. I think a lot of questions come up when you are dealing with batterers.

LAWLISS: I would like to see us think about every conceivable thing we could do to a batterer under the law and not try to prejudge what we think would be successful and come up with a laundry list of what could be done and create experi-

mental programs. I also wonder sometimes if we are in the wrong courtroom. The criminal justice system is much more limited than the family court system.

FEDER: The problem in many, many jurisdictions is that you can't be experimental.

When I go to individuals in the court system—and this is true in criminal justice on the whole—and say I really want to do an experimental study, because that is the way we find out what works and what doesn't work, they say to me we can't do that. The Supreme Court has already put out a long, long monograph saying that experimental studies are fine by us, but people are afraid to look at that. I want to say right now from my perspective we are experimenting all the time. The judges and the prosecutors who go to a conference and hear something that works and then implement it are experimenting. It's just not a controlled experiment which means we are not learning from it.

LAWLISS: I totally agree. The difference, though, is that Monday morning I have to decide something and I can't wait for these studies. If I hear a good idea, I want to start implementing it because I have human beings in front of me and I want to give it a try.

FEDER: Here's the thing we have to change your mind about. You have got to recognize that untested programs may actually do more harm than good. I could give you a pill and say give this to men to stop the battering, but in fact, it increases battering. You really need to do these things under controlled circumstances. Yes, you need to do something on Monday. So Monday you will continue doing what you've always done. But can't we get grant money so that I can come in and starting a month from Monday—after we come up with a program, a protocol, and a formal study—to test this out? We don't know that it's going to work, but it's the first step.

ALDRICH: I think we need to drastically improve the courts system's ability to collect data. Even if you did know what worked, you couldn't build accountability without having a way to track outcomes and violations.

FRANK: The study that I threw out earlier is to assess what the judge and what the court do when a man is ordered into a batterer program and doesn't comply. Does the community become contemptuous of the whole criminal justice process

if he gets ordered to a program and then nothing happens when he doesn't go?

LUCIBELLO: I think we have to take baby steps and I think the first step might be to capture what is happening. I don't think we know what happens when violations of compliance occur.

FEDER: I'm tired of all this money being spent to take a picture of what we have now. If we keep on doing what we have always done why are we so surprised that we keep on getting what we have always gotten? We need to think about reform as experiments, small things that are attached to theories explaining why it might make a difference. See if it works. If it works in this one jurisdiction replicate it.

SCHNEIDER: I think the central question is: can courts make a difference? That is where we started. If so, what pieces of the court experience can make a difference? What does that mean in terms of a research agenda? It seems to me that we are assuming we can make a difference. There are now more than a hundred law schools around the country that have domestic violence programs or clinical programs. There is a whole generation of lawyers taking part in these programs. I would like to think that has made a difference. I would like to think there are more people out there who are listening to battered women. We certainly have a huge amount of people who are trying to intervene and I like to think it makes a difference. I have to think that having more conversations like this one that bring so much experience and expertise together will help us develop research projects and activism projects that can make a difference.

INTERVIEW
G. Thomas Munsterman: Guilty (of a Career Dedicated to Improving the Jury System)

*Interviewed by Robert V. Wolf**

No one has been more involved in the sweeping changes to the jury system over the last several decades than G. Thomas Munsterman. As the long-term director of the Center for Jury Studies at the National Center for State Courts, Munsterman has researched or consulted on virtually every significant jury innovation since he co-founded the Center for Jury Studies in 1979. Although he recently left his post as director—passing the mantle to Paula L. Hannaford-Agor—he remains on the center's staff as director emeritus, working on projects of his choosing. As a testament to his influence, the National Center for State Courts this year inaugurated the G. Thomas Munsterman Award for Jury Innovation. He also received the 2008 Jury System Impact Award from the American Bar Association Commission on the American Jury Project, sharing this honor with Judith S. Kaye, the chief judge of the State of New York.

* Robert V. Wolf is director of communications at the Center for Court Innovation.

Your background is in engineering. How did you end up studying the jury system?

Life takes interesting turns. My degrees—both undergrad and grad—are in electrical engineering. I was working for Bird Engineering in Vienna, Virginia, when a colleague of mine, Dr. William Pabst, was called to jury duty in the federal district court for the District of Columbia. This was the 1970s. He reported every day for several weeks and realized a lot of time was being wasted. Some days things happened and some days things didn't. So he came back to the office and said we should do some engineering about this because, if you think about it, it's a utilization issue—it's queuing theory, inventory control.

Explain queuing theory.

It's the study and theory of queues: people or things lining up to be served, such as shoppers in line for checkout at a store; people waiting in cars to pay a toll; workers waiting for an elevator; jurors waiting to be sent to a court for jury selection; or judges waiting for prospective jurors. How do you minimize the wait time given the number of servers, the service time and the arrival time of those seeking service? You would not believe the number of learned papers about elevators. The change to the single queue in airports, banks and post offices is a most elementary example of improvements from queuing theory.

Bill raised the issue of juries at a conference, and there was a person there from the Department of Justice who said, "We'll give you $10,000 for a good idea, but the grant program requires submission by tomorrow." So Bill went home and wrote up an application on his manual typewriter and got $10,000 to study the federal district court of the District of Columbia.

We looked at the records for the federal court to figure out what the real demand for jurors was. Why not have them call in the night before to see if they're really needed? We tried to match the number of jurors who reported to the number needed, and found, in the end, that by having them call in the night before we saved them something like $300,000 a year.

Following that success, the Department of Justice and one of its units, the Law Enforcement Assistance Administration, asked us to take a more general look at jury utilization. We

wrote "A Guide to Juror Usage,"[1] which was published in the 1970s, and then we did a second volume called "A Guide to Jury System Management."[2]

After that, we decided that the only way to get funding was to set up a nonprofit, so we created the Center for Jury Studies.[3] The first employees were my wife, Janice, now executive director of the State Justice Institute, myself, and Bill Pabst. We started with funding from the Law Enforcement Assistance Administration, looking at the issue of juror management and usage. Then, we began to look at some of the issues that arise before jurors report for service: the list from which names are called, qualifications and summoning. Eventually, we looked at courtroom activity: jury selection, voir dire, in-court communications, jury instructions and the whole jury process.

You were taking tools from the world of engineering and science and applying them to the court system. Were you among the first to do this?

Yes. There had been a few studies looking at juries in the 1960s, but we were the first to look at this systematically. To write our first manual, "A Guide to Jury Usage," we studied a dozen courts in the District of Columbia, Minnesota and Colorado and tried to come up with some generalized rules for improving jury use.

How did the Center for Jury Studies come to join the National Center for State Courts?

The Center for Jury Studies worked just fine as long as we had large individual grants from the Law Enforcement Assistance Administration.[4] But when the LEAA went out of business, we needed a larger organization, so we merged with the National Center for State Courts with whom we had worked on jury studies.

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1. G. T. MUNSTERMAN, A GUIDE TO JUROR USAGE (1974).
2. G. T. MUNSTERMAN, A GUIDE TO JURY SYSTEM MANAGEMENT (1974).
3. NATIONAL CENTER FOR STATE COURTS, CENTER FOR JURY STUDIES, http://www.ncsconline.org/D_Research/cjs/.
4. The Law Enforcement Assistance Administration was established by the Omnibus Crime Control and Safe Streets Act of 1968 and was abolished in 1982.

How unique is the American jury system?

We all like to think it came from England with the settlers and colonists, but, in fact, we were denied trial by jury, which is one of the reasons cited in the Declaration of Independence for breaking with England.

Jury trials are an exercise in democracy, reflecting our distrust of government and of sovereigns. When we look at the number of jury trials per population, nothing comes close to the United States. We estimate that, despite recent decreases in the numbers of jury trials, we still have 95 percent of all jury trials in the world.

But the jury trial is coming back in some places. One of Boris Yeltsin's reforms was to re-institute the trial by jury in criminal cases in Russia. The death penalty cannot be given in Russia without the finding of guilt by a jury. Spain re-instituted juries in 1995; it had been used in Spain before, but Franco got rid of it. The first thing dictators do is get rid of juries. They don't want citizens making decisions.

Japan will be introducing a mixed tribunal jury in 2009. It will be a nine-person jury where six jurors are laypeople, and three of them are judges; they can convict or acquit on a simple majority, but at least one in the majority must be a judge.

China is going to be introducing trial by jury. Korea is experimenting with trial by jury. In all three—Japan, China and Korea—the juries only involve criminal cases.

What have been the most difficult changes to make to the jury system during the course of your career?

I think any change is a challenge, and none of them came that easily, although I think some were more difficult—attempts to reduce peremptory challenges or change the way in which they're exercised, for instance—than others.

The whole move has been to democratize the system. When you think about the most famous jury movie, *Twelve Angry Men*, it's a 1950s movie and the jury is made up of 12 white guys. It wasn't until 1975 in *Taylor v. Louisiana* that the Supreme Court said that we couldn't give women an exemption

just because they're women.[5] At that time, the jury pool in many courts was anything but 50-50 men and women; it was more like ten percent women to 90 percent men.

So women didn't have to be jurors if they didn't want to be?

Exactly. A woman could exclude herself. She could check a box that identified her as female and automatically get out of jury service.

In terms of the history of the jury system, we had a long period where not much was happening. Then, we started with the 1960s: civil rights, integration and the recognition of the desire for a representative jury. People asked, "Why is the jury just those who are hand-selected by jury commissioners?" In those days, many states still had jury commissioners, who had full authority to get names from whatever list and select whomever they liked.

We started moving away from commissioners with such broad discretion to using multiple lists, going well beyond just the voter lists. That was a big step, which happened in some states as early as the 1940s and 1950s. Today, no state allows commissioners to hand pick jurors. Then, we started reducing the term of service with one day/one trial, which started in Houston in the 1970s. My first trip when I started studying juries was to go to Houston to look at this thing called one day/one trial. The idea was that rather than having the same people come back over the entire term of the court, you'd have people come back only one day, unless selected for a jury, and then they'd sit to the verdict. What this meant was that we didn't have to excuse as many people because of hardship, and, because we needed more people, we had larger and broader lists, which, in turn, meant we got a better cross section.

We used to have exemptions for people who had certain professions: doctors, lawyers, embalmers and airline pilots. California exempted keepers of alms houses. These exemptions existed primarily because these organizations had a political lobby. Now, most states have no exemptions based on profes-

5. Taylor v. Louisiana, 419 U.S. 522, 536 (1975).

sion. Everyone serves, which again, gets us to that democratization idea.

We started looking at jury service from the point of view of the juror. We tried to make it more convenient by, for instance, allowing postponements. At first, people thought that postponements were a violation of randomness, but, if done correctly, they stand up to anyone's definition of randomness.

Today, many jurors can fill out forms online. And the orientation for jurors has vastly improved. One of the first juror orientation films was done in New York State with help from the New York State Bar Association. Now, some states conduct orientation on the Web in streaming video.

And what about changes that have taken place inside the courtroom?

Here, much of the credit, I think, goes to a now retired Arizona judge, B. Michael Dann. He was working on his master's in judicial administration at the University of Virginia, and he published a paper in 1993, looking at the judicial model of the jury in which the jury sits there, information is fed to them, and they don't do anything but absorb what is said; they're not reacting until they get in the deliberation room, and then they start discussing the case. He said, "Isn't the more appropriate model an education model in which the judge and the attorneys are instructors and the jury is the students? Don't we have a lot of knowledge about educating people that we're really not using in the courtroom?"

There's a very good video out called "Order in the Classroom,"[6] in which a college professor tells his students that the class will be run as if it were a jury trial: you can't take notes; you can't talk to each other; you all have to agree on the same answer; and you can't ask any questions. The students look at each other in disbelief.

But to get back to Judge Dann: he sent a copy of his paper to the chief justice in Arizona, and the chief justice formed a committee and made Judge Dann the chairman. They recom-

6. DVD: Order in the Classroom (International Association of Defense Counsel), *available at* http://www.iadclaw.org/jti_material.cfm.

mended in-court innovation, things as simple as letting jurors take notes or allowing them to submit questions. There was some experimentation done as to what the instructions to the jury should be. In one of the first tests, a juror interviewed afterwards said, "I had a tough time thinking of a question to ask," as if the judge in his instructions was somehow mandating a question.

There's also the idea of giving jurors a copy of the judge's instructions. In many states, at least one copy of the instructions goes to the jury. When I served as a juror, the judge, as he read the instructions, taped them with a little pocket recorder and then broke off the tab, so the tape couldn't be changed, and gave the tape to us to be used in the deliberation room.

And that's an innovation, although it's kind of amazing to say an innovation is something as simple as taking notes or using a tape recorder.

The idea behind all these changes is to make it a more interactive, more educational experience for the jury. Judge Dann provided the unifying model to make these ideas make sense in a larger way.

In the preface to the second edition of "Jury Trial Innovations," you and your two co-editors observe that, after the first edition was published in 1997, you hadn't anticipated that "jury reform would capture the imagination of so many judges, lawyers, researchers, and citizen-jurors."[7] Why, considering that the jury system has been around for literally hundreds and hundreds of years and hasn't really changed all that much, have the last 10 years been such a time of change?

I think the changes I just mentioned caught the imagination of a lot of people who said, "Doesn't this make sense? Here we are in the 1990s, and jurors can't take notes?" Most trials last a couple of days, and maybe you don't need notes in some of them, but, when cases go on for weeks and weeks, that's a different story. I remember attending a capital case in Illinois in which maybe a dozen guys were being tried simulta-

7. G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2006).

neously on capital murder charges. It was a prison uprising and several guards were killed. The case went on for months, and jurors weren't allowed to take any notes. I don't know how they even kept the defendants straight. Each defendant had his own lawyers and the jurors just sat there and nodded, and eventually the defendants were acquitted. They didn't convict any of them. They were already serving time, so it's not as if people walked, but the fact was that no one was convicted for the knifing of the guards.

Another idea in complex cases is to give the jury a glossary of terms, or, if we have many witnesses, a blank piece of paper with a picture of the witness, so they can remember what this witness looked like and so they can make all their notes, or copies of documents that are entered as evidence.

A lot of these ideas arose spontaneously. I was talking to a judge in Alabama once who said, "I let my jurors ask questions," and I asked, "How did this come about?" He said, "One day a juror raised his hand and asked, 'Can I ask a question?'" It's just sort of a natural thing for people to do. Likewise, taking notes. In fact, we have jurors now who go into deliberations, who'll ask for flip charts and Post-it notes and laptops because if they're calculating damages, they'd like to have a laptop with Excel on it.

All these ideas have come up from judges or attorneys, who thought this made good sense. A judge in California heard a case on alleged patent infringements and wanted a briefing from the attorneys on terminology, and it was given to the judge and her clerks, and she said, "Wait a minute, this should be given to the jurors," so she held the first jury tutorial, where the witnesses came in and spoke to the jury about computer technology and software. In so many cases, that's where these innovations come from.

When reforms are made, are they research-based, or are they considered common sense reforms, and the research comes later to support it?

The change usually occurs first, although it's not totally uninformed. It's not just "Gee, wouldn't that be fun?" The research helps courts fine-tune the reform or outline the best

practices or explain how it's done. Research also helps us design and evaluate pilot tests of the innovations.

With jurors' submitting questions, there were some judges who were just letting them ask, and people said: "No, they should be in writing, and the parties should have the right to review them." Others asked: "What if the judge decides not to ask a question? Does the juror infer that something is being hidden from them?" Shari Diamond's research, for instance, from Arizona found that one of the first questions that jurors always ask in civil cases is about insurance. One of the recommendations that Shari and Neil Vidmar of Duke came up with was a better instruction on insurance.[8] That's an example of research helping us improve the process.

So does the research usually validate the wisdom of reforms?

Yes, I think it usually offers support for them. I will say that nothing is ever as bad or as good as we thought it would be.

We have had much better research from the 1990s onward than we've ever had before. We now have a large database from actual deliberations, thanks to work in Tucson in Pima County, Arizona, by Shari Diamond and Neil Vidmar.

One of the Arizona courts' innovations is that jurors can discuss the evidence prior to deliberations.[9] Some people call this "pre-deliberation," although I think that's a misnomer because they're told they can discuss the evidence but not begin their deliberations, or not make up their minds. That's a very easy thing to say but a hard thing to do, and there are several arguments against letting jurors discuss the evidence. One thought is that if it's discussed, a juror might express an opinion that might be very difficult to change. Anyway, Shari and Neil worked with the Arizona courts and videotaped civil jury trials and the jury deliberations and discussions. Their research

8. *See* Shari Seidman Diamond, et al., *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

9. *See* 16 ARIZ. REV. STAT. ANN. RCP Rule 39(f) permitting jurors to discuss the evidence among themselves as long as all jurors are together in the jury room.

supports the idea that pre-deliberation discussions are not causing jurors to commit early on.

Another area researchers are looking at is juror stress, the idea that jurors, post-verdict, can exhibit signs of extreme stress. It shouldn't be surprising that after a trial, some jurors have stress and problems, and we're doing things about that now in many jurisdictions. Psychologists are provided, or some effort is made to help the jurors. This came about in the late 1990s and early 2000s when we had some grizzly cases, and the judges were finding that they were having trouble sleeping and they thought, "If I, the hardened judge, can't sleep, how about some of the jurors?"

Have any innovations turned out to be mistakes, things that were experimented with but which didn't really work?

One of the innovations early on was reducing the size of the jury from 12 to six; the Supreme Court, in its decisions permitting it in civil and criminal trials,[10] relied on what we now consider to be poor research, people saying "Oh, it doesn't make any difference. We can save a lot of time, people and money." If you can save money, that always sits well.

Now the feeling is that having smaller juries isn't necessarily a good idea; that by going to a smaller size, you remove wisdom, intelligence, and experience from the jury room. The dynamic of the deliberation changes with a smaller number, and, statistically, the chance of having a representative cross section has got to be worse. In other words, the probability of having an all-white jury of six is much greater than an all-white jury of 12.

When we did a study of eight- versus 12-person juries in California, we saw that very thing.[11] We saw that it wasn't because of peremptory challenges being used in a discriminatory way or any other reason. It was simply because of statistics that say a smaller jury is going to be less representative and less likely to have minorities.

10. *See* Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978).

11. G. THOMAS MUNSTERMAN, JANICE T. MUNSTERMAN & STEVEN D. PENROD, A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES (1990).

In fact, the American Bar Association in 2005 adopted "Principles Relating to Juries and Jury Trials" that called 12-person juries in civil and criminal cases the "gold standard."[12] So that is one improvement made a while back that people are now re-thinking.

Are there any areas still ripe for reform?

The one area we really haven't totally solved is jury compensation. New York has one of the highest compensation levels at $40 a day. Some states pay only $20 or $25. Pennsylvania pays $9 a day, and it has a bill pending to raise it. I don't think they've touched it since 1980.

We don't have a good lobby for the jury, and that's probably a good idea.

Are you saying it's good not to have a group lobbying on behalf of juries?

There have been attempts to form organizations of former jurors, but I'm afraid the concept becomes very political. The fact that jurors don't have a lobby may mean that the jury hasn't become a political animal.

Where you have strong state leadership, like in New York, then the courts can come forward and promote legislation to get the jury fees increased, eliminate exemptions and so forth. Jury reform became New York Chief Judge Judith Kaye's cause. She realized something had to be done. I don't think any state has had such sweeping changes as we've seen in New York. In fact, the New York court system, in collaboration with the National Center for State Courts, sponsored the National Jury Summit in 2001.

In most states, it's the state's highest court or the state bar that pushes for change. The American Bar Association first came out with jury standards in the 1980s, but I think that we had a wider and deeper examination after we saw Arizona,

12. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS: (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf. Principle 3 states that "Juries should have 12 members."

New York, California and Colorado look seriously at their jury systems.

The American Bar Association, particularly its recent past president, Robert J. Grey, has been very active in forming the American Jury Project that developed the new American Bar Association principals and a commission to develop ways to reach out to the public about the jury. In October 2008, we're having a symposium at Fordham Law School, like one we had in Dallas two years ago, and everyone is saying that every two years we should have a symposium to bring people up to date.

There are a few citizens groups that have become interested. There's one in the District of Columbia called the Council for Court Excellence, which is organized outside the court system. The Fund for Modern Courts in New York is somewhat similar, as is Pennsylvanians for Modern Courts.

What are the key issues going forward? Is it jury compensation? Are there other things on the horizon?

Jury compensation is certainly one of them, as well as getting the changes or improvements, which I've already discussed, adopted in more states.

We've got a number of courts where the desire is, rather than to have one courthouse downtown, to have courts in several locations in the county. The idea is to give better access to justice. Community courts are an example. But if a community court in, say, Los Angeles, is going to do jury trials, are you going to pull jurors from all over Los Angeles County to go to every courthouse in Los Angeles? L.A. has dozens of courthouses where jury trials are held, so how do you allocate citizens based on the needs of the court and on convenience of the citizens? Can you expect that a jury in Van Nuys looks like a jury in Santa Monica, which looks like a jury downtown? These differences present complex issues and methodologies as to how you go about allocating people and how much discretion the court should have in doing this.

Finally, we are seeing some very good work at making jury instructions more understandable. For years, the instructions to the jury at the conclusion of the presentation of the evidence were written for the appellate courts and not for the

jurors. That is, would the instructions pass appellate examination? California was the first to do a complete rewrite of its instructions with the assistance of linguists. A recent symposium brought together committees from various states that are tasked with writing and updating jury instructions. Wouldn't you think that by now we could agree on a definition of "reasonable doubt?"

We're also still looking at the use of juror's time, the whole issue of scheduling, figuring out how many people do we need and trying to minimize the burden on the citizen. Those are ongoing issues.

Using jurors' time more efficiently was your first issue. That's what brought you into the business.

The situation has improved. Nonetheless, you ask jurors, what's their biggest complaint, and they say "waiting" and the fact that so few people called actually make it to the jury box. There was a follow-up jury commission in New York that we called the "82 Percent Committee" because only 18 percent of the people who came in the front door actually made it to the jury box, and 82 percent didn't.[13] Today, some courts have the number up to 30 or 40 percent. But, still, we have a lot of people who are called in who are challenged, or the defendant pleads, or the case settles, so we don't need them. So there's always that frustration.

It seems like we're proud of the jury system and we think it's an integral part of our democracy, but we'd rather someone else do it.

My line is: "Everybody loves jury duty but not this week."

We've done some looking at the parallel between jury service and voting. We wouldn't dare get rid of voting or have

13. New York State Chief Judge Judith S. Kaye appointed The Commission on the Jury in 2003. The commission issued a report on June 17, 2004. *See* THE COMMISSION ON THE JURY, INTERIM REPORT OF THE COMMISSION ON THE JURY TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2004), http://www.nycourts.gov/reports/Commjury_InterimReport.pdf.

some other mechanism for picking our officials; on the other hand, what are our turnout rates on Election Day?

That's why so many reforms are aimed at making it feasible for people to serve so that on the morning when they're supposed to report for duty we minimize the burden. There's no question that if they have to go downtown where they don't usually go, to find a parking place or to take public transportation, it can be difficult and cause them to think, "Well, maybe next time."

The public has never known more about the jury system than they do today thanks to the O.J. Simpson trial, Court TV or the experience of other people. About a third of the population has been called for jury duty. That number is much higher than it's ever been because of things like one day/one trial.

What always amazes me is when I ask someone if they've been on a jury, and they say, "Yea, it was 10 years ago, and on the first day this happened, and on the second day that happened . . . and then this and this and this." It's an incredible, indelible experience. It stays in the memory for years and years, even down to what "he said" and "she said" and the details of deliberations.

Is the jury trial vanishing?

I think there's a large national concern for the vanishing trial, particularly on the civil side and particularly in the federal courts. The decrease in jury trials is not as pronounced in criminal cases.

Why is the civil jury trial vanishing?

We don't know. Research has been done by many people to try and answer that question. We know that jurors are becoming more conservative and less generous in most jurisdictions. Contrary to *The Bonfire of the Vanities*,[14] the awards are getting much smaller, which means that attorneys are less likely to take cases that are more marginal. We have alternative dispute resolution; we have caps on punitive awards; and we have

14. TOM WOLFE, THE BONFIRE OF THE VANITIES (1988).

a whole slew of efforts that could explain why we're seeing fewer jury trials.

Do you think efforts should be made to prevent civil jury trials from vanishing?

If the rights of the individuals can still be maintained, then it doesn't bother me, although the loss of the educational experience of jury service does bother me. If, as when you get some Visa or MasterCards, you have to waive the right to a jury trial, then it's a real problem. Incidentally, there's been some very good research from Cornell University about how often and why companies issue these contracts.[15] They've seen that in jurisdictions where the courts are more highly held, it's less likely that these sorts of clauses are in the contracts. It seems that, if the corporations who are issuing the contracts trust the jury system or trust the courts, they're less likely to try and find an alternative mechanism.

What aspect of your work do you find most interesting?

The thing that keeps me going is the uniqueness of this institution. The citizens are asked to resolve disputes or resolve these factual findings. The participation of these individuals is quite remarkable, as is the fact that in most cases they do it unanimously. The only other thing that has to be unanimous is the U.N. Security Council. It goes back to Alexis de Tocqueville's wonderment at this participatory aspect of our administration of justice. Some of these innovations would not have been needed if we still had two day break-and-enter trials. But when we have these complex cases, we're going to need new tools, and it's very rewarding to see these innovations being used and being used in very inventive ways by creative judges.

15. *See* Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 1539 (2007).

How many courts/court systems have you consulted with over the years?

Precious few when you consider that there are thousands of them. But I can say I've been in a court in every state. I only know that because once I was in a Holiday Inn waiting for breakfast where they had a placemat that had the states on it, and I just started checking off everywhere I'd been.

Book Review

Scientific Jury Selection

Joel D. Lieberman, Ph.D. and
Bruce D. Sales, Ph.D.
American Psychological Association 2007
261 pages

*Reviewed by Gary R. Giewat, Ph.D.**

In discussing research problems in the social sciences, social psychologist Kurt Lewin remarked over 50 years ago:

> The greatest handicap of applied psychology has been the fact that, without proper theoretical help, it had to follow the costly, inefficient, and limited method of trial and error. Many psychologists working today in an applied field are keenly aware of the need for close cooperation between theoretical and applied psychology. This can be accomplished in psychology, as it has in physics, if the theorist does not look toward applied problems with highbrow aversion or with a fear of social problems, and if the applied psychologist realizes that there is nothing so practical as a good theory.[1]

Scientific Jury Selection successfully integrates empirical research with applied social science. The authors provide a thorough overview of the history of scientific jury selection with a strong academic point of view. They identify and review what

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1. Kurt Lewin, *Problems of Research in Social Psychology*, *in* Field Theory in Social Science; Selected Theoretical Papers 169 (D. Cartwright ed.) (1951).

is likely the majority of social science research relevant to jury selection. As a practicing trial consultant, I found this survey very useful as a refresher that touches on theory and methodology. The work also covers areas that consultants or other readers may not be familiar with, including the history of this young profession. This book will be useful to attorneys as a means for becoming better consumers of jury consulting services. The book also provides the judiciary and court administrators with insight into the theory and methods of what litigation consultants do and dispels myths and stereotypes about what we do.

It should be noted that the term "scientific jury selection," in the eyes of many litigation consultants is perhaps a misnomer. "Scientific jury selection," per se, is not *science* in the Popperian[2] sense of testability and falsification or of Fisher's[3] testing of hypotheses. Instead, litigation consultants with a background in the social sciences who are involved with jury selection use *tools* and *theory* from the social sciences in assisting attorneys with jury selection.[4] I am among the litigation consultants who view their role as a hybrid, blending social science theory and methodology with years of experience in the courtroom.

Lieberman and Sales dispel the misguided view that litigation consultants assist with jury selection in a John Grisham-like manner, "reading" people by drawing conclusions about behavior from jurors' clothing and non-verbal cues much the same as Rankin Fitch did in "Runaway Jury."[5] Rather than the Hollywood mythology, Lieberman and Sales address the

2. Karl Popper was an influential 20th century philosopher. For Popper, a theory is scientific only if it is refutable by a conceivable event. Every genuine test of a scientific theory then is logically an attempt to refute or to falsify it, and one genuine counter-instance falsifies the whole theory. STEPHEN THORNTON, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), http://plato.stanford.edu/entries/popper/#Trut.

3. R.A. Fisher is thought of as the father of modern statistics. His legacy includes statistical evaluation and the null hypothesis. That is, if there is a statistical difference between a treatment group and a control group, one may reject the null hypothesis of no difference between groups. In addition, Fisher is often cited as setting the $p < .05$ level as the acceptable probability for determining statistical significance. ELAZAR J. PEDHAZUR & LIORA PEDHAZUR-SCHMELKIN, MEASUREMENT, DESIGN, AND ANALYSIS: AN INTEGRATED APPROACH (1991).

4. The field has also been named "systematic jury selection." *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 91 (2001).

5. JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION (2006).

"tools" that litigation consultants use to help guide and advise attorneys including community attitude surveys, supplemental jury questionnaires, proper questioning techniques, and, yes, to some extent, non-verbal and paralinguistic behavior.[6]

The authors cover a variety of topics in this volume, first tracing the origins of scientific jury selection to the 1972 Harrisburg Seven trial[7] and other political themed cases in the 1970's where academics offered their time and skills to assist the defense in criminal trials that were challenging, to say the least, in terms of identifying potential bias in jurors.[8] The authors then trace the evolution of scientific jury selection in complex civil trials of the 1980's and recent high-profile criminal trials including O.J. Simpson, Martha Stewart, and Kobe Bryant.[9] Lieberman and Sales also thoroughly review the purposes and effectiveness, and ineffectiveness, of voir dire as they examine the historical development of voir dire, explaining its intended purpose, as well as its unsanctioned roles in educating jurors and attorneys' efforts to ingratiate themselves with jurors.[10]

In discussing the substance of scientific jury selection, Lieberman and Sales skillfully review the use of community attitude surveys as a tool in identifying potential bias in jurors for jury selection, as well as for change of venue.[11] Their work is not a "how to" or a guideline for jury selection; that was not their intent. Instead, the authors outline the important issues of which both attorneys and the judiciary should be aware, including sample size, questionnaire length, the use of bogus items and other methodological and statistical issues. Knowledge about these issues will make for a better attorney-consumer of

6. LIEBERMAN & SALES, *supra* note 5. *See generally* chapters 3, 6, and 7.

7. In the Harrisburg Seven trial, seven anti-Vietnam-war activists were accused of plotting to kidnap Secretary of State Henry Kissinger. Sociologists and psychologists sympathetic to the defense assisted with jury selection by conducting survey research and produced a juror profile that was used to assist with voir dire. *See* Jay Schulman et al., *Recipe for a Jury*, 37 PSYCHOL. TODAY 41, 77-84 (1973).

8. *See* LIEBERMAN & SALES, *supra* note 5, at 3.

9. LIEBERMAN & SALES, *supra* note 5.

10. *Id.* at 107.

11. *Id.* at 39. The American Society of Trial Consultants' Professional Code includes a detailed overview of procedural issues regarding survey methodology in venue research. *See* ASTC Professional Code, Venue Surveys, http://www.astcweb.org/public/about_us/code.cfm.

consulting services and more knowledgeable judiciary when motions for change of venue are submitted.

The most significant sections of *Scientific Jury Selection* address the role of demographic factors[12] and of personality and attitudes[13] as they relate to identifying unfavorable or biased jurors. The authors highlight the tradition of using demographics as a predictor of juror behavior. While skilled and talented advocates in their day, famed attorneys Clarence Darrow and Melvin Belli made broad and sweeping generalizations regarding juror type.[14] For instance, Belli believed that married people are perhaps more forgiving, while Darrow suggested that wealthy jurors were conviction prone.[15] Even today, over reliance on demographic stereotypes is pervasive. In a 2003 California District Attorney Association Capital Prosecution Seminar, a senior deputy district attorney made a blanket statement on his practice of excluding Jews during jury selection in capital trials.[16] A 1986 training videotape prepared by an assistant district attorney in Philadelphia advised against seating African-American women in capital cases.[17]

The authors rightfully caution on the use of demographics as predictors of juror behavior and highlight their limited predictive value in light of empirical research demonstrating little relationship between demographics and verdict preference.[18] On the basis of factors such as age, occupation, gender, race, and socioeconomic status, the authors conclude that broad generalizations made on the basis of demographic factors may be unreliable and flimsy as predictors of behavior,[19] a conclusion with which this author generally agrees.

Lieberman and Sales do not discount *fully* juror demographics as characteristics to take into consideration when

12. LIEBERMAN & SALES, *supra* note 5, at 57. Demographics are characteristics of human populations which describe factors such as age, gender, marital status, etc. *See* GLOSSARY: A SURVEY RESEARCHER'S HANDBOOK OF INDUSTRY TERMINOLOGY AND DEFINITIONS (1992).

13. LIEBERMAN & SALES, *supra* note 5, at 79.

14. *Id.* at 58.

15. *Id.*

16. Leonard Post, *Boxing with Jury Selection*, NAT'L L. J., April 27, 2005, http://www.law.com/jsp/article.jsp?id=1114506316826.

17. Commonwealth v. Lark, 746 A.2d 585, 589-90 (Pa. 2000).

18. LIEBERMAN & SALES, *supra* note 5, at 57.

19. *Id.* at 77.

making decisions during jury selection. Instead, they explain that demographic characteristics might account for a *modest* degree of verdict preference.[20] For instance, I have experience in civil litigation where in a case involving employment discrimination, religiosity was a decidedly important variable; devout Baptists were unsympathetic to a plaintiff whose claims had considerable merit, but whose marital infidelity was viewed with great disdain and compromised his credibility. Some demographic factors might be considered quasi-attitudinal, such as education, political orientation or religion. Varied life experiences influence the way jurors attend to and process information. Using varied demographic factors may sometimes assist in jury selection decision making, particularly in the context of federal court, where attorney conducted voir dire is often absent. Nonetheless, as Lieberman and Sales point out, demographics alone are of modest value in identifying potentially biased or adverse jurors during jury selection.

Personality factors and attitudes are viewed as more reliable predictors of juror behavior than demographics.[21] The authors provide an interesting review and discussion of personality theories and characteristics such as authoritarianism[22], dogmatism,[23] just world beliefs[24] and attitudinal issues such as tort reform and the death penalty.[25] The attitudes people maintain have value in predicting behavior to some extent. But, it is important to use this construct carefully when making decisions in jury selection.

As the authors point out, there is a marked pitfall in relying on attitudes to predict behavior when the focus is on a

20. *Id.* at 76.

21. *Id.* at 79.

22. Authoritarianism is a personality construct that was first studied during the Post World War II era. Persons defined as authoritarian in nature have a desire for order, conform to conventional norms, and defer to authority. The classic research was conducted by Theodor Adorno. *See* THEODOR ADORNO ET AL. , THE AUTHORITARIAN PERSONALITY (1950).

23. Similar to the authoritarian construct, dogmatism focuses primarily on those with an inflexible and closed minded personality. *See* MILTON ROKEACH, THE OPEN DOOR AND THE CLOSED MIND (1960).

24. The general premise of "just world beliefs" is that people get what they deserve in life, that good things happen to good people and bad things happen to bad people. *See* MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980).

25. LIEBERMAN & SALES, *supra* note 5, at 95.

broad, global range of issues.[26] That is, asking jurors if they dislike large corporations is far less informative than asking more specific questions, like "To what extent do you believe large corporations are ethical?" or "How common is it for large corporations to cheat to get ahead?" Here, Lieberman and Sales identify the importance of level of specificity in attempting to predict actual behavior.[27] The more specific a question is regarding attitude, the better the ability to predict behavior.

The attitude-behavior connection has long been a focus of study in social psychology. In predicting behavior, attitudes are known to have only a modest correlation. However, the degree to which attitudes accurately predict behavior depends in large part on the specificity of the assessed attitude. The probability of accurately predicting a behavior can be increased by asking about *specific* attitudes. Thus, in voir dire questions it is best to focus on attitudes toward specific issues rather than broad or global attitudes. As an example, a question such as "Are you in favor of the death penalty" is of less value than something more specific, such as "Are you in favor of the death penalty in a case involving a woman convicted of murder in a case involving spousal abuse?" This section of the book specifically addressed to jury selection underscores the value offered by litigation consultants, with training in the social sciences, in jury selection. The authors conclude that consultants with knowledge and training in attitude theories, cognition and survey research are best able to assist attorneys in revealing potential bias in jurors via careful and systematic application of the tools of their trade.[28]

Does scientific jury selection work? The answer to that question, according to Lieberman and Sales, is *yes*. . . and *no*. . . and *maybe*. In other words, there is no clear answer to this question. To empirically verify whether scientific jury selection is effective is a challenge for several reasons. The first challenge is to define "effective." Is effectiveness evaluated solely on the basis of winning or losing? Is the assistance effective if a jury convicts a defendant in a murder trial, but recommends a life

26. *Id.* at 152.
27. *Id.* at 100.
28. *Id.* at 165.

sentence rather than death? Or, is litigation consulting effective when a corporate defendant is found negligent, but the damage award is only $100,000 when the plaintiff sought $15 million?

The authors discuss several studies that assess the effectiveness of scientific jury selection.[29] They point to case studies suggesting that scientific jury selection is effective. But, that research does not involve true experimental design using a control and treatment group. And yet research that addresses the question using more sophisticated experimental design is flawed because it often relies on artificial scenarios, small sample sizes, lack of judicial admonitions and may use law students rather than attorneys. A variety of other factors in addition to jury trial consulting services can influence case outcome, such as attorney skill and experience, the use of other experts, graphic presentations, and more. In the end, the most significant determinant of case outcome is the actual case evidence.[30]

The authors make clear, after reviewing experimental and quasi-experimental research, that the strength of case facts is a stronger predictor of verdict variance than juror characteristics. On the other hand, case strength is not always clear cut and in those instances where the scales of justice could easily tip one way or the other, the ability to account for 1% to 10% of variation in juror verdict preference or inclination might be especially valuable.

Litigation consultants provide an additional set of eyes and ears for a trial team in order to allow for the most effective use of peremptory challenges and inform counsel on cause challenges. Consultants with a background in the social sciences use the tools and theory from psychology and sociology to provide a more systematic and objective approach to the jury selection process. As noted by the authors, scientific jury selection may be viewed as an actuarial decision making approach, relative to the attorneys' experiential based clinical approach.[31] The experiential approach is more susceptible to a variety of errors

29. *Id.* at 153.

30. *Id.*

31. Lieberman and Sales discuss the theoretical reasons why an actuarial approach, based in statistically oriented judgment, is more accurate and valid than a clinical decision making approach, which relies primarily on personal experience. *See id.* at 146.

in judgment including overreliance on heuristics, mental or cognitive "shortcuts," and stereotypes.

Beyond the history of scientific jury selection, its mechanics and efficacy, Lieberman and Sales discuss briefly other services offered by litigation consultants, including focus group research, mock trials, shadow juries and post trial interviews.[32] Although the litigation consulting industry has its roots in jury selection, the authors place undue emphasis on the importance of jury selection services, in the opinion of this author. The pretrial services offered by consultants provide significant value to attorneys in identifying the strengths and weaknesses of a case, identifying and testing trial themes, assessing risk, providing insight for settlement in civil litigation, and of course insight into strategies for jury selection. From an economic perspective, in my opinion, attorneys may get more "bang for their buck" with pre-trial services as opposed to jury selection.

In discussing the litigation consulting profession as a whole, issues of ethics and professionalism invariably arise—as they should. Lieberman and Sales provide an evenhanded overview, examining issues such as fairness, affordability, discoverability, standards and more.[33] The American Society of Trial Consultants has been working diligently for the last several years, and continues to do so, developing practice guidelines for trial consultants.[34]

Highlighting the lack of certification or licensure of consultants, the authors suggest that licensing would guarantee minimal academic backgrounds, participation in continuing education, and sanctions against practitioners who violate professional standards. While the call for stringent standards for professional conduct has merit, the authors fail to recognize

32. *Id.* at 167.

33. *Id.* at 187.

34. The American Society of Trial Consultants was founded in 1982. It is formed of professionals who devote themselves to enhancing the effectiveness of legal advocacy. Members work with attorneys in planning all phases of trial—including discovery, trial preparation, and jury behavior. The work of members encompasses expertise in many fields, including psychology, communications, graphic design, and theater, as well as the law. The American Society of Trial Consultants is the pre-eminent organization for establishing practice standards, ethical guidelines, and continuing education for members of this highly specialized field. *See* The American Society of Trial Consultants, http://astcweb.org/public/index.cfm.

that unlike attorneys and psychologists who have received similar training from accredited institutions, litigation consultants do not have similar backgrounds and training. Instead, litigation consultants come from diverse educational and practice backgrounds including psychology, communications, social work, law, theatre, business, political science, and more.

Conclusion

The primary value of *Scientific Jury Selection* is its breadth of coverage and appeal to consultants, attorneys, students, and the judiciary. The authors state in their introduction that:

> The ultimate goal of this book is to familiarize readers with various consultant activities that are related to jury selection and to discuss research that has evaluated the effectiveness of those activities. As a result, psychologists, other social scientists, and practicing jury selection consultants who read the book should have a better understanding of the current research relevant to scientific jury selection and of areas in which new research needs to be conducted to advance the field. In addition, attorneys who read the book should be better able to decide whether to hire selection consultants to assist in future litigation, and if they do, what types of services these consultants should provide. We hope that this will lead to more widespread and creative collaborations between academic researchers, consultants, and attorneys and that more effective approaches for eliminating biased jurors can be developed.[35]

In a single volume, *Scientific Jury Selection* provides a thorough review of the roots and history of the application of social science to jury selection, gives an overview of the purpose and effectiveness of voir dire, and then a thorough compilation of relevant social science research to date that examines varied issues related to jury selection. The authors conclude their work with a call for increased collaboration between litigation consultants and academic researchers. This call for collaboration has been answered by the American Society of Trial Consultants via student research grants, student paper competitions, and increased involvement with academic researchers throughout the United States.[36]

While *Scientific Jury Selection* has a strong academic slant, the research addressed by its authors will have broad appeal for

35. LIEBERMAN & SALES, *supra* note 5, at 15.
36. The American Society of Trial Consultants, *supra* note 34.

many, including attorneys, judges, and graduate students considering litigation consulting as a career. For practitioners in the field, *Scientific Jury Selection* is useful as a "go to" reference for a variety of special niche topics related to jury selection.