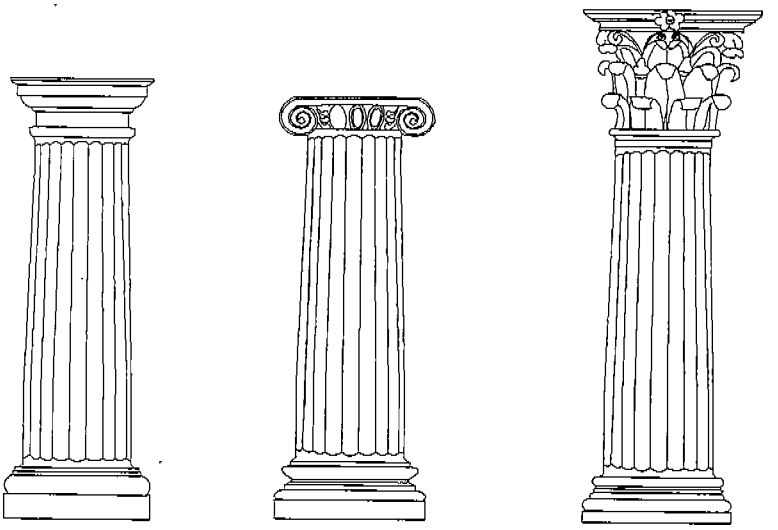
# Juries for the Year

# 2000

## and beyond

*Proposals to Improve the Jury Systems in Washington, D.C.*

**Council for Court Excellence**
**District of Columbia Jury Project**



Council for Court Excellence
Suite 620
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036-4104
(202) 785-5917

International Standard Book Number 0-940259-02-8

# Juries for the Year

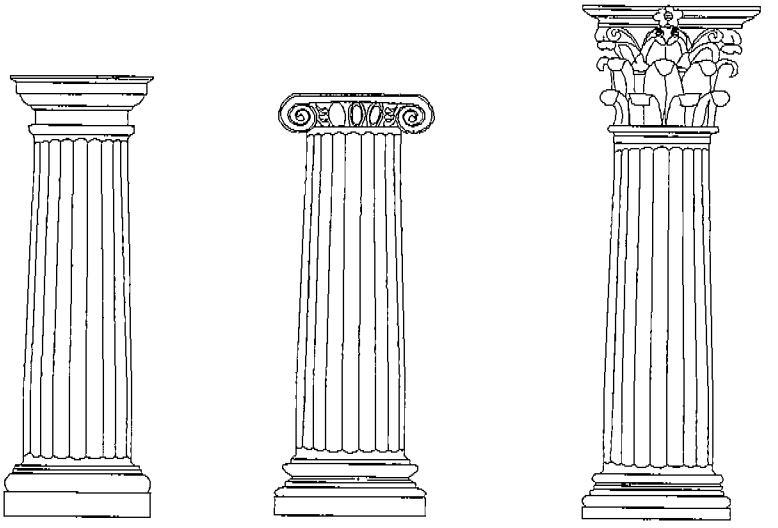
# 2000

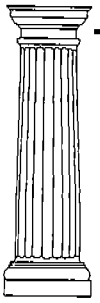
## and beyond

*Proposals to Improve the Jury Systems in Washington, D.C.*

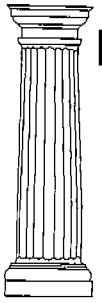
**Council for Court Excellence**
**District of Columbia Jury Project**

## Executive Summary





# Table of Contents



# Executive Summary

## Note from the Co-Chairs

We are very pleased to share *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington, D.C.* with our judicial colleagues, court administrators, bar associations leaders, practicing trial attorneys, and the many District of Columbia citizens who are eligible to serve as jurors or who employ persons summonable as jurors in our courts. The following recommendations and reference materials are the product of hundreds of hours of research, debate, and, in some instances, soul-searching by a devoted group of persons concerned with enhancing a dearly cherished institution of our society — trial by jury.

We would like to acknowledge and thank the Council for Court Excellence for embracing this important subject, and for facilitating the overall D.C. Jury Project so ably. We would like also to thank the judges and court administrators of the D.C. Superior Court and the U.S. District Court for D.C. for their participation in this process and for their support of the overall D.C. Jury Project.

By design, a large category of membership on the D.C. Jury Project was former jurors who served on trials in the U.S. District Court for D.C. or the D.C. Superior Court. These jurors volunteered numerous valuable reflections on their journeys through jury service — from the time of summoning, to being examined in voir dire, to the rigors of trial and deliberations. We give special thanks to them. We also express a strong desire that our juror-colleagues and yet-to-be-identified other former jurors will be consulted throughout the future stages of implementing the D.C. Jury Project recommendations.

As you will see, the recommendations contained herein cover a wide spectrum. Some are completely practical, suggesting nuts and bolts steps to obtain more accurate juror source lists. Others express simple common sense guides to promoting citizen comfort, pride and security. Yet others, such as one recommendation for major revisions in the jury selection, or voir dire, process, will necessitate ongoing dialogue within the legal community and in legislative chambers.

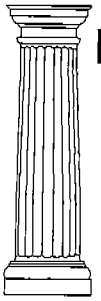
We recognize that embrace of these recommendations will vary among those who read and ponder their contents. A recommendation may strike one person as unremarkable and a long-accepted custom. While another recommendation may appear radical or unreachable. The prime audience for one recommendation may be a juror administrator or data system designer. In other instances, a recommendation will be most relevant to a newer member of the bench or to a continuing legal

education coordinator. In any event, whether you are a jurist, policy maker, barrister, or citizen, we hope that you will engage yourself in this continuing project. In so doing, we believe you will experience what we have — an opportunity to revisit important first principles of our jury system, join hands with a broad and talented spectrum of Washingtonians, and seek to make a genuine difference in the administration of justice in our courts. Welcome aboard.

In closing, we are heartened to observe that the American Bar Association at its February 1998 meeting endorsed a report by their Litigation Section entitled *Civil Trial Practice Standards.* The new ABA report closely parallels many of the reform proposals independently researched and adopted by the Council for Court Excellence D.C. Jury Project.

The Honorable Gregory E. Mize
District of Columbia Superior Court

The Honorable Thomas F. Hogan
U.S. District Court for the District of Columbia



# Project Overview

## Creation of the Committee

The Council for Court Excellence in April 1996 assembled a thirteen member D.C. Jury Project Planning Committee and charged it with laying the groundwork for a year-long study of the jury system in the District of Columbia. This group, modeling their work after successful jury reform efforts in Arizona and other states, adopted a Jury Project Mission Statement (Appendix A) and identified a number of priority issues to be addressed in the study phase of the D.C. Jury Project.

- Initiated in private sector
- Year-long study
- Federal *and* state court focus
- 36 cross-discipline members

This core planning group was expanded to a thirty-six member D.C. Jury Project Committee, members of which were appointed by Council for Court Excellence President Kenneth Starr in December 1996. Judge Gregory Mize of the D.C. Superior Court and Judge Thomas Hogan of the U.S. District Court for D.C. served as co-chairs for the Committee. Project members were drawn from the judicial, legal, civic, academic, and business communities in the District of Columbia.

## Committee Structure and Process

Three working subcommittees:
- Jury pool and summoning process
- Trial procedures and role of jury
- Quality of juror life

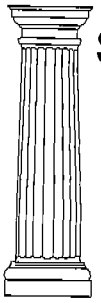
D.C. Jury Project members were divided into three working subcommittees. Over the course of a year, these respective working groups examined the summoning process, including the scope and quality of juror source lists, the length of jury service, juror utilization, and sanctions for scofflaw jurors; addressed issues related to the nature of the trial process and how that process affects both judicial efficiency and juror understanding; and studied issues related to the quality of the juror life, such as the physical environment of the courthouse, orientation materials, juror privacy and security, and juror pay. Each working subcommittee included jurors, judges, attorneys, court administrators, and academics. The working subcommittees met monthly to develop draft recommendations for consideration by the D.C. Jury Project Committee. Working papers of the DC Jury Project are available at the Martin Luther King branch of the DC Public Library and at the Council for Court Excellence.

While a majority of the D.C. Jury Project Committee reached consensus on the recommendations contained in this report, there was considerable and lively debate on several issues presented here, and not all recommendations enjoy unanimous support. Dissenting minority

views are included in this report where appropriate. Each of these minority statements were supported by fewer than five members of the D.C. Jury Project.

## Perspective

The Council for Court Excellence D.C. Jury Project differs from other jurisdictions' jury reform projects to date in two significant ways. First, it has been initiated by the private sector, thus seeking to speak with the resonance and perspective of the juror and the community. Second, it encompasses the federal trial court as well as the state trial court, addressing the impact on citizens of being subject to jury duty in two separate court systems in the same community.



# Summary List of Recommendations

## THE DC JURY PROJECT RECOMMENDS:

**Public Education**

**1** that the courts use positive means to encourage participation in the jury system. The imposition of available sanctions for delinquent jurors should be administered cautiously.

**2** that citizens receive substantial information concerning jury service at the time that they are summoned for jury duty. For example, information about the summoning, deferral, excusal, jury selection and jury trial phases of their service should accompany the initial summons and could be broadcast by local media as a public service.

**3** that the use of juror orientation videos be expanded in order to increase the reach of the videos and to address the diverse population which comprises the jury pool.

**4** that a Jury Pride Task Force be established, the goal of which would be to educate the citizenry about juries and jury service in the District of Columbia.

**Jury Pool**

**5** that the court administration work with the District of Columbia Financial Responsibility and Management Assistance Authority (D.C. Control Board) and with agencies contributing juror source lists to facilitate managing the master juror source list in a way that keeps mailing data on formerly summoned jurors up to date.

**6** that the courts expand the current juror source list to include D.C. income tax mailing lists, D.C. public assistance lists, and the list of newly naturalized citizens in order to increase the number of citizens called upon to serve as jurors. Since implementation of this recommendation will invariably create more duplicate names, the D.C. Jury Project recommends that the courts require each provider of a source list to include the social security number, when available, for each person listed in order to minimize duplications on the ultimate master juror source list.

**7** that the master juror source list in D.C. include those citizens who are qualified and have indicated a willingness to serve, but who are not included on one of the existing juror source lists.

**8** that the D.C. Superior Court and the U.S. District Court for D.C. increase levels of cooperation in the areas of jury management and utilization and in the provision of juror services by designating one judge in each court as a jury liaison with the other court. Areas of cooperation could include utilizing compatible computer systems, sharing child care facilities, and exploring the possibility of sharing jurors on an emergency basis.

**9** that the courts exempt from service those jurors who have served in either court within a two year period.

**10** that guidelines for juror pay be revised to increase public participation and to compensate those who are not selected to sit on a trial on the first day of service in the D.C. Superior Court. The daily fee should at least cover the minimum cost of public transportation to and from the courthouse. Additionally, jurors should be provided with a lunch stipend on the first day of service.

**11** that the term of petit jury service in the U.S. District Court be reduced to one week, when the results of implementing other recommendations in this report render such a change feasible.

Courthouse accommodation

**12** that the courts take reasonable measures to provide accessible and comfortable facilities for jurors during all stages of their service. Among other things, jurors should be provided with adequate space in the check-in area, comfortable seating and other amenities in the jury lounge, workstations in quiet rooms that enable computer usage, clean and convenient restrooms, and comfortable deliberation rooms.

**13** that judges and jury officers take steps to minimize juror waiting time during the pre-trial phase of jury service.

**14** that the courts take reasonable measures to insulate jurors from coming into contact with witnesses or parties on trial during their term of service.

**15** that judges and jury officers implement methods of providing meaningful expressions of gratitude to all citizens who appear for jury duty.

**16** that the courts continue to regularly seek the feedback of jurors and that the results of any surveys/questionnaires utilized be tallied and reviewed by judges, jury administrators, and court policy makers.

Selection procedures

**17** that individual judges be authorized to excuse a juror from further service on the date the juror is summoned where voir dire of the juror clearly shows that the juror would be unable to serve on any case.

**18** that judges and other court personnel protect the privacy of jurors during the voir dire process consistent with the constitutional rights of the parties and the public.

**19** that the fairness, efficiency and utility of the voir dire process in the trial courts of the District of Columbia be enhanced by:

a. Increasing relevant information about jurors available to the Court and parties by use of a written jury questionnaire completed by all jurors and given to the Court and parties upon the jury panel's arrival in the courtroom;

b. Improving the ability of parties to ascertain grounds for strikes of jurors for cause by requiring that each juror be examined during the voir dire process and by giving attorneys a meaningful opportunity to ask follow-up questions of each juror;

c. Assuring to the extent possible that prospective jurors who may be biased or partial are stricken for cause by establishing an expanded legal standard for cause strikes which mandates that when a prospective juror's demeanor or substantive response to a question during voir dire presents any reasonable doubt as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court's own motion; and by

d. Reducing improper discrimination against jurors, unnecessary inconvenience to them, needless delays in trials, and excessive costs by eliminating, or drastically reducing the number of, peremptory strikes.

Juror tools

**20** that jurors be permitted to take notes during trials and that they be advised that they may do so.

**21** that jurors be permitted to submit written questions to be asked of witnesses by the trial judge.

**22** that judges take steps to minimize juror waiting time during trial by, among other things, discouraging the use of unnecessary bench conferences while the jury is in the courtroom and by expediting the

voir dire process.

**23** that the management of trial exhibits at pre-trial and trial be improved in order to minimize juror confusion, promote understanding among the jurors, and expedite trial proceedings.

**24** that, at the discretion of the trial judge, jurors be permitted to use and maintain exhibit notebooks during trial and jury deliberations.

**25** that judges permit counsel to make interim summations to the jury in extended trials.

**26** that judges give final jury instructions on substantive law before closing arguments, reserving only instructions on administrative matters until after closing arguments.

**27** that to the extent possible, jury instructions be case-specific and that the courts expand the use of preliminary and interim jury instructions. Interim instructions, given at the appropriate times in the course of the trial, might cover such items as burden of proof, leading questions and the purpose of opening statements and closing arguments. In complex or technical cases, definitions of terms and other information to help orient the jury should be included.

**28** that the courts consider later in 1998 the issue of whether jurors should be permitted to discuss testimony and evidence of a trial in the jury room, during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The decision at that time should be informed by the experience of Arizona trial courts, which now are permitting such discussions on an experimental basis.

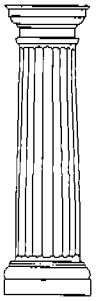
Effective Deliberations

**29** that guidance regarding the jury deliberation process be included in final jury instructions.

**30** that judges provide a written copy or copies of the final jury instructions to the jury for their use in deliberations.

**31** that trial judges consider assisting deliberating juries in reaching a verdict in cases where a *Winters* charge has already been given and the jury continues to report that they are deadlocked.

**32** that trial judges join jurors at the close of a trial in order to personally and informally thank them for their service, to answer questions about the court and jury systems, and to provide assistance for any juror who may have experienced extreme stress caused by the trial.



# District of Columbia Jury Project Members

Co-Chairs

**Honorable Thomas Hogan**, Co-Chair
U.S. District Court for D.C.
**Honorable Gregory Mize**, Co-Chair
D.C. Superior Court

Committee Chairs

**William Lightfoot, Esq.**, Chair, Jury Pool & Summoning Working Committee
Koonz, McKenney, Johnson, DePaolis & Lightfoot
**Daniel Margolis, Esq.**, Chair, Trial Structure Working Committee
Patton Boggs, L.L.P.
**Annie King Phillips,** Chair, Jury Care Working Committee
Public Member and Former Juror

Members

**Mark Austrian, Esq.** - Collier, Shannon, Rill & Scott
**Linda Bostick** - Public Member and Former Juror
**Beverly Burke, Esq.**- Washington Gas Light Company
**Honorable Kevin Chavous** - D.C. Council
**Duane Delaney** - Clerk, D.C. Superior Court
**Mark Dickson, Esq.** - Washington Bar Association
**Colin Dunham, Esq.** - Independent Public Defender Bar Association
**Ellen Watson Eager** - Public Member and Former Juror
**Honorable Jack Evans** - D.C. Council, Judiciary Committee Chair
**Stephen Glickman, Esq**. - Zuckerman, Spaeder, Goldstein, Taylor & Kolker
**Honorable Henry Greene** - D.C. Superior Court
**Martin Grossman, Esq**. - Deputy Corporation Counsel for D.C.
**James Hourihan, Esq.** - Hogan & Hartson
**Laura Jackson** - Public Member and Former Juror
**Ramsey Johnson, Esq.**- Principal Assistant U.S. Attorney for D.C.
**Nancy Lesser, Esq.** - Williams & Connolly
**Nancy Mayer-Whittington** - Clerk, U.S. District Court for D.C.
**Tamar Meekins, Esq.** - Public Defender Service for D.C.
**Frederic Miller, C.P.A.** - Coopers & Lybrand, L.L.P.
**Dwight Murray, Esq.** - President, Bar Association of D.C.
**Reita Pendry, Esq.** - Deputy Chief Federal Public Defender for D.C.

**Honorable Henry Ramsey, Jr.**[1] - Retired Judge
**Honorable Judith Retchin** - D.C. Superior Court
**William Robinson, Esq.** -Travelers Property Casualty Corp.
**Professor Richard Seltzer** - Howard University
**Professor Rita Simon** - American University
**Honorable Emmet Sullivan** - U.S. District Court for D.C.
**Mark Uherek** - Public Member and Former Juror
**Honorable Ricardo Urbina** - U.S. District Court for D.C.
**Robert Wilbur** - Public Member and Former Juror
**Alan Youkeles** - Public Member and Former Juror

Additional Contributors

## Additional Contributors

**Suzanne Bailey-Jones** - Juror Officer, D.C. Superior Court
**Mark Blecker** - Jury Administrator, U.S. District Court for D.C.
**Benjamin Chew, Esq.** - Patton Boggs, L.L.P.
**Phil Braxton** - Director of Data Processing, D.C. Superior Court
**Alohna Jones** - Jury Administrator, U.S. District Court for D.C.
**Elizabeth Paret** - Chief Deputy for Administration, U.S. District Court for D.C.
**Michelle Sedgewick, Esq.** - Legal Counsel, D.C. Council Judiciary Committee
**Roy Wynn, Jr., Esq.** - Director-Special Operations, D.C. Superior Court

## Consultant

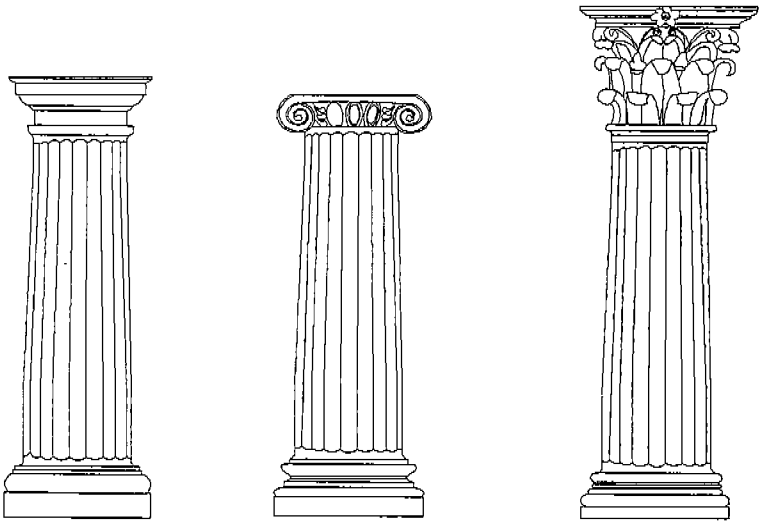
**G. Thomas Munsterman** - Director, Center for Jury Studies, National Center for State Courts

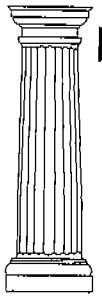
## Council for Court Excellence Staff

**Samuel F. Harahan** - Executive Director
**Priscilla Skillman** - Assistant Director
**Kathleen C. Clark** - Senior Analyst, D.C. Jury Project

[1]Resigned from Committee March 1997 due to relocation.

# Recommendations of the DC Jury Project





# Educate the Public About Jury Service

## RECOMMENDATION 1

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS USE POSITIVE MEANS TO ENCOURAGE PARTICIPATION IN THE JURY SYSTEM. THE IMPOSITION OF AVAILABLE SANCTIONS FOR DELINQUENT JURORS SHOULD BE ADMINISTERED CAUTIOUSLY.**

- Less than 25% of summoned citizens qualified and serve
- 19% purposely ignore summons
- 43% never receive summons

Jury administrators in the D.C. Superior Court and the U.S. District Court for D.C. estimate that less than one-quarter of citizens who are summoned are actually qualified and appear for jury service. In order to determine an appropriate remedy for this problem, the Jury Project commissioned a study which sought to determine why jury yield in D.C. is so low.[1] The results of this study indicate that low juror yield in the District of Columbia is a result of two primary factors: (1) approximately 19% of citizens in D.C. purposely ignore jury duty when summoned; (2) an additional 43% of citizens never receive the jury summons in the first place.[2]

The latter problem is a function of the inaccurate information contained on the two juror source lists — the Board of Election and Ethics list and the Bureau of Motor Vehicle Services list. In two other recommendations in this report, the Jury Project has recommended that the courts improve the accuracy of the master juror source list. (Recommendation 5, encouraging the continual updating of the master juror source list and Recommendation 6, encouraging the use of additional source lists). The results of the "*Examination of Low Juror Yield*" study confirm that the implementation of these recommendations should be a high priority for the courts. This study's background and findings are summarized in Appendix B.

- Apathy requires positive encouragement

The former problem — that of citizen apathy — is also a significant issue. Based on surveys with citizens in D.C., the Jury Project recommends that the D.C. Superior Court and the U.S. District Court for D.C. take a positive approach to encouraging citizens to participate in jury service. This could include telling jurors that they are needed;

---

[1]Council for Court Excellence, *Civic Apathy or Governmental Deficiency? An Examination of Low Juror Yield in the District of Columbia,* Richard Seltzer, (December 1997). See Appendix B for an Executive Summary of the study.

[2]Id. Other results show that 18% of summoned jurors responded and served on the appropriate date; 7% of summoned jurors responded and requested that their date of service be deferred; and 13% responded, but were not qualified for service.

educating jurors about services provided by the court (such as child care for jurors); letting jurors have a greater role in the process, and educating jurors when they serve.

• Sanctions need careful consideration

The D.C. Jury Project recommends that, at this time, the use of severe sanctions, including monetary fines, be carefully considered prior to implementation. In light of the inaccuracy of the current source lists, it is possible that a citizen could be targeted for sanction who never received a summons. Further, it is clear from surveys with jurors that the imposition of sanctions may lead to greater participation, but could also result in far greater resentment.

## RECOMMENDATION 2

**THE D.C. JURY PROJECT RECOMMENDS THAT CITIZENS RECEIVE SUBSTANTIAL INFORMATION CONCERNING JURY SERVICE AT THE TIME THAT THEY ARE SUMMONED FOR JURY DUTY. FOR EXAMPLE, INFORMATION ABOUT THE SUMMONING, DEFERRAL, EXCUSAL, JURY SELECTION AND JURY TRIAL PHASES OF THEIR SERVICE SHOULD ACCOMPANY THE INITIAL SUMMONS AND COULD BE BROADCAST BY LOCAL MEDIA AS A PUBLIC SERVICE.**

Orientation information needed prior to reporting date about:
- Metro
- Parking
- Jury lounge
- Summoning Process
- Deferral and excusal
- Term of service
- Attire
- Lunch
- Expense money

Providing informative materials to jurors in a variety of formats prior to their arrival at the courthouse could significantly reduce juror frustration, confusion or apprehension, as well as limit the number of inquiries to the jury office. Giving citizens who are summoned more and earlier information about jury service will relieve anxieties and improve the overall court experience.

Recognizing the importance of comprehensive juror orientation, the D.C. Jury Project recommends that orientation begin at the time the summons is received, rather than at the courthouse. The summons should be clear and easy to read. It should include information about the courthouse (including a map, Metro and parking information, and location of the jury lounge). Additionally, information about the summoning process and deferral and excusal procedures and policies should be included. At the time that they are summoned, citizens should be informed about the term of service required, especially if circumstances may result in exceptions to the standard term. Citizens should also be notified of appropriate attire, lunch information, expense money, and any special services for handicapped persons, persons needing assistance communicating in English, or those who may need child care. Finally, summoned jurors need information about the courtroom processes and their role during the trial.

The D.C. Superior Court and the U.S. District Court for D.C. should include the additional information with the summons where possible, so that citizens receive it before their assigned reporting date. Additionally, the juror summons should contain direction on where more orientation materials are available — at the library, the supermarket, from the jury office, from video rental stores, or from the local media, for example.

It is without dispute that the courts should reach out to persons who have the ability to speak English, but who are not fully able to understand the language in written form. The Jury Project recognizes that the District of Columbia is a diverse area and that it is not feasible

to mail jury summonses in all languages. However, interpretation assistance should be made available by telephone to all citizens summoned for jury service. Due to the large percentage of Spanish-speaking residents, each mailed summons should state prominently on its cover that persons who speak Spanish may call the court to receive a written summons in Spanish or to determine the appropriate course of action. A Spanish speaking person should then be available to assist these citizens when they call.

Special assistance for Spanish speakers

## RECOMMENDATION 3

**THE D.C. JURY PROJECT RECOMMENDS THAT THE USE OF JUROR ORIENTATION VIDEOS BE EXPANDED IN ORDER TO INCREASE THE REACH OF THE VIDEOS AND TO ADDRESS THE DIVERSE POPULATION WHICH COMPRISES THE JURY POOL.**

**Orientation Videos**
- Greater pre-service availability
- Judicial review of current tapes needed
- Judicial involvement in needed updates essential
- Greater diversity must be portrayed in updates

Most citizens are not familiar with the court system. The judiciary, therefore, has an obligation to make its processes understandable in a user friendly manner. The orientation videos currently in use in D.C. Superior Court and U.S. District Court for D.C. are both quality productions which convey important information on the importance and nature of jury duty. The D.C. Jury Project recommends the following to expand the reach of these videos and to increase their effectiveness:

The videos should be made available to jurors before they appear for jury service. This could be accomplished by showing the videos on a local cable television channel, by providing public libraries with copies of the videos, and by allowing citizens to check out copies of the video from the court directly. Notice of these orientation opportunities should be included with the summons.

All judges should view the videos currently in use. The video includes instructions on several issues also covered by many judges; it is important that they be aware of this fact. Whenever a new video is in development, judges and citizen/jurors should be involved in the process.

When updated, the videos should be racially diverse; the population in D.C. is very diverse, and it is important that orientation materials address all potential jurors. Further, the video should include disabled citizen/jurors to ease the special concerns of this population. To accomplish this, the U.S. District Court for D.C. could produce a short local supplement to the current video which is used nationwide.

## RECOMMENDATION 4

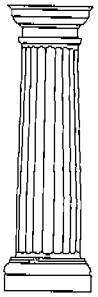
### THE D.C. JURY PROJECT RECOMMENDS THAT A JURY PRIDE TASK FORCE BE ESTABLISHED, THE GOAL OF WHICH WOULD BE TO EDUCATE THE CITIZENRY ABOUT JURIES AND JURY SERVICE IN THE DISTRICT OF COLUMBIA.

**Ongoing Education Task Force**
- Clear, positive message
- Effective delivery Mechanisms
- Targeted Groups

Studies indicate that citizens' attitudes toward jury service at the time they receive a summons are primarily negative. However, after having the opportunity to serve jury duty, that cynicism is often replaced with an appreciation for the justice system and the role of the public in it.[3] In order to improve public attitudes toward jury service through education and public awareness campaigns, a task force should be established which actively considers the views of the courts and the citizens of D.C. The task force should be charged with: 1) identifying a clear and positive message about jury service; 2) developing a method of presentation of this message; and 3) proposing groups to whom the message should be delivered.[4] Suggested groups to target with educational materials include schools, civic organizations, professional organizations, and employers.

[3] *WITH RESPECT TO THE JURY: A Proposal for Jury Reform, Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries*, 15 (February 1997) and citations therein.

[4] Some ideas for these areas of emphasis are included in "Lessons Learned From the Public Health Campaigns and Applied to the Development of Positive Jury Service Norms," Prepared for the Council for Court Excellence by *Consulting Research and Information Services* (December 1996).



# Broaden the Jury Pool

## RECOMMENDATION 5

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURT ADMINISTRATION WORK WITH THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY (D.C. CONTROL BOARD) AND WITH AGENCIES CONTRIBUTING JUROR SOURCE LISTS TO FACILITATE MANAGING THE MASTER JUROR SOURCE LIST IN A WAY THAT KEEPS MAILING DATA ON FORMERLY SUMMONED JURORS UP TO DATE.**

**Improve management of Juror Source Lists**

- 43% of summons never reach prospect
- DMV, Elections source lists uncorrected
- Courts' active corrective role essential

Currently, 43% of juror summonses mailed in D.C. never reach the intended prospective juror.[5] The juror source lists, as provided to the D.C. Superior Court and the U.S. District Court for D.C. by the D.C. Board of Elections and Ethics and the D.C. Bureau of Motor Vehicle Services, contain an extemely high number of outdated citizen addresses. The D.C. Jury Project has learned that at present the courts do not correct citizen lists received from the contributing agencies. Rather, the courts rely on the Board of Elections and Ethics and the Bureau of Motor Vehicle Services to provide source lists with accurate citizen information and addresses.

To reduce unnecessary mailing and administrative costs, the D.C. Jury Project recommends that the D.C. Superior Court and the U.S. District Court for D.C. take an active role, working with the appropriate agencies, in ensuring that the master juror source list contains accurate citizen information and addresses.

[5]Council for Court Excellence, *Civic Apathy or Governmental Deficiency? An Examination of Low Juror Yield in the District of Columbia*, Richard Seltzer (December 1997). See Appendix B for an Executive Summary of the study.

## RECOMMENDATION 6

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS EXPAND THE CURRENT JUROR SOURCE LIST TO INCLUDE D.C. INCOME TAX MAILING LISTS, D.C. PUBLIC ASSISTANCE LISTS, AND THE LIST OF NEWLY NATURALIZED CITIZENS IN ORDER TO INCREASE THE NUMBER OF CITIZENS CALLED UPON TO SERVE AS JURORS. SINCE IMPLEMENTATION OF THIS RECOMMENDATION WILL INVARIABLY CREATE MORE DUPLICATE NAMES, THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS REQUIRE EACH PROVIDER OF A SOURCE LIST TO INCLUDE THE SOCIAL SECURITY NUMBER, WHEN AVAILABLE, FOR EACH PERSON LISTED IN ORDER TO MINIMIZE DUPLICATIONS ON THE ULTIMATE MASTER JUROR SOURCE LIST.**

Increase Number of Source Lists

20% of summons returned as undeliverable

At the present time, the D.C. Superior Court and the U.S. District Court for D.C. find they must send out jury summonses to approximately four people in order to have one qualified juror present in the courthouse. The D.C. Jury Project found that one reason for this low yield is that the current juror source lists in D.C. appear to have a significant number of incorrect addresses, addresses that are not updated, and names of people who no longer live in the city. In addition, the District has lost a significant number of residents since 1990. These factors adversely affect the reliable delivery of summonses. In fact, the two trial courts estimate that more than 20% of all summonses are returned to the courts as undeliverable. The low yield causes the court to exhaust the jury wheel well before the standard two year period. In addition, various former jurors have expressed public dissatisfaction with the summoning process, as it appears that some citizens are called on a regular basis, while other qualified adults are never reached by the current source list.

Takes 4 summonses to yield one qualified juror

Additional sources lists needed:
- Public Assistance
- Income tax
- Naturalized citizens

Recognizing the need to address these problems and recognizing the importance of maintaining a quality juror source list which is accurate, inclusive, and representative of the adult population, the D.C. Jury Project encourages the D.C. Superior Court and the U.S. District Court for D.C. to expand the current source list to include the three lists noted above. Additionally, the courts should begin using social security numbers as the common identifier to eliminate duplications on the resulting master list. See Appendix C for background findings and an in-depth analysis related to this recommendation.

SSN field to reduce Duplicative names

## RECOMMENDATION 7

**THE D.C. JURY PROJECT RECOMMENDS THAT THE MASTER JUROR SOURCE LIST IN D.C. INCLUDE THOSE CITIZENS WHO ARE QUALIFIED AND HAVE INDICATED A WILLINGNESS TO SERVE, BUT WHO ARE NOT INCLUDED ON ONE OF THE JUROR SOURCE LISTS.**

**Allow volunteers**

Facilitate random selection of volunteer jurors

Citizens who are not listed on one of the juror source lists, but who are nevertheless qualified to serve as jurors in D.C. Superior Court and the U.S. District Court for D.C., should be allowed to volunteer for inclusion on the master juror source list. This practice could expand the jury pool, as well as increase its representativeness. Additionally, it furthers the important goal of court accessibility.

Citizens should not be permitted to volunteer to serve at any particular time, but only to be listed on the source list from which jurors are randomly selected. Thus, the practice would not skew the jury pool in any way.

This practice is currently permitted in four other states.[6] Jury officials in Pennsylvania and New York indicated that allowing citizens to request to serve was a factor in reducing the public stigma that the courts are unapproachable and/or inaccessible. Essentially, this practice helps "capture" those not on the jury list who are willing to take a pro-active approach in regard to jury service, and this is a population, albeit small, whose tendencies should not be discouraged.

Pursuant to other recommendations contained in this report, the D.C. Jury Project recommends that information on the master jury list be updated continually, so that citizens who volunteer to be listed do not bear the burden of contacting the courts each time a new master juror source list is started.

[6]In New York, the Jury Information Line (an 800 telephone number) prompts citizens to volunteer to be on the jury list. If qualified, these citizens are placed on the jury list from which jurors are randomly selected. In Alaska, Maine, and Pennsylvania no formalized procedure exists for handling "volunteer" jurors since an informal process is just as effective.

## RECOMMENDATION 8

**THE D.C. JURY PROJECT RECOMMENDS THAT THE D.C. SUPERIOR COURT AND THE U.S. DISTRICT COURT FOR D.C. INCREASE LEVELS OF COOPERATION IN THE AREAS OF JURY MANAGEMENT AND UTILIZATION AND IN THE PROVISION OF JUROR SERVICES BY DESIGNATING ONE MEMBER OF EACH COURT AS A JURY LIAISON WITH THE OTHER COURT. AREAS OF COOPERATION COULD INCLUDE UTILIZING COMPATIBLE COMPUTER SYSTEMS, SHARING CHILD CARE FACILITIES, AND EXPLORING THE POSSIBILITY OF SHARING JURORS ON AN EMERGENCY BASIS.**

Inter-court cooperation and coordination

Still greater DC/federal court coordination needed:
- compatible jury management software
- shared child care
- juror sharing

The two trial courts in D.C. have a long history of cooperation regarding jury management issues.[7] Since 1969, the D.C. Superior Court has managed the juror source list used by both courts; the U.S. District Court for D.C. has expressed willingness to take on the costs associated with eliminating duplicate names and sorting the source lists beginning in late 1997. Additionally, the courts, through the jury administrators, have engaged in occasional informal dialogue regarding Jury Service Appreciation Month, the possibility of sharing child day care facilities, and allowing citizens who have served in either court within the past two years to be excused from jury service. The D.C. Jury Project commends the courts for these efforts and encourages their continuation.

Specifically, the D.C. Jury Project recommends that the courts continue to share the task of managing the juror source lists. Since they draw prospective jurors from the same pool of citizens, it simply makes sense that this administrative task be shared. To increase the benefit of this effort, the courts should make efforts to use compatible jury management software systems.

Because of the proximity of the two courthouses, the courts have additional opportunities to save money and provide additional services for jurors. For example, the courts could share child care facilities.

[7]The Jury Plan for the D.C. Superior Court provides for the continuation of these efforts in Section 19, which states in part: "Nothing in this Plan shall be construed to prevent the Superior Court and the District Court from entering into any agreement for sharing resources and/or facilities." D.C. Code Sec. 11-1917 also provides for coordination and cooperation between the two courts, suggesting the courts consider sharing "automated data processing and hardware and software, forms, postage, and other resources."

• Judicial liaison exchange

Further, the courts could work to develop a system of "sharing" jurors on an as-needed basis. To ensure that these, and other, opportunities are recognized, the D.C. Jury Project recommends that a judge from each court be designated as a liaison with the other court for the exchange of ideas and resources. With this mechanism in place, the courts will be better able to meet their own needs and to respond to the concerns of citizens.

## RECOMMENDATION 9

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS EXEMPT FROM SERVICE THOSE JURORS WHO HAVE SERVED IN EITHER COURT WITHIN A TWO YEAR PERIOD.**

Two-year exemption as goal

Jury pool improvements could make possible

While this recommendation may be impractical at this time, the D.C. Jury Project recommends that the D.C. Superior Court and the U.S. District Court for D.C. set a goal to this effect. The implementation of recommendations contained in this report could increase the jury pool and improve juror turnout in both courts in the District of Columbia in the future. When these improvements are made, the courts should consider establishing methods to avoid the double-booking of jurors within any two year period, both to distribute the opportunity of jury service across the community, and to provide an adequate respite for those who have served recently.

## RECOMMENDATION 10

**THE D.C. JURY PROJECT RECOMMENDS THAT GUIDELINES FOR JUROR PAY BE REVISED TO INCREASE PUBLIC PARTICIPATION AND TO COMPENSATE THOSE WHO ARE NOT SELECTED TO SIT ON A TRIAL ON THE FIRST DAY OF SERVICE IN THE D.C. SUPERIOR COURT. THE DAILY FEE SHOULD AT LEAST COVER THE MINIMUM COST OF PUBLIC TRANSPORTATION TO AND FROM THE COURTHOUSE. ADDITIONALLY, JURORS SHOULD BE PROVIDED WITH A LUNCH STIPEND ON THE FIRST DAY OF SERVICE.**

**Juror pay improvements:**

- Adequate reimbursement for public transportation
- Lunch stipend

According to statute, jurors in federal court are currently paid $40.00 per day for the first thirty days of service, and $50.00 for each day thereafter; these jurors also receive a $3.00 transportation fee. Jurors in D.C. Superior Court receive a $2.00 travel allowance for each day of service and $30.00 per day if selected to serve on a trial. Thus, if not selected to serve on a trial on the first day of service, a juror in D.C. Superior Court will receive only the $2.00 transportation fee. Employees of the United States or of any State or local government continue to receive their regular salary during jury service. Employers in the District of Columbia with ten or more workers are required to pay an employee for his or her wages for up to five days of jury service. However, those jurors who most need compensation — the self-employed, the unemployed, commissioned and temporary workers, and those who work for small employers — are not paid for their first day of jury service.

The out of pocket costs imposed on many persons summoned for jury duty include, at a minimum, all transportation costs in excess of $2.00 in addition to potential significant lost wages. While undue hardship is grounds for deferral or excusal from service, the D.C. Jury Project considers it important to limit financial hardship for citizens, both because it is the right thing to do, and in order to help achieve the goal of having representative jury panels. At a minimum, therefore, juror pay for the first day of service in D.C. Superior Court should be increased to: 1) adequately cover transportation costs, and 2) provide a lunch stipend for first day jurors.

## RECOMMENDATION 11

**THE D.C. JURY PROJECT RECOMMENDS THAT THE TERM OF PETIT JURY SERVICE IN THE U.S. DISTRICT COURT FOR D.C. BE REDUCED TO ONE WEEK, WHEN THE RESULTS OF IMPLEMENTING OTHER RECOMMENDATIONS IN THIS REPORT RENDER SUCH A CHANGE FEASIBLE.**

Reduce federal court term of service

Jurors are currently summoned by the U.S. District Court for D.C. to serve for a two week period. Under the telephone call-in system used in this court, jurors are typically required to appear at the courthouse for a total of two or three days during this two week period. In order to limit the personal and financial burdens imposed on citizens summoned by the U.S. District Court for D.C. and to increase citizen participation in the jury system, the D.C. Jury Project recommends that the term of service be reduced to a one week telephone call-in period.

One rather than two week telephone call term

The purpose of a short term of jury service is to reduce the personal and financial burden upon those serving, as well as upon their employers, and to permit persons to serve who would otherwise be excused for personal or community hardship reasons. This broader participation should result in a better cross-section of the public serving on jury duty and will distribute the burden, as well as the positive educational aspects of jury service, more equitably across the eligible population.[8]

Long-term goal should be one day/one trial

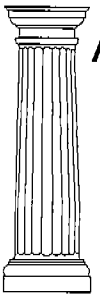
While it would be impractical at this time to reduce the term of service in U.S. District Court for D.C., the Jury Project encourages the Court to set a goal to this effect. In the future, the D.C. Jury Project encourages the Court to set an additional long term goal of implementing a one day/one trial system, as is used in D.C. Superior Court. As recommendations included in this report are put into effect,[9] a one day term of service may become a more feasible alternative for the U.S. District Court for D.C. "From the jurors' point of view, the length of the term determines the amount of hardship and is related to their willingness ... Praise for reduced terms comes from employers as well as jurors and courts."[10]

---

[8]Munsterman, G. Thomas, *Jury System Management*, p. 66-67, National Center for State Courts (1996).

[9]See Recommendations 5, 7, and 8.

[10]Munsterman, G. Thomas, *Jury System Management*, p. 66, National Center for State Courts (1996).



# Accommodate Jurors in the Courthouse

## RECOMMENDATION 12

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS TAKE REASONABLE MEASURES TO PROVIDE ACCESSIBLE AND COMFORTABLE FACILITIES FOR JURORS DURING ALL STAGES OF THEIR SERVICE. AMONG OTHER THINGS JURORS SHOULD BE PROVIDED WITH ADEQUATE SPACE IN THE CHECK-IN AREA, COMFORTABLE SEATING AND OTHER AMENITIES IN THE JURY LOUNGE, WORKSTATIONS IN QUIET ROOMS THAT ENABLE COMPUTER USAGE, CLEAN AND CONVENIENT RESTROOMS, AND COMFORTABLE DELIBERATION ROOMS.**

**Accessible and comfortable facilities**

Long-term goals:

- Accommodations for physical and sensory disabled
- Adequate space
- Comfortable seating
- Quiet workstations
- Reading, television, and other diversions
- Telephones
- Refrigerators
- Quiet, private deliberation rooms with adequate amenities and supplies

Throughout the course of a jury service term, a citizen may encounter almost all parts of the courthouse. After checking in at the jury office, a juror may be required to spend an entire day in the jury lounge, to travel to one or more courtrooms for panel selection, to sit in the courtroom jury box, to deliberate, and to have lunch in the cafeteria.

As respected guests and as citizens who have appeared to perform a vital civic duty, jurors deserve facilities which are in compliance with federal standards regarding accessibility, comfort and convenience. It is especially important that the D.C. Superior Court and the U.S. District Court for D.C. address functional limitations in and access to courthouses that might impede persons with disabilities — whether they be physical or sensory — from fully participating as a juror.

Regarding the comfort and other needs of jurors, the jury lounge should be equipped with comfortable chairs, adequate room for moving around, quiet work space, reading materials, televison or other diversions, phone accessibility, refrigeration for jurors' lunches or medications. The deliberation room should ensure privacy and be equipped with necessary supplies (chalkboard, e.g.), as well as amenities such as coffee or water. The court should also make reasonable efforts to provide general services (e.g., a nurse, child care) at the courthouse.

It is the D.C. Jury Project's view that some of these improvements may be long-term project goals, in light of current financial realities and other priorities in the District of Columbia. Nonetheless, such long-term projects are a significant part of the court's duty to the citizenry. Accordingly, the D.C. Jury Project recommends their inclusion in such planning.

## RECOMMENDATION 13

### THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES AND JURY OFFICERS TAKE STEPS TO MINIMIZE JUROR WAITING TIME DURING THE PRE-TRIAL PHASE OF JURY SERVICE.

**Minimize waiting time**

It simply makes good common sense to make efficient use of juror time. Upon arrival to the courthouse, jurors spend time checking in, receiving orientation, and waiting in the jury office/lounge. Minimizing waiting time during this period of jury service is extremely important in improving overall juror satisfaction. Toward this end, the D.C. Jury Project recommends that jurors be informed if a significant delay is anticipated. When possible, jurors should be provided with explanations for unpredictable interruptions or delays. This show of respect for jurors' time vastly improves juror morale.

- Standby juror system
- Improvement in perdictability of required juror numbers
- Explanation for inevitable delays

Specifically, the D.C. Superior Court and the U.S. District Court for D.C. should consider the following methods, among others, to decrease juror waiting time. The courts should seek ways to eliminate unnecessary trips to the courthouse for jurors (implement a standby juror system, e.g.). Measures should be taken to improve the rate of utilization of potential jurors. Clear communication between judges and jury officers should be promoted to facilitate the predictability of the number of jurors needed in advance of a trial commencement.

Because some waiting is inevitable, the courts should provide reasonable and appropriate diversions for jurors who spend time in the jury lounge (e.g., the provision of reading materials, telephones, television, educational materials). Additional suggestions for improving the comfort of the jury lounge are contained in Recommendation 12 in this report.

## RECOMMENDATION 14

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS TAKE REASONABLE MEASURES TO INSULATE JURORS FROM COMING INTO CONTACT WITH WITNESSES OR PARTIES ON TRIAL DURING THEIR TERM OF SERVICE.**

Better insulation of jurors from parties, witnesses, and discussions:
• Secured, or designated elevators, hallways

There are legitimate concerns regarding juror privacy and security in and around the courthouse. When released from service, either during a lunch break or at the end of a day, jurors may come into contact with witnesses, parties on trial, or spectators in the courtroom. To insulate jurors from accidentally overhearing information about a case, and to protect them from fear of retaliation, the D.C. Jury Project recommends that the D.C. Superior Court and the U.S. District Court for D.C. take appropriate measures to limit the possibility of juror contact with witnesses or parties throughout the courthouse.

To accomplish this the courts are urged to make available, to both grand jurors and trial jurors, access to secured corridors and elevators. When this is not feasible, one of the public elevators should be designated for juror use only, at a time when others are not using the elevator. When appropriate, jurors should be encouraged by judges and court personnel to eat lunch privately in order to prevent accidental or purposeful contact with witnesses or parties in the court cafeteria or nearby restaurants.

While such measures would require the court to make logistical accommodations, the D.C. Jury Project feels that ensuring juror privacy — to protect both the integrity of the trial and the personal security of the jurors — should be a priority.

## RECOMMENDATION 15

Gratitude

### THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES AND JURY OFFICERS IMPLEMENT METHODS OF PROVIDING MEANINGFUL EXPRESSIONS OF GRATITUDE TO ALL CITIZENS WHO APPEAR FOR JURY DUTY.

In recognition of the importance of citizen involvement in the judicial process, it is both appropriate and important to express appreciation to those citizens who appear when summoned for jury duty. This practice serves the important function of letting jurors know that their time is valued; further, treating jurors with respect in this way significantly increases overall juror satisfaction. Positive public relations initiatives such as communicating appreciation to jurors — both those who serve on a trial and those not selected — could increase broad based citizen support for the judicial system, thereby increasing juror turnout in the future.

Jurors must feel valued or appreciated:

- Certificates of appreciation
- Letters of thanks to employers
- Words from the bench
- Court personnel training

In light of the important function jurors serve, and in light of the continuing need to improve the image of the jury experience, the D.C. Jury Project recommends that the U.S. District Court for D.C. and the D.C. Superior Court implement specific methods of showing jurors appreciation. For example, the courts may send a certificate of appreciation to all who appear for jury duty whether or not they are selected for a trial. Annually, letters may be sent to employers who cooperate by continuing to pay their employees who serve on a jury. Judges could appear frequently to personally thank citizens responding to the jury summons. At the close of a trial, judges could personally thank jurors in the jury room or in chambers. Also, the courts could initiate training programs for court personnel whose duties put them in contact with jurors to ensure appropriate juror treatment. Trial judges should be encouraged and expected to express the judge's and the court's appreciation to those jurors whose services were not needed and to explain to them why their presence was important, despite the fact that they were not chosen for a jury.

## RECOMMENDATION 16

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS CONTINUE TO REGULARLY SEEK THE FEEDBACK OF JURORS AND THAT THE RESULTS OF ANY SURVEYS/QUESTIONNAIRES UTILIZED BE TALLIED AND REVIEWED BY JUDGES, JURY ADMINISTRATORS, AND COURT POLICY MAKERS.**

Post-service feedback:

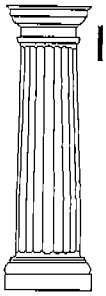
- Exit survey
- Suggestion/comment box
- Telephone line for complaints/compliments
- Tabulations, reports, appropriate follow-up

Jurors constitute a rich source of opinions and other information about the conduct of jury trials and the administration of the jury system. It is important that jurors are given a meaningful voice in which to express these views. Providing an opportunity for jurors to share their reactions to their courthouse experience could serve to increase juror morale by making them more active participants and utilization of their ideas and comments may assist in improving the jury system.

The D.C. Jury Project, therefore, recommends that the D.C. Superior Court and the U.S. District Court for D.C. continue to seek input from jurors regarding possible improvements. For example, jury officers should administer exit questionnaires or solicit input into a suggestion/comment box from all jurors called for duty, whether or not they are chosen for a trial. Additional information concerning juror reactions to the courtroom experience could also be elicited from trial jurors through the use of questionnaires administered by the judge or judge's staff. Another example, used in the State Supreme Court in New York, is to install an OmbudService table outside the main juror assembly area. The table could be staffed by volunteers, interns or court employees who would provide information and respond to juror complaints. The collaborative effort in New York also provides a 24 hour telephone line where jurors and citizens can call to lodge complaints or positive responses to the system and get information about jury service.

Juror responses should be periodically collected and tabulated. Reports of such results should be provided to judges, jury commissioners and clerks, so that appropriate follow-up action can be taken.

## Reader's notes



# Improve Juror Selection Procedures

## RECOMMENDATION 17

**THE D.C. JURY PROJECT RECOMMENDS THAT INDIVIDUAL JUDGES BE AUTHORIZED TO EXCUSE A JUROR FROM FURTHER JURY SERVICE ON THE DATE THE JUROR IS SUMMONED WHERE VOIR DIRE OF THE JUROR CLEARLY SHOWS THAT THE JUROR WOULD BE UNABLE TO SERVE ON ANY CASE.**

Procedures needed to excuse jurors from further service

Presently, a trial judge may excuse a juror for cause in the case in which the judge is selecting a jury, but must order the juror to return to the jury lounge to be available for selection to another jury panel in another case. While this procedure is sensible in an instance where the reason for excusing a juror relates to the juror's inability to serve in a particular case, it does not make sense in an instance where a juror's response during voir dire reflects that the juror would not be able to serve in any case. (e.g., the juror is ill, under the influence of medication, or has deeply held religious or moral beliefs that would preclude passing judgment on another). Routinely requiring jurors who are unable to serve on any case to return to the jury lounge for further service unnecessarily inconveniences such jurors, and unnecessarily delays and extends the voir dire process in other courtrooms to which such jurors might be sent. Consequently, the D.C. Jury Project recommends that individual judges in the D.C. Superior Court and the U.S. District Court for D.C. be authorized to excuse a juror from further jury service for the date the juror is summoned when voir dire of the juror clearly shows that the juror is unable to serve on any case that day. A standard procedure should be developed by the jury office, whereby judges will be able to notify the juror and the jury office of such a decision.

## RECOMMENDATION 18

### THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES AND OTHER COURT PERSONNEL PROTECT THE PRIVACY OF JURORS DURING THE VOIR DIRE PROCESS CONSISTENT WITH THE CONSTITUTIONAL RIGHTS OF THE PARTIES AND THE PUBLIC.

Privacy Concerns

During the voir dire process, judges, and other court personnel in the D.C. Superior Court and the U.S. District Court for D.C. to the extent applicable, should be sensitive to jurors' privacy concerns. Based on conversations with jurors, it appears that many jurors are intimidated by the voir dire process. To allay their concerns, judges may wish to provide the jurors with additional information about the jury selection process. For example, judges may wish to explain that the parties and their counsel receive a juror list which must be returned immediately after the jury is selected, and that the parties are prohibited from copying information from the list. Additionally, judges may wish to explain what information is on the list (the juror's name, the street on which the juror lives without the exact address, the juror's age, and the juror's type and place of employment). Although some members of the D.C. Jury Project were concerned that informing jurors that the list does not contain their exact street addresses might heighten security concerns, others believed that jurors might feel more comfortable knowing precisely what information was on the list. Additionally, the judge could explain in a matter-of-fact manner that because the juror list provides only basic information, the voir dire process is designed to enable the parties to learn more about the jurors. In the rare instance when there are serious security concerns and the court has determined that the jury will be "anonymous," the jurors should be so informed.

- Allay concerns with full explanation of voir dire process and purpose

Additionally, jurors may be more at ease if they are informed that the judges are sensitive to their privacy concerns. Thus, judges should assure the venire panel that the voir dire questions are designed to assure that jurors can be fair, not to invade anyone's privacy, and that jurors may respond to questions at the bench rather than in open court. Additionally, the judges should strive to make certain the voir dire questions asked by the court and/or parties are framed with due regard for jurors' privacy.

- Bench, juror room, and other alternatives to open court jury selection

Judges should consider the manner in which the voir dire is conducted to ease jurors' privacy concerns. For example, in highly sensitive cases or in cases where a defendant chooses to be present for the voir dire bench conferences, the judge should give consideration to whether jurors might feel more comfortable responding to voir dire questions in the jury room or another room besides the courtroom.

Additionally, where the technology and financial resources are available, judges should consider allowing the parties to participate in the voir dire bench conference via headphones.

Of course, judges should be careful not to assure jurors of complete privacy during the voir dire process. In high profile cases, members of the media or public may seek to obtain access to the jurors' responses to voir dire questions, and only in very limited circumstances may the jurors' answers be shielded from public view.[11]

[11]*See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); and *Cable News Network, Inc. v. United States*, 263 U.S. App. D.C. 66, 824 F.2d 1046 (1987).

## RECOMMENDATION 19

**THE D.C. JURY PROJECT RECOMMENDS THAT THE FAIRNESS, EFFICIENCY AND UTILITY OF THE VOIR DIRE PROCESS IN THE TRIAL COURTS OF THE DISTRICT OF COLUMBIA BE ENHANCED BY:**

**a. Increasing relevant information about jurors available to the Court and parties by use of a written jury questionnaire completed by all jurors and given to the Court and parties upon the jury panel's arrival in the courtroom;**

Eliminate *or* drastically reduce number of peremptory challenges

**b. Improving the ability of parties to ascertain grounds for strikes of jurors for cause by requiring that each juror be examined during the voir dire process and by giving attorneys a meaningful opportunity to ask follow-up questions of each juror;**

**c. Assuring to the extent possible that prospective jurors who may be biased or partial are stricken for cause by establishing an expanded legal standard for cause strikes which mandates that when a prospective juror's demeanor or substantive response to a question during voir dire presents any reasonable doubt as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court's own motion; and by**

**d. Reducing improper discrimination against jurors, unnecessary inconvenience to them, needless delays in trials, and excessive costs by eliminating, or drastically reducing the number of, peremptory strikes.**

Improving the fairness and efficiency of jury selection procedures in the District of Columbia was among the fundamental concerns which generated the initiation of the D.C. Jury Project. Members of the Jury Project, be they jurors, court administrators, lawyers or judges, are keenly aware of the need for our courts and our community to take effective steps to avoid summoning many more jurors than necessary. At the same time we are cognizant that it is vital to reduce perceptions — and too frequently, realities — that litigants are unable to obtain adequate information about prospective jurors who, in turn, are peremptorily stricken from juries for improper reasons based on bias and discrimination. The four parts of this recommendation are intended together to address these concerns.

Enhance:

- Fairness
- Efficiency
- Utility

of voir dire process

## A. Abolition or Substantial Reduction of Peremptory Strikes

While many members of the D.C. Jury Project believe that peremptory challenges should be abolished entirely,[12] an overwhelming majority believe that if not eliminated, they should be drastically reduced.[13]

### 1. Abolition of Peremptory Strikes

Case for Elimination:

- Inconsistent with fundamental precepts
- No constitutional entitlement

Those members of the D.C. Jury Project supporting the elimination of peremptory strikes believe that the peremptory challenge is inconsistent with the fundamental precepts of an impartial jury.

In *Batson v. Kentucky*[14] and subsequent decisions over the past decade, the Supreme Court has affirmed the constitutional principle that peremptory strikes of jurors may not be exercised in our nation's trial courts to discriminate against jurors based on their race or gender, and that parties are not constitutionally entitled to peremptory strikes. Justice Thurgood Marshall, concurring in the *Batson* decision, forcefully advocated ridding trials of peremptory strikes entirely:

> . . . The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely. . . .

[12]At the first reading of a recommendation for abolition of peremptory challenges, 13 members of the Project voted in favor and 10 voted in opposition. At the second reading of the same recommendation, 10 voted in favor and 13 voted in opposition.

[13]The vote regarding the Jury Project's final recommendation to eliminate *or* drastically reduce peremptory challenges was 14 in favor and 5 opposed. In addition to those present and voting in favor, 3 members of the Jury Project had previously cast proxy votes favoring the elimination of peremptory strikes.

[14]476 U.S. 79 (1986). See also *Powers v. Ohio*, 499 U.S. 400 (1991) (criminal defendant may challenge prosecutor's race-based peremptory challenge regardless of whether defendant and juror are of the same race); *Georgia v. McCollum*, 505 U.S. 42 (1992) (criminal defendant's discriminatory exercise of peremptory challenges violates Equal Protection Clause); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Equal Protection Clause prohibits discrimination in jury selection process based on gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1994) (private civil litigant has standing to raise Equal Protection claim of venireperson who has been excluded from jury service on account of race).

> Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. [Citing numerous examples] . . . .
>
> I wholly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. . . . [However, m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge. . . .
>
> The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. . . . Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," . . . and "one of the most important of the rights secured to the accused" . . . I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against the prosecution. Between him and the state the scales are to be evenly held." . . . We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing States to eliminate the defendant's peremptory as well. *Batson v. Kentucky*, *supra*, 476 U.S. at 103-08.

Justice Marshall foretold the future as accurately as he assessed the present; discrimination in the exercise of peremptory jury strikes was a routine occurrence at the time *Batson* was decided, and neither *Batson* nor its progeny have ended such discrimination. It is the experience of most trial judges on the Jury Project that counsel in both civil and criminal cases continue to exercise peremptory strikes in a manner that, at a minimum, gives the appearance that prospective jurors are being peremptorily stricken on the grounds of race, gender or both. The District of Columbia Court of Appeals, as well as numerous state and federal appellate courts throughout the nation, repeatedly have found that such discrimination routinely occurs.[15]

- At minimum, gives appearance of strike on racial, gender grounds

[15]See, e.g., *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993); *Epps v. United States*, 691 A.2d 126 (D.C. 1996); *Capitol Hill Hospital v. Baucom*, 697 A.2d 760 (D.C. 1997). See also, e.g., *Congdon v. State*, 427 S.E.2d 758 (Ga. 1993); *United States v. Greene*, 36 M.J. 274 (Ct. Mil. App. 1993); *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992); *State v. Levinson*, 795 P.2d 845 (Haw. 1990); *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989) (en banc); *Jackson v.*

Beyond their misuse in violation of the constitutional rights of both litigants and jurors, peremptory challenges also unnecessarily tax the administration of justice with costs and delays that could be significantly reduced if such strikes were eliminated. Former Chief Judge H. Carl Moultrie expressed these concerns in 1983 in a letter to the Council of the District of Columbia, proposing on behalf of the Board of Judges of Superior Court, that the number of peremptory challenges in felony cases be reduced:

> In our view, the reduction of peremptory challenges in felony cases in Superior Court would have the salutary effects of (1) reducing the number of jurors to be called each month, (2) reducing the number of jurors to be called in individual felony cases, and (3) reducing the time consumed by *voir dire*, not only because fewer strikes would be exercised, but because with fewer jurors present on the panel, the overall response time for answers to all *voir dire* questions would be reduced. Of course, there also would be a financial saving to the Court as a consequence of having to compensate fewer jurors.

- Delays process

- Increases jury pool requirements

Chief Judge Moultrie further observed in his letter that notwithstanding the historical credentials of peremptory challenges in the common law, they have been the subject of considerable criticism on the grounds that they require summoning of an excessive number of persons for jury service, that they frequently are used only to eliminate intelligent or otherwise highly qualified jurors, and that they protract both the *voir dire* examination and the selection process.

"The experience of the judges in Superior Court," Chief Judge Moultrie added, "persuades us that these criticisms carry considerable weight. . . ."

- Perception problems

The use and abuse of peremptory challenges leaves in the minds of the public in general, and of prospective jurors in particular, a perception that persons are being arbitrarily and discriminatorily denied the opportunity for jury service. Such a perception inevitably undermines confidence in our courts and in the administration of justice. As G. Thomas Munsterman, Director of the Center for Jury Studies of the National Center for State Courts,[16] has written:

---

*Commonwealth*, 380 S.E.2d 1 (Va. 1989); *Reed v. State*, 544 So.2d 1077 (Fla. 1989); *Gamble v. State*, 357 S.E.2d 792 (Ga. 1987); *Slappy v. State*, 503 So.2d 350 (Fla. Ct. App. 1987); *State v. Butler*, 731 S.W.2d 265 (Mo. Ct. App. 1987); *People v. Turner*, 726 P.2d 102 (Cal. 1986).

[16]The Jury Project has been very fortunate to have the insights and services of Mr. Munsterman as a consultant to the Project.

> The peremptory challenge is a curious feature of our jury system. Starting with randomly selected names from broad-based lists, we work hard to assemble a demographically representative panel from which to select a jury. We defend every step of the process used to arrive at that point. Then comes the swift sword of the peremptory challenge, cutting jurors from the panel with nary an explanation.
>
> Each participant in the trial process views the peremptory challenge differently. To the would-be juror it is a sign of rejection. We tell jurors not to take it personally if they are peremptorily challenged, yet how else can such an event be taken? If it isn't personal, then it must be random, for personal information is the only information available on which to base a peremptory. The jurors, quite naturally, resent the implication that they cannot be fair and impartial.[17]

No one has recently written more thoroughly or compellingly of the need to eliminate peremptory challenges than Judge Morris Hoffman, a state trial judge in Denver, Colorado.[18] Judge Hoffman carefully traces the history of the peremptory challenge and demonstrates that it is rooted not in principles of fairness, impartiality or protection of the rights of the accused, but rather in "the now meaningless and quite undemocratic concept of royal infallibility, having been "invented two hundred years before the notion of jury impartiality" was conceived.[19] Moreover, he observes, "the Supreme Court has consistently and unflinchingly held that the peremptory challenge is neither a constitutionally necessary component of a defendant's right to an impartial jury, nor even so fundamental as to be part of federal common law."[20] Indeed, there was no known discussion of peremptory challenges whatever by the framers in either the *Federalist* papers or during the Constitutional Convention, and the Constitution is "utterly silent" on the matter.[21] It has been efforts to subvert constitutional rights, not to defend them, Judge Hoffman forcefully demonstrates, that has invigorated and sustained the practice of

- Historical perspective

[17]See Munsterman, *The Future of Peremptory Challenges*, The Court Manager 16 (Summer, 1997).

[18]See Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809 (1997) (hereinafter, "Hoffman"). The members of the Jury Project favoring the elimination of peremptory challenges adopt and incorporate by reference Judge Hoffman's scholarly article in its entirety in support of abolishing peremptory challenges.

[19]Hoffman, supra at 812, 815-822, 846-47.

[20]Id. at 813, 823.

[21]Id. at 823-25

peremptory challenges as the "last best tool of Jim Crow" in American trials by providing "an incredibly efficient final racial filter" to keep blacks off juries not only in the south, but throughout the United States.[22] Against this background, Judge Hoffman shows that peremptory challenges never have had a legitimate purpose and have none today. Their genesis in England was to serve as a basis to excuse jurors for *cause*.[23] Peremptory challenges are "decidedly undemocratic," are "susceptible to significant abuse by authorities," and are "inherently irrational."[24] There is evidence that, notwithstanding the *Batson* decision and its progeny, they are used "in the same old way" they always have been used, "save for some nominal and meaningless extra hoops now required by *Batson*."[25]

Judge Hoffman concludes, as do many members of the D.C. Jury Project, that the peremptory challenge is inconsistent with fundamental precepts of an impartial jury because: (1) it reflects an inappropriate distrust of jurors, causing "perfectly acceptable, perfectly fair and perfectly impartial prospective jurors to be excluded in droves" and to become frustrated and cynical about the justice system;[26] (2) it improperly shifts the focus of jury

---

[22]Id. at 827, 829.

[23]Id. at 845.

[24]Id. at 847. Judge Hoffman finds curious the vigorous, but in his view irrational, defense of peremptory challenges by some criminal defense attorneys:

> Even if one clings, as do some public defenders with whom I have discussed this question, to the notion that American venires are rampant not only with seething anti-defendant bigotry but with the kind of seething anti-defendant bigotry that is smart enough to disguise itself from the glare of the challenge for cause. The practice of giving equal numbers of peremptory challenges to each side [as is the practice in the District of Columbia] actually increases, not decreases, the chances that these smart bigots will end up on the jury. This is so because any given peremptory challenge is more valuable to the prosecution in ferreting out those hypothetically few pro-defense jurors than it is to the defense, who will use up all its challenges and still tend to be left with some of those hypothetically rampant pro-prosecution jurors. Perhaps this is why, in an informal survey of the lawyers who practice in my courtroom, the prosecutors seemed substantially more vigorous in their defense of the peremptory challenge than the defense lawyers.
> Hoffman, supra at 851-52.

[25]Id. at 849.

[26]Id. at 854-59. "Every time a prospective juror is peremptorily challenged," Judge Hoffman writes, "we are telling that prospective juror that the foundation of this system is not evidence, but rather rumor, innuendo, and prejudice. I cannot count the number of times I have seen prospective jurors flash me a look of betrayal when, after they have passed through the gantlet [sic] of challenges for cause, they have been excused peremptorily because of their educational level or their

selection from the individual to the group;[27] and (3) it injects an inappropriate level of adversariness into the jury selection process, tending to result not in the selection of impartial jurors, but jurors who are biased for one side or the other.[28] As another thoughtful judge has written, the peremptory challenge is fundamentally at odds with the rationality that is supposed to characterize — and consequently, legitimize — the administration of justice in our courts:

> The peremptory [challenge] is a renegade in this nation's trial procedures. . . . [P]eople will accept the decrees of courts only so long as the institution is perceived to be both unbiased and governed by the "quiet rationality" that is its distinction. It uses reason to confront disputes that are some of the most intractable, frightening, and emotion-laden that society has to offer. In the courtroom, the dispassion of the rule of law ideally answers hysteria and rumor. Every accusation or idea is tested by discourse and evidence. The logic of the court's decision-making is laid bare to the litigants, other judges, scholars, the media, and the community. The trial itself must unfold in public view.
>
> In contrast stands the peremptory challenge. It functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients. With the few exceptions now interposed by courts, the peremptory is exercised secretly, for any or no reason at all, unchecked by inquiry or debate. Raymond Broderick, "Why the Peremptory Challenge Should Be Abolished", 65 *Temple L. Rev.* 369, 417-18 (1992).

## 2. Substantial Reduction of Peremptory Strikes

Members of the D.C. Jury Project supporting the drastic reduction — but not the elimination — of peremptory strikes agree that excessive peremptory challenges impose unnecessary costs upon the courts, demean potential jurors, and permit unconstitutional discrimination without a sufficiently corresponding benefit. However, they also believe

---

occupation or the kind of car they drive. Is it any wonder that these people leave our courtrooms thinking that the whole trial process is just as trivial and flawed as jury selection?" Hoffman, supra at 861-62.

Every trial judge on the Jury Project has witnessed the looks of betrayal that so discomforted Judge Hoffman. "By firing their simple peremptory challenge guns at the biased among us," Judge Hoffman observes, "lawyers are shooting us all, and the injuries are taking their toll on the public's confidence in the jury system." Id. at 859.

[27]Id. at 860-65.

[28]Id. at 865-870.

a limited number of peremptory challenges should remain in order to protect legitimate concerns of litigants.

The genesis of the peremptory challenge has been explained in detail elsewhere and derives from a concern that the individual be able to protect himself or herself against state power in the guise of the court and prosecutor.[29] There also is a popular belief, whether or not true, that peremptory challenges help ensure a fair and impartial jury.[30] Peremptory challenges are so ingrained in the legal jurisprudence that total elimination could lead to a public perception that the state is depriving defendants of a fair trial.

The U.S. Supreme Court in *Swain v. Alabama*,[31] articulated five reasons for the peremptory challenge. First, it is important that the parties before the court, especially the defendant, perceive that the jury will be fair and impartial through some unfettered control over the selection process. Second, it reduces the danger that an impartial juror will not be detected in *voir dire*, or has erroneously not been eliminated by a challenge for cause. Third, it is important that the parties believe that the jury will be free from bias. Fourth, it creates the appearance of justice. Fifth, jurors who seem offended or prejudiced by questioning during *voir dire* can be struck. Accurate or not, the peremptory challenge has been described as "one of the most important of the rights secured by the accused."[32] The entire thrust of *Batson v. Kentucky*[33] was a recognition of the perceived importance of that right and the need to exercise that right within constitutional limits.

Attorneys who defend criminal defendants believe that peremptory challenges are essential in protecting the rights of their clients.[34] Part of

---

[29]*See e.g., Swain v. State of Alabama*, 380 U.S. 202, 212-224 (1965). *See generally* Charles J. Ogletree "Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges", 31 Am. Cr. L. Rev. 1099 (1994) (hereinafter "*Ogletree*").

[30]Note, "*Batson v. Kentucky*: The New and Improved Peremptory Challenge", 38 Hastings L.J. 1195 (1987). However, the U.S. Supreme Court has stated quite clearly that the right to peremptory challenges is not based upon any constitutional principles.

[31]380 U.S. 202, 218 (1965).

[32]*Pointer v. United States*, 151 U.S. 396, 408 (1894).

[33]476 U.S. 79 (1986).

[34]*See* Raymond Brown, "Peremptory Challenges As A Shield for the Pariah", 31 Am. Cr. L. Rev. 1203 (1994).

**Case for limited number, rather than elimination**

this is undoubtedly based on years of experience and intuition.[35] The problem that many commentators have expressed is that the elimination of peremptory challenges transfers an enormous amount of power and discretion from the defense attorney to the trial judge. The defense attorney, they believe, is deprived of the opportunity to correct an error made by the trial judge or even the exercise of conscious or unconscious racism. Given that the standard of appellate review on a challenge for cause, in most courts, is an abuse of discretion standard, it may be exceedingly difficult to have the trial judge's decision overturned.[36] There is also a concern that with judges conducting the *voir dire*, lawyers will have virtually no exposure to the juror and it will be difficult for counsel to identify biased jurors and develop grounds to challenge "for cause." Some believe that, given the difficulty of enforcing the *Batson* mandate, unfettered peremptory challenges are still necessary to protect a defendant's rights against racially biased jurors.[37]

Many members of the D.C. Jury Project do not believe that the present number of peremptory challenges[38] in the District of Columbia are needed to address legitimate concerns about judicial error in ruling on "for cause" challenges, or to reinforce the perception that the process is fair. Legislatures have continuously reduced the number of peremptory challenges. The common law originally allowed the

---

[35]There is some empirical data which suggests that peremptory challenges can benefit the defense, but this research is concededly imprecise. The only explanation given in the article was that some defense lawyers performed better than the prosecution in eliminating jurors who ultimately favored the prosecution in the cases examined, and the defendant had more challenges than did the state. Hanz Zeigel & Shari Seidman Diamond, "The Effect of Peremptory Challenge on Jury and Verdict: An Experiment in a Federal District Court", 30 Stan. L. Rev. 491 (1978).

[36]*E.g., George v. Commonwealth*, 411 S.E.2d 12, 19 (VA 1991). *But see Tursio v. U.S.*, 634 A.2d1205 (D.C. App. 1993).

[37]*Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J. concurring).

[38]In felony cases, the federal courts permit 10 peremptory challenges for the defense and 6 for the prosecution. The states differ widely in the number of peremptory challenges allowed. See Appendix D. For example, New Hampshire allows 3 peremptories for both the government and the defense, while California allows 10 for the defense and 10 for the government. The District of Columbia currently allows 10 for the defense and 10 for the state. A substantial majority of the Jury Project believes that this number is excessive.

Specific numbers suggested:
- 3 in felony cases
- One in civil and misdemeanors

defendant 35 such challenges.[39] As the number of constitutionally permissible types of peremptory strikes has diminished under *Batson* so should the absolute number of peremptory strikes be reduced. Put another way, "the longer the list of prohibited categories, the less room there is for lawful challenge other than challenge for cause."[40] Those members of the D.C. Jury Project who believe that peremptory challenges should be reduced, recommend that they be reduced to three per side in felony cases and one per side in civil and misdemeanor cases while permitting trial judges in multiple party cases to increase the number of peremptory strikes as they deem appropriate.

## B. Steps to Improve Knowledge of Grounds for Strikes for Cause and to Allow Their Use Whenever Any Reasonable Doubt Exists as to a Juror's Impartiality

Improve ability to strike for cause by increasing knowledge of juror background

The foregoing considerations have persuaded a substantial majority of the D.C. Jury Project that peremptory strikes should be eliminated or drastically reduced in the trial courts of the District of Columbia. However, the Jury Project is also persuaded that in the event peremptory strikes are eliminated, it is vital to improve the ability of parties to ascertain grounds for strikes of jurors for cause by increasing the relevant information about jurors available to the parties through (1) the use of a written jury questionnaire completed by all jurors and given to the Court and parties upon the jury panel's arrival in the courtroom, and (2) requiring that each juror be examined at least once during the voir dire process and attorneys be given a meaningful opportunity to ask follow-up questions of all jurors. The process should be conducted so that no jurors will be called to the bench more than once. Moreover, to assure to the extent possible that prospective jurors who may be biased or partial are in fact stricken for cause, an expanded legal standard for cause strikes should be established and should mandate that when a prospective juror's demeanor or substantive response to a question during voir dire presents *any* reasonable doubt as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court's own motion.

[39]*Swain* at 212.

[40]Barbara D. Underwood, "Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?" 92 Col. L. Rev. 725 (1992).

## 1. Juror Questionnaires

Although juror questionnaires are widely used across the nation in complex or sensitive cases, they are rarely used in routine cases in most jurisdictions. An exception to the rule is the city courts of Philadelphia, which now use a standard, written juror questionnaire in *all* criminal and civil cases. The D.C. Jury Project has reviewed both the Philadelphia questionnaire and the video tape displayed to Philadelphia jurors to assist them in responding to it. The questionnaire contains most of the questions customarily asked in every courtroom, with some questions being pertinent only to civil or only to criminal cases. The videotape includes a welcome to jurors, an introduction to the role of the juror, and an explanation of the questionnaire, leading jurors through each question and giving them time to digest the questions and record their answers. Judges and court personnel in Philadelphia report that the questionnaires are very helpful in obtaining relevant information about jurors, providing jurors more time to reflect before answering questions, and saving significant amounts of time in voir dire.

Standard, written juror questionnaire
- Video instruction

The D.C. Jury Project recommends that if peremptory strikes are eliminated or drastically reduced, the courts should institute a juror questionnaire procedure similar to that in Philadelphia. Shortly after arrival at the jury lounge, jurors would receive questionnaires and complete them with the help of a video tape. Once seated in the courtroom, jurors would be asked a few additional questions pertinent to the case on trial. Each juror then would be called to the bench individually (or to the jury room if individual questioning is conducted there) for the court and counsel to review information provided on the questionnaire, thereby eliminating the possible embarrassment of jurors acknowledging affirmative answers to sensitive questions in open court.

Use of a jury questionnaire would help to ensure a more informed selection process by eliminating the inability of the court and counsel to personally address jurors who have not answered any voir dire question (and who therefore have left counsel uncertain as to whether any grounds might exist to doubt such jurors' ability to be fair and impartial).

## 2. Individual Voir Dire of Jurors

For similar reasons, the D.C. Jury Project is persuaded that in the event peremptory challenges are eliminated or drastically reduced, the ability of parties to ascertain grounds for strikes of jurors for cause should be further enhanced by requiring that each juror be examined at least once during the voir dire process and attorneys either be given the

• At least one oral examination of each juror

• With opportunity for counsel follow-up

right to conduct the voir dire, or given a meaningful opportunity to ask follow-up questions of each juror individually if the court conducts it.[41]

### 3. Expansion of the Standard for Challenges for Cause

In the event peremptory challenges are abolished or drastically reduced, the D.C. Jury Project believes that the standard for striking jurors for cause should be expanded to mandate the exclusion of any juror as to whom any reasonable doubt exists about the juror's impartiality, based on either the juror's demeanor or substantive answers to questions during voir dire; and where a trial judge is uncertain regarding the existence of such a reasonable doubt, the judge's uncertainty should be resolved in favor of striking the challenged juror. While it is vital to the administration of justice and to protection of the constitutional rights of jurors and litigants to prevent unreasoned and unconstitutional treatment of prospective jurors by discriminatory peremptory strikes, it also is fundamentally important to ensure that prospective jurors who may not be able to be fair or impartial in a particular case are excused for cause. By requiring application of the strictest burden of proof to retain a juror as to whom any question has been raised during voir dire regarding the juror's fairness and impartiality, the D.C. Jury Project believes that parties and lawyers can be reasonably assured that the elimination of peremptory challenges will not lead to the impaneling of jurors impaired by bias or partiality.

Broader standard for challenge
• reasonable doubt as to impartiality
• Presumption in favor of allowing strike

[41]While the District of Columbia Court of Appeals has not generally mandated individual voir dire of jurors, the Court has criticized trial judges who have limited questioning on issues critical to potential bias to perfunctory polling of the jury, *Artisst v. United States*, 554 A.2d 327 (D.C. 1989), and has reversed a conviction where a trial judge refused to permit adequate follow-up questioning of a juror regarding her law enforcement connections. *Gibson v. United States*, 649 A.2d 593 (D.C. 1994).

## Minority View - Recommendation 19

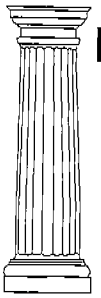
Long considered one of the most important rights afforded a criminal defendant, the peremptory challenge plays a crucial role in assuring a fair trial and an impartial jury. Although its use has become controversial in recent years as litigators in some jurisdictions have improperly abused the challenge in racially discriminatory ways, the right to peremptory challenge remains as crucial an ingredient to a fair trial as it was at the time of its inception more than 600 years ago. Instances of discriminatory use of the challenge have been addressed by our courts, and a framework has been implemented to eliminate such abuse. The reluctance of trial judges to conduct the required inquiries and make the difficult rulings, when necessary, is not an acceptable justification for the abolishment of such a fundamental right.

The importance of the peremptory challenge is perhaps more subtle than that of other fair trial protections, but only because its exercise is subtle as well. In a system predicated upon the notions of justice and the *appearance* of justice, citizens accused of crimes (and, arguably, the government as well) must be permitted to strike those potential jurors who appear to have bias against them. The abolition or reduction of peremptory challenges, as proposed by the D.C. Jury Project in Recommendation 19, would place the power to select juries entirely in the hands of trial judges, leaving litigants — and especially criminal defendants — to hope that the trial judge is as meticulous and skeptical as they would be in selecting those citizens that would decide their own fate. Experience has shown that such is not always the case. When the trial judge has the sole discretion to decide the composition of the jury, and when that judge's decisions are reviewed with extreme deference, the very real danger arises that defendants may be tried by jury members that either harbor, or appear to harbor, subtle biases against them. These types of subtle biases may not be focused upon by trial judges, and often may be overlooked because the trial judge is not as knowledgeable about the circumstances or intricacies of a given case as are the litigants. Moreover, even with the D.C. Jury Project's notion of an expanded for cause strike, the danger that a trial judge will not pick up on the subtle bias against a litigant by a potential juror remains great. The standard by which the Jury Project envisions that the trial judge will grant strikes for cause leaves the decision open to the discretion of the trial judge, in effect granting the trial judge with the sole power to determine who can sit on a jury. Quite curiously, the D.C. Jury Project overlooks one the basic guiding principles upon which our legal system is built — that some decisions should not be made by judges.

The D.C. Jury Project's recommendation is also troubling because of the manner in which it was adopted. After the initial recommendation of the Trial Structure Working Committee to eliminate peremptory challenges was approved by the D.C. Jury Project Committee, standard procedure required a second reading vote one month later. At this second reading, the proposed recommendation was defeated. Over our objection, a motion to reconsider was offered with an amendment calling for *either* the elimination *or* the drastic reduction of peremptory challenges. The motion to reconsider as well as the amended recommendation passed. [Note] This amendment had not been formally considered at the first reading level by the D.C. Jury Project. As a result, the meaning of the phrase "drastic reduction" was not adequately considered, nor were the principles or criteria upon which it should be based. Given this issue's importance to the Constitutional and fundamental rights of litigants, we believe the matter should have been referred back to the Trial Structure Working Committee for further deliberations.

Editorial Note: The motion to reconsider was approved by an 18-2 vote. The amended recommendation was approved by a 14-5 vote.

## Reader's Notes



# Provide Jurors with Tools to Make Better Decisions

## RECOMMENDATION 20

**THE D.C. JURY PROJECT RECOMMENDS THAT JURORS BE PERMITTED TO TAKE NOTES DURING TRIALS AND THAT THEY BE ADVISED THAT THEY MAY DO SO.**

### Permit Note Taking

- Standard practice already
- Acknowledged benefits
- Perceived dangers largely unfounded

Allowing jurors in civil and criminal trials to take notes is already standard practice in many courtrooms in the D.C. Superior Court and the U.S. District Court for D.C. In fact it is widely considered one of the most effective ways to better equip jurors to understand and remember the information they are asked to absorb during a trial. Concerns raised regarding the potential dangers of juror note taking have proven to be largely unfounded. Further, the trial court in the District of Columbia clearly has discretion regarding whether to permit juror note taking.[42]

Among the reasons that juror note taking has become widely accepted[43] are:

the procedure serves as a memory aid;

notes make it easier to follow and understand complex legal issues and arguments;

writing helps keep some jurors alert and interested in the proceedings; and

jurors who feel more involved are more satisfied with the judicial process as a whole.[44]

---

[42]*Yeager v. Greene*, 502 A.2d 980 (D.C. 1985). This opinion was recently upheld by the D.C. Court of Appeals in *Murphy v. United States*, 670 A. 2d 1361 (D.C. 1996).

[43]Federal Judicial Center, *Manual for Complex Litigation 3d*, Sec. 22.42 (1995).

[44]*JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, 83-84 (1993); *Yeager v. Greene* 502 A.2d 980, 989-90 (D.C. 1985).

Indeed, educational research has shown that note taking aids memory for both factual and conceptual items.[45] As U.S. Supreme Court Justice Sandra Day O'Connor has observed, "Taking notes is a way for a person to make sense of the information being received; to write things down that seem important, so that memory of them will not fade; and perhaps most importantly for the juror, to take an active, rather than a passive, part in what is going on."[46]

Research has largely dispelled notions about the possible disadvantages of juror note taking. For example, jurors who are taking notes during trial do not become distracted because they are doodling or devoting too much attention to their notepads.[47] Further, these jurors do not distract others, nor do they gain undue advantage over jurors who did not take notes during deliberations.[48] Juror notes were found to be an accurate record of the trial, and their presence did not lengthen deliberation time.[49] Finding that concerns over juror note taking are minimized by the fact that many jurors choose not to take notes, the Federal Judicial Center asserts that "denying [jurors] permission to [take notes] is demeaning and inconsistent with the large measure of responsibility the system places on jurors, and it may hamper their performance."[50]

Most courts recognize that discretion lies with the trial judge to permit juror note taking.[51] The D.C. Jury Project recommends that jurors be provided with paper and pen and that the judge provide instructions that may include the following:

Suggested explanatory instructions from bench

jurors may, but are not required to, take notes;

---

[45]Carrier, C.A. (1983). *Notetaking Research: Implications for the Classroom*, Journal of Instructional Development, 6(3), 19-26.

[46]*Juries: They May Be Broke, But We Can Fix Them*, The Federal Lawyer, p. 24 (June 1997).

[47]Heuer and Penrod, *Increasing Juror Participation Through Note Taking and Question Asking*, 79 Judicature 256 (1996).

[48]*Id.*

[49]*Id.*

[50]Federal Judicial Center, *Manuel for Complex Litigation 3d* (1995).

[51]*Murphy v. United States*, 670 A.2d 1361 (D.C. App. 1996); *Esaw v. Friedman*, 586 A.2d 1164 (1991); *Sugar v. Bartlett*, 916 P.2d 1383, 1385-87 (Okla. 1996); *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511, 519-20 (1992).

note taking should not divert jurors from paying full attention to the evidence and to witnesses;

notes are memory aids, and not evidence;

jurors who do not take notes should not allow their memory of the evidence to be influenced solely by the fact that others have taken notes;

jurors may take their notes with them into the deliberation room for use during discussion; and

all juror notes will be collected and destroyed immediately after the trial.

The D.C. Jury Project, finding that the advantages of allowing jurors to become more actively involved in the trial process by taking notes far outweigh any possible disadvantages, recommends that all jurors in the District of Columbia be permitted to take notes and that they be advised that they may do so. A sample instruction is included as Appendix E.

## RECOMMENDATION 21

**THE D.C. JURY PROJECT RECOMMENDS THAT JURORS BE PERMITTED TO SUBMIT WRITTEN QUESTIONS TO BE ASKED OF WITNESSES BY THE TRIAL JUDGE.**

Permit juror questioning:

- Submitted in writing
- Asked from bench

District of Columbia jurors and judges, a growing number of published works (both in the popular media as well as in empirical studies), and local and national jurisprudence strongly support the practice of allowing jurors to submit written questions to be asked of witnesses by the trial judge.

### Jurors Favor the Practice

Since 1985, when the D.C. Court of Appeals ruled that it was fully within the discretion of a trial judge to permit written questioning by jurors to witnesses,[52] a number of judges in the D.C. Superior Court have used the procedure espoused in this recommendation. In 1987 and 1995, Judge Henry Greene of the D.C. Superior Court surveyed over 165 jurors who had served in felony cases in his courtroom concerning their views about a variety of practices used during trials, including permitting jurors to submit written questions to witnesses. The jurors overwhelmingly favored the judge-controlled questioning method — over 85% found it very helpful (64%) or somewhat helpful (23%), and jurors commented that it helped them pay better attention to the trial, resolve ambiguities in witnesses' answers to questions, address relevant issues that lawyers failed to address, and feel like a "real participant."

Trial judges in the D.C. Superior Court and the U.S. District Court for D.C. who have used the procedure report no difficulties with improper questions or other problems. Significantly, no cases in the District of Columbia have resulted in reversals or findings of error, harmless or otherwise, because of juror questions.

### Published Studies Commend the Practice

In *The Jury — Trial and Error in the American Courtroom*, which studies the workings of juries in recent high profile cases, Stephen J. Adler argues persuasively that to create a justice system that works more competently, we "urgently need to build a better jury." Specifically, Adler writes:

---

[52] *Yeager v. Greene*, 502 A.2d 980, 985 (D.C. 1985). The Court found the procedure "supported by precedent and sound reasoning," and well within a trial judge's discretion.

> We ... need to bridge the information gap between the courtroom professionals and the frequently befuddled amateurs we enlist as jurors. After all, people in powerful positions typically demand as much information and guidance as possible before they make decisions. Yet jurors, who briefly assume among the most powerful positions in America, have no way of insisting that their needs be met. . . . we need to grant jurors... easier access to information about the particulars of the cases before them.[53]

Moreover, psychologists Larry Heuer and Steven Penrod's empirical study investigating the consequences of allowing jurors to direct questions to witnesses in 160 state and federal trials in 33 states dispelled many assumptions about the supposed harmful effects of juror questioning and established that jurors' questions promote juror understanding and alleviate juror doubts about trial evidence.[54] Additionally, permitting jurors to submit written questions during trial may help keep them alert and involved in the trial proceedings and improve overall juror satisfaction.[55]

## Legal Authorities Support the Practice

Finally, the D.C. Jury Project recommends the practice of judicially controlled juror questioning because it is fully supported by a wide array of legal authorities. In 1985 the D.C. Court of Appeals held that a trial judge has authority to permit jurors in criminal trials to submit written questions to be propounded to witnesses so long as the procedure is circumscribed with safeguards designed to minimize the

[53]Stephen J. Adler, *The Jury — Trial and Error in the American Courtroom*, Times Books (1994).

[54]Heuer and Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256 (1996). *See also* Dann, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229, 1244-46, 1253-55, 1260 (1993).

[55]G. Thomas Munsterman, Paula L. Hannaford and G. Marc Whitehead, eds., *Jury Trial Innovations*, National Center for State Courts (1997).

risk of improper questions.[56] In *U.S. v. Callahan*,[57] Judge Charles Clark wrote for a unanimous panel of the Fifth Circuit:

> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

All federal and most state courts which have addressed the issue of whether jurors should be permitted to submit questions have held that, in the absence of a statute or rule of court,[58] the issue rests within the sound discretion of the trial judge. The rare cases resulting in reversals as a result of juror questioning nearly all have involved the posing of *oral* questions in open court, and, with the exception in the two states which prohibit the practice,[59] have been marked by highly improper juror or judicial conduct.[60] The clear lesson from these aberrational instances of error is not to bar the practice of juror questioning of witnesses all together, but rather to allow such questioning subject to

Careful judicial control

[56]*Yeager v. Greene*, 502 A.2d 980, 985 (D.C. 1985). The Court found the procedure "supported by precedent and sound reasoning."

[57]588 F.2d 1078, 1085 (5th Cir. 1979).

[58]See Appendix F, Part 1 for supporting research.

[59]In *Morrison v. State*, 845 S.W.2d 882, 887 (Tex.App. 1991), the Court of Criminal Appeals of Texas, sitting en banc, prohibited juror questioning of witnesses finding that it undermined the adversarial process by encouraging jurors to "depart from their role as passive listeners and assume an active adversarial or inquisitorial stance." The court stated that "[a]bsent a thorough legislative mandate in this area, courts should not experiment." The court emphasized that there is no existing authority in Texas that permits jury questioning. Nebraska, in *State v. Zima*, 468 N.W.2d 377 (Neb. 1991), also outlawed the practice of juror questioning of witnesses. In *Zima*, the court stated that a change in the adversarial system "whereby jurors become advocates and possible antagonists of the witnesses does not on its face suggest a fairer of more reliable truthseeking process." Id. at 380.

[60]See Appendix F, Part 2 for supporting research.

careful judicial control. As the court in *Callahan* observed, it "makes good common sense" to permit a juror to ask a question about a matter which, in the juror's mind, needs clarification.[61]

Moreover, counsel and the court both may be alerted to particular factual issues that need exploration or more extensive development. Questions by jurors also may bring to the court's and counsel's attention improper concerns which can be promptly addressed with cautionary instructions, admonishing the juror who asked the question that the matter is not relevant to the case and should not be brought to the attention of other jurors or play any part in the inquiring juror's consideration of the case.

One of the major concerns raised by those who oppose permitting jurors to submit questions to witnesses is that jurors will put questions which are legally improper. Even if the experience of judges using this procedure confirmed such concerns, and it does not, the incidence of legally improper questions would actually support the practice. Improper matters which concern jurors are more likely to taint jury deliberations if left unaddressed and unchecked than if discovered and confronted by a strong admonition from the trial judge.

The D.C. Jury Project is also mindful of the assertion raised by some members that juror questioning in criminal cases may sometimes provide an unacceptable advantage to prosecution who would otherwise fail to meet their burden of proof but for responses given to juror questions. However, such concerns improperly exalt the adversarial tradition over the trial's factfinding purpose.

As the *Callahan* court also noted, consistent with repeated appellate averments in the District of Columbia, "[t]rials exist to develop truth",[62] and it seems indisputable that the increased effectiveness of communication with jurors that will result if they are permitted to pose questions to witnesses will aid in finding the truth. As one of the most thorough commentaries on the questioning of witnesses by jurors has observed:[63]

---

[61]Id. *See also* Harms, *The Questioning of Witnesses by Jurors*, 27 Am. U.L. Rev. 127 (1977), Fortston, Sense and Non-Sense: Jury Trial Communication, 1975 BYLU L. Rev. 601, 628-29; *Louisville Bridge and Germinal Co. V. Brown*, 227 S.W. 320 (Ky. 1925); *Schaefer v. St. Louis and Suburban R. Co.*, 39 S.W. 331 (Mo. 1895).

[62]Harms, *The Questioning of Witnesses by Jurors*, 27 Am. U.L. Rev. 127 (1977). See also Appendix F, Part 3.

[63]See Appendix F, Part 4.

> Only when evidence and issues are communicated successfully to jurors can they begin to fulfill their duty to seek truth and deliver a just verdict. But, because the jury is relegated to a passive role, communication in a trial is basically a one-way system — a system notably lacking in ability to insure a reliable communication of evidence or issues to the jury.
> Allowing jurors to ask questions of witnesses would promote better and more reliable communication, because a two-way system provides for constant clarification of message being sent. Understanding testimony more clearly, jurors thus would be able to fulfill their basic function of finding the facts in dispute.[64]

Finally, there is reason to believe that permitting receivers of information, e.g., jurors, to ask questions enhances not only their ability to understand what is being communicated, but results in their putting forth more effort to listen and to understand because they *know* they may ask questions.[65] A concomitant benefit might well be a reduced likelihood that the court will be required to intervene to question witnesses or elucidate issues that are clarified by juror questions.

## Judicial Control is Essential

Notwithstanding the likelihood that permitting jurors to submit questions to witnesses will enhance both the search for truth in a trial and the knowledge, motivation and understanding with which jurors pursue that search, the questioning of witnesses by jurors also may present problems unless the trial judge exercises careful control over the process from the outset of trial.

Written, not oral

First, it is essential that jurors not be permitted to question witnesses orally. Oral questioning by jurors not only effectively eliminates the judge's ability to confine potentially prejudicial concerns of a single juror to that juror, but may also place counsel who wishes to object to a juror question in an embarrassing and difficult position.[66] Directing that jurors reduce to writing their questions effectively addresses these concerns.[67]

---

[64]Harms, at 160.

[65]See Appendix F, Part 5.

[66] See *Raynor v. State*, 447 S.W.2d at 393.

[67]See *State v. Barrett*, 297 S.E.2d at 795; *Cheeks v. State*, 361 N.E.2d at 910; *A Handbook for Petit Jurors* (hereafter, "Handbook"), p. 28 (Circuit Administrative

Second, questions submitted by jurors must be discussed with counsel out of the hearing of the jury, and counsel should be afforded an opportunity to interpose objections prior to the questions being posed to witnesses.[68] In this fashion, objections to questions "irrelevant or clearly improper and prejudicial to the rights of either party" may be sustained by the court without embarrassment to counsel.[69]

- Prior submission and opportunity to object
- Only at close of witness examination
- Follow-up question by counsel
- Anonymity
- Careful Instruction from bench

Third, jurors should be permitted to submit questions only at the close of the examination of a witness so as to avoid interrupting or distracting counsel or other jurors, and to maximize the possibility that issues of concern to jurors will be addressed by counsel's examination and therefore will not prompt unnecessary inquiries by jurors.[70]

Fourth, in the event the court decides to pose one or more questions submitted by jurors, counsel should be afforded an opportunity to ask additional questions in any areas that might be opened by the jurors' question(s) or the witness's answer(s) to the question(s).[71]

Fifth, it would seem wise to avoid, where possible, the disclosure to the jury [or the witness] of the juror who posed a particular question. This might alleviate embarrassment of a juror whose question was not asked.

Finally, it is of critical importance that the jury be instructed carefully both at the outset of trial regarding the proper procedure for submitting questions to witnesses, and during trial in the event the trial

---

Judges of Maryland, 1979, revised 1981). The Maryland *Handbook* instruction reads:

> Sometimes a juror may himself wish to ask a question of a witness after examination by counsel for both parties has been completed. Such questions are usually not necessary and are proper only for the purpose of getting information, and not for the purpose of discrediting or arguing with the witness. However, if a juror has a question which he feels should be asked, he should write his question and present it the judge upon the conclusion of the examination of the witness. The court will then ask the question if the information sought is material to the issue and admissible under the rules of evidence. *Handbook, supra*, at 28.

[68] See *State v. Barrett*, 297 S.E.2d at 795-96; *Cheeks v. State*, 361 N.E.2d at 910; *State v. LeMaster*, 669 P.2d at 597.

[69] *State v. LeMaster*, supra, note 17.

[70] See *Barrett*, 297 S.E.2d at 795, *Devitt and Blackmar*, Federal Jury Practice and Instructions, vol. 1, p. 267 (3rd ed. 1977).

[71] See *State v. LeMaster*, 669 P.2d at 597.

judge declines, for whatever reason, to pose a juror's question to a witness. Model instructions on juror questions are included as Appendix F, Part 6.

## Exceptions Can Be Accommodated

Opponents of the practice recommend herein offer virtually no support in the Constitution, statutory law, or numerous court opinions that have considered juror questioning of witnesses. No federal or state court has found cause to question the constitutionality of the procedure, and almost all courts have found election of the procedure to be firmly committed to the discretion of the trial judge. Trial judges and jurors who have used the procedure have found it helpful. Commentators who have thoughtfully discussed jury questioning of witnesses commend it for many of the reasons that have prompted the D.C. Jury Project to recommend it, and respected compilations of federal jury instructions, as well as juror handbooks in adjoining jurisdictions, acknowledge acceptance of the practice. There well may be cases, however, where, notwithstanding the sound reasons that prompt the D.C. Jury Project to favor juror questioning, it nevertheless would be wise for a trial judge, in the exercise of discretion, to dispense with the practice because of unique circumstances posing unusual dangers of prejudice to a party.

## Conclusion

Commentary from trial judges and jurors, empirical analyses and sound legal authority overwhelmingly support the D.C. Jury Project's recommendation that jurors in civil and criminal trials be permitted to submit written questions to be asked of witnesses by the trial judge. By allowing the jurors to be more engaged in the process of determining what really happened in a case, the practice of juror questioning, subject to careful judicial control, enhances the trial process and thereby improves the quality of the result.

## Minority View - Recommendation 21

The case against permitting juror questioning of witnesses is perhaps best summarized in a recent Second Circuit decision in *United States v. Amjal*, 67 F.3d 12 (2nd Cir. 1995). In *Amjal* a criminal conviction was vacated precisely because a trial judge had abused his discretion in allowing jurors to question witness (albeit by using such "prophylactic measures" as written notes, screened by the judge with benefit of the parties' advice) without first determining whether such questioning was justified by the **extraordinary or compelling circumstances** of the case. The *Amjal* court noted that, while juror questioning is a permissible practice, "[n]onetheless, the courts of appeals are unified in their disapproval of the general practice of juror questioning of witnesses. As we stated in *Bush*, '[a]lthough we reaffirm our earlier holding in *Witt* that juror questioning lies within the trial judge's discretion, we strongly discourage its use.'" *Id* at 14 (citations omitted). In deciding that juror questioning should only be permitted in extraordinary and compelling circumstances, the *Amjal* court found that "when acting as inquisitors, jurors can find themselves removed from their appropriate role as neutral fact finders."[72] The *Amjal* court also concluded that "[i]f allowed to formulate questions throughout the trial jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence."[73] Further, the court saw the force to a holding in an earlier case, *United States v. Sutton*, 970 F.2d 1001 (1st Cir. 1992), that "the practice also delays the pace of trial, creates a certain awkwardness for lawyers wishing to object to juror inspired questions and runs a risk of undermining litigation strategies." Finally, the court, following *United States v. Lewin*, 900 F.2d 145 (8th Cir. 1990), pointed out that "juror questioning is particularly troublesome when it is directed at the defendant himself in a criminal trial." *Amjal*, at 14.

The decision of the *Amjal* court reflects a consensus of the jurisdictions — both federal and state — on the dangers of routinely permitting jurors to submit questions to witnesses during trial. Whatever the questionable merits of this intrusion into the traditional

[72] *Id. See also United States v. Bush*, 47 F.3d 511 (2nd Cir. 1995); *United States v. Johnson*, 892 F.2d 707 (8th Cir. 1989).

[73] *See also DeBendetto v. Goodyear Tire and Rubber Co.*, 754 F.2d 512 (4th Cir. 1985).

adversarial model of our system of jurisprudence,[74] most courts do not find the benefits to outweigh the disadvantages. In those cases where a trial judge's decision to allow juror questioning has been upheld, courts of appeals have taken pains to emphasize the perils inherent in the practice and have required that the procedure be justified by the extraordinary and compelling circumstances of the **particular case**.[75] Certain State courts have gone beyond merely disfavoring the practice of juror questioning. Following an exhaustive review and a close analysis of legal precedent and scholarship on the subject, the Texas Court of Criminal Appeals, sitting en banc, forthrightly prohibited the practice of juror questioning in *Morrison v. Texas*, 845 S.W. 882 (1993). Similarly, the Supreme Court of Nebraska, after considerable analysis, outlawed juror questioning in *Nebraska v. Zima*, 468 N.W. 2d 377 (1991). As with Federal courts, those state jurisdictions that continue to allow trial judges the discretion to accept juror questions **do not** encourage the practice; still less do these jurisdictions embrace the proposition that the practice be made routine.[76]

[74] *See, e.g.*, Heuer and Penrod, *Increasing Juror Participation in Trials Through Note-Taking and Question-Asking*, Judicature, 79(5): 256-262 (1996).

[75] *See, e.g., United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979); *DeBendetto v. Goodyear Tire and Rubber Co.*, 754 F.2d 512 (4th Cir. 1985); *United States v. Polowichak* 783 F. 2d 410 (4th Cir. 1986); *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989); *United States v. Johnson*, 892 F.2d 707 (8th Cir. 1989).

[76] *See, e.g., Commonwealth v. Urena*, 417 Mass. 692, 632 N.E. 1200 (1994). Extensive discussions of the subject , with both the federal and state practice, may be found in two very fine recent law review articles: Jeffry R. Sylvester, *Your Honor May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses*, 7 Cooley L. Rev. 213 (Trinity Term, 1990); Jeffrey Berkowitz, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?* 44 VNLR 117 (1991). For a review of the debate in South Carolina — where the state Supreme Court has recently instructed trial judges how they are to conduct juror questioning in those rare instances where it is appropriate — see S. Creighton Waters, *Court Sets New Procedures For Juror Questions To A Witness*, 47 S.C. L. Rev. 86 (Autumn, 1995).

## RECOMMENDATION 22

**THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES TAKE STEPS TO MINIMIZE JUROR WAITING TIME DURING TRIAL BY, AMONG OTHER THINGS, DISCOURAGING THE USE OF UNNECESSARY BENCH CONFERENCES WHILE THE JURY IS IN THE COURTROOM AND BY EXPEDITING THE VOIR DIRE PROCESS.**

Minimize juror waiting time:

- Discourage unnecessary bench discussions
- Expedite voir dire

Effective time management during both the jury selection and the trial phases saves money, increases juror satisfaction, and improves the overall efficiency with which the court functions. Thus, the D.C. Jury Project recommends that judges in the D.C. Superior Court and the U.S. District Court for D.C. take measures to limit juror down time during this phase of jury service.

For example, judges should consider discouraging bench conferences, except when absolutely necessary. One judge includes the following in his standard pre-trial order:

> Bench conferences are discouraged. Except in extraordinary situations or when necessary to secure clearance before pursuing a line of questioning (e.g. missing witness/evidence, etc.), the court will not entertain bench conferences. Counsel who lodge objections must state the legal basis for their objections without elaboration or argument (unless invited by the court). The court shall rule on the objection without additional discussion except in unusual circumstances. For purposes of "protecting the record" and assisting appellate review, counsel may explain or amplify the basis and rationale for their objections, on the record, when the court excuses the jury for a recess or adjournment.

According to judges who discourage bench conferences in this, or a similar manner, this show of respect for jurors' time vastly improves overall juror satisfaction and saves valuable court time.

Additionally, the D.C. Superior Court and the U.S. District Court for D.C. should consider providing additional information for judges on conducting efficient voir dire. One judge has indicated that when confronted with an unexpected delay, he occasionally asks a magistrate to preside over jury selection to avoid unnecessary juror down time. Other judges may have time-saving techniques that could serve as models in educating judges in the area of time management.

## RECOMMENDATION 23

**THE D.C. JURY PROJECT RECOMMENDS THAT THE MANAGEMENT OF TRIAL EXHIBITS AT PRE-TRIAL AND TRIAL BE IMPROVED IN ORDER TO MINIMIZE JUROR CONFUSION, PROMOTE UNDERSTANDING AMONG THE JURORS, AND EXPEDITE TRIAL PROCEEDINGS.**

Improve court management of exhibits:

- Encourage use of appropriate technology
- Include indicies and summary sheets in juror notebooks

According to an American Bar Association Report, the proliferation of exhibits at trial, the significance of which is too often lost on jurors, has been shown to be a cause of juror confusion and decreased juror comprehension.[77] Jurors often complain that they are burdened with extensive exhibits, yet are not given the guidance or the means to properly organize the information. As the Federal Judicial Center has observed:

> Jury trials in complex cases place a heavy responsibility on the judge, who must ensure not only that the parties receive a fair trial but also that the jurors are treated with courtesy and consideration, are not burdened more than necessary, and are given the help they need to perform their task adequately.[78]

In complex trials which involve a large number of exhibits, the D.C. Jury Project recommends that trial judges in the D.C. Superior Court and the U.S. District Court for D.C. become involved as soon as possible in controlling the number of documents used at trial and managing the number of exhibits and how they are displayed. Trial judges should also encourage the use of all available technology to facilitate the display of trial exhibits in ways that will maximize juror understanding and trial efficiency, including the highlighting of exhibits where appropriate.[79]

In document-intensive cases, the judge should provide an index or copies of the exhibit summary sheets for inclusion in the jurors' notebooks. In accord with Recommendation 24, copies of the exhibits

---

[77] *ABA Litigation Section Report, Jury Comprehension in Complex Cases*, 602-06 (1989); *JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, 85 (November 1994), and citations therein.

[78] *Manual for Complex Litigation, 3d*, Federal Judicial Center (1995).

[79] ABA *Standards for Criminal Justice* 15-2(c)(3d ed. 1996).

should also be included in the jurors' notebooks when appropriate. Additionally, the D.C. Jury Project encourages judges to provide jurors with copies of exhibits in a timely manner, if that can be done without unduly prolonging the proceedings.

## RECOMMENDATION 24

**THE D.C. JURY PROJECT RECOMMENDS THAT, AT THE DISCRETION OF THE TRIAL JUDGE, JURORS BE PERMITTED TO USE AND MAINTAIN EXHIBIT NOTEBOOKS DURING TRIAL AND JURY DELIBERATIONS.**

Permit notebooks in complex, protracted, and other appropriate trials and deliberations

• Within discretion of judge

The D.C. Jury Project recommends the use of notebooks during trial and deliberations in both civil and criminal trials in the D.C. Superior Court and the U.S. District Court for D.C. While an argument can be made for the use of notebooks in all cases, it is the Jury Project's recommendation that notebooks only be used in complex, protracted, or other appropriate cases.

The primary purposes of the notebook are to assist the jurors in better understanding the evidence and recalling significant facts and witnesses presented during the trial. The use of notebooks is solely within the discretion of the trial judge. It is recommended that the decision to use notebooks be made during a pretrial conference or proceeding and that the contents of the notebook be agreed to by the court and counsel. The expenses of the notebook should generally be borne by the parties. The court, however, should assure that cost does not work to an unfair advantage or disadvantage of one party over another.

• Accessible only to individual juror
• Collected at day's end
• Signed by each juror
• Case-specific materials destroyed post-trial

The notebook should be a three-ring binder that can be supplemented as the trial progresses. Generally, it should be distributed to the jurors at the beginning of the case. It should, where possible, have dividers to separate the various sections and permit easy access to each subject. The notebook should be signed by each juror and given to him or her at the beginning of each day for use during trial and deliberations. Jurors may retain the notebooks throughout the day. The notebooks should be collected by a member of the court staff at the end of each day and secured in the courthouse. No one other than the juror to whom the notebook is assigned should have access to it at any time.

When the trial has been concluded, those portions of the notebook that are case specific should be destroyed. To the extent possible, the binders, separators and other generic materials should be retained by the court for use in future cases.

The D.C. Jury Project recommends that the notebook contain all or some of the following:

1. A diagram of the courtroom with an identification of the participants;

2. Stipulations of the parties, including the agreed upon facts;
3. A short statement of the parties' claims and defenses;
4. Witness lists, including in some cases photographs of the witnesses;
5. Curricula vitae of expert witnesses;
6. Key exhibits after having been stipulated to or admitted into evidence;
7. Glossaries of technical, scientific and legal terms;
8. Chronologies or timelines;
9. The court's preliminary instructions;
10. The court's final instructions. (It is recommended that the preliminary instructions be removed from the binder and replaced by the final instructions.)
11. Adequate space for the juror's notes.

The use of notebooks by jurors in complex and prolonged cases is becoming more widely used throughout the United States in both federal and state courts. Arizona recently adopted a rule permitting the use of notebooks in complex or lengthy civil and criminal cases. The Litigation Section of the American Bar Association and the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries both have recommended the use of notebooks in complex or lengthy trials.

There is a modest amount of case law on the use and content of juror notebooks. It appears to be commonly accepted that their use and content is within the discretion of the trial judge. Before an exhibit may be given to the jury, it should be either stipulated to by opposing counsel or admitted into evidence. *United States v. Rana*, 944 F. 2d 123 (3d Cir. 1991). Providing a jury with an exhibit notebook containing exhibits that had not yet been admitted into evidence has been found to be error but harmless, where the defendant could not demonstrate any prejudice. *United States v. Rana*, 944 F. 2d 123 (3d Cir. 1991). Further, counsel should not be permitted to examine jurors' notebooks to determine whether jurors were aware of extraneous information contained in an exhibit list or to obtain jurors' thought processes, comments or calculations. *United States v. Elder*, 90 F.3d 1110 (6th Cir. 1996).

It is indisputable that the exhibit notebook can be useful in assisting the jurors to understand the evidence and for recording significant facts and witness testimony. However, the court should closely control the size, scope and content of the notebook. The case specific portions of the notebook, including any notes made by a juror, should be destroyed immediately upon dismissal of the jury.

## RECOMMENDATION 25

### THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES PERMIT COUNSEL TO MAKE INTERIM SUMMATIONS TO THE JURY IN EXTENDED TRIALS.

Permit counsel to make interim summations in lengthy trials

- Common practice already
- Endorsed by Federal Judicial Center

The D.C. Jury Project recommends that in lengthy jury trials, judges in the D.C. Superior Court and the U.S. District Court for D.C. allocate a reasonable and equal amount of time for counsel to make interim statements to the jury during trial, between the opening statements and closing arguments. Counsel should be permitted to use the allotted time to discuss the evidence and testimony that has been received up to the time of the interim statement(s). This procedure has been endorsed by the Federal Judicial Center,[80] and is an increasingly common practice.[81]

The D.C. Jury Project believes that such a procedure, if properly used by counsel, will assist jurors in a long, complex case to recall important evidence and testimony, understand how it fits into the parties' theories of the case, and separate relatively significant evidence and testimony from that which is less important.[82]

Practice, however, should be rare rather than routine

The D.C. Jury Project believes that the procedure should be used rarely rather than routinely. The judge's decision whether to use it should be informed by the projected length and complexity of the trial, the number of witnesses and exhibits anticipated, whether lengthy interruptions in the trial are expected due to special scheduling problems, and the views of the parties concerning the utility of the procedure.

The judge should also consider the various methods of implementing the procedure. The court may: (1) allocate to each side a

---

[80]Federal Judicial Center, *Manual For Complex Litigation 3d*, Sec. 22.21, 22.34 (1995).

[81]*See e.g. Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); *ACandS, Inc. v. Godwin*, 340 Md. 334, 407-9, 667 A.2d 116, 152-53 (1995); *Westmoreland v. CBS, Inc.*, Civ. No. 82-7913, S.D.N.Y. (Order of Leval, J., Oct. 3, 1984).

[82]*JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, 93 (November 1994), citing: *ABA Litigation Section Report, Jury Comprehension in Complex Cases*, 621-22 (1989). The practice is also suggested as an effective method of increasing juror comprehension in lengthy or complex trials by the National Center for State Courts. Munsterman, G. Thomas, Paula L. Hannaford, and G. Marc Whitehead, eds, *Jury Trial Innovations*, p. 154-155, National Center for State Courts (1997).

total amount of time that may be used at counsel's discretion at any reasonable point during the trial; (2) allocate to each party or side a certain amount of time that must be used within prescribed intervals or will be forfeited; or (3) schedule interim addresses at prescribed points during the trial.[83]

In trials where interim summations are permitted, the judge's preliminary instruction to the jury should explain the procedure and remind the jury that the interim statements are not evidence in the case but are intended to help the jury clarify the evidence and testimony as the trial progresses and to understand why each party thinks that particular testimony or evidence is important in the jury's consideration of the case.

[83] *ABA Litigation Section, Civil Trial Practice Standards, Final Public Comment Draft*, p. 37-8 (May 1997).

## Minority View - Recommendation 25

The D.C. Jury Project has recommended that judges permit counsel to make interim summations in extended civil and criminal trials. We oppose this recommendation in criminal trials because it runs afoul of the admonition to jurors that they must keep an open mind and refrain from deciding the case until all the evidence has been presented. The Jury Project has recommended note-taking by jurors, that jurors be given exhibit notebooks in complex cases, and that jurors be given preliminary instructions prior to trial and case specific instructions during trial. Under rules of evidence, summaries of evidence can be prepared and presented by either side in closing argument. In light of these recommendations, there is no need to permit interim summations, in our view.

## RECOMMENDATION 26

### THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES GIVE FINAL JURY INSTRUCTIONS ON SUBSTANTIVE LAW BEFORE CLOSING ARGUMENTS, RESERVING ONLY INSTRUCTIONS ON ADMINISTRATIVE MATTERS UNTIL AFTER CLOSING ARGUMENTS.

Judges in the D.C. Superior Court and the U.S. District Court for D.C. traditionally give jurors final instructions after closing arguments by the attorneys. The D.C. Jury Project believes that reversing the order and instructing the jury before closing arguments would benefit both the court and the jurors. Jurors will be in a better position to listen to the closing arguments by counsel with a discerning ear, integrating the evidence with the standard of law during, rather than after, arguments. Thus, they may be less likely to be swayed inappropriately by closing arguments, using legally correct guidelines in their evaluation of the evidence.[84] Juries may spend less time in deliberations trying to understand judges' instructions. Additionally, trial attorneys will have the benefit of directly referring to the court's instructions in their arguments, thus eliminating the problem of explaining legal issues with which the jury may be unfamiliar.[85]

Give final substantive instructions prior to closing arguments:
- Reverse of traditional order
- Better juror preparation for final arguments
- Less likely to be inappropriately swayed

Some judges prefer to read instructions after closing arguments because they prefer to have the last word, rather than send a jury to deliberate with the counsel's passionate arguments in their ears.[86] This problem can be averted by providing instructions on administrative matters after closing arguments. Such matters could include designation of a foreperson and excusal of alternate jurors, among others. This allows the judge to have the last word, reminds the jury of its responsibilities, and mitigates any potential bias.

Give administrative instructions after arguments

The Federal Rules of Civil and Criminal Procedure and the D.C. Superior Court Rules of Procedure give judges discretion regarding

[84]G. Thomas Munsterman, Paula L. Hannaford and G. Marc Whitehead, *Jury Trial Innovations*, 162, National Center for State Courts (1997).

[85]*JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, 110 (November 1994), and citations therein. William W. Schwarzer, "Communicating with Juries: Problems and Remedies," 69 U. Cal. L. Rev. 731 (1981).

[86]William H. Erikson, *Criminal Jury Instructions*, 1993 U. Ill. L. Rev. 285, 291.

when final instructions should be delivered.[87] As noted by the Advisory Committee for Federal Rules of Civil Procedure Rule 51:

> This practice has [the] potential to make closing arguments by counsel much more meaningful to jurors and a somewhat easier task for counsel....When jurors know the applicable law before the attorneys sum up, they are better equipped to understand and evaluate the arguments.[88]

The D.C. Jury Project recommends that discretion on this issue remain with the trial judge, but encourages judges to consider the potential advantages of instructing the jury prior to closing arguments.

[87]Fed. R. Civ. P. 51; Fed. R. Crim. P. 30; D.C. RCP. Rule 51; D.C. RCRP. Rule 30. Other states where judges have discretion regarding when to deliver final instructions include Missouri, Wisconsin, and Arizona. The State of Maryland goes further and *requires* instruction before closing arguments. "The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." Md. R. Civ. P. 4-325.

[88]Advisory Committee Notes, Fed. R. Civ. P. 51.

## RECOMMENDATION 27

**THE D.C. JURY PROJECT RECOMMENDS THAT, TO THE EXTENT POSSIBLE, JURY INSTRUCTIONS BE CASE-SPECIFIC AND THAT THE COURTS EXPAND THE USE OF PRELIMINARY AND INTERIM JURY INSTRUCTIONS. INTERIM INSTRUCTIONS, GIVEN AT THE APPROPRIATE TIMES IN THE COURSE OF THE TRIAL, MIGHT COVER SUCH ITEMS AS BURDEN OF PROOF, LEADING QUESTIONS AND THE PURPOSE OF OPENING STATEMENTS AND CLOSING ARGUMENTS. IN COMPLEX OR TECHNICAL CASES, DEFINITIONS OF TERMS AND OTHER INFORMATION TO HELP ORIENT THE JURY SHOULD BE INCLUDED.**

Give case-specific instructions:

- Use actual names of parties, actual transactions at issue

Preliminary jury instructions are already used by most of the judges in the D.C. Superior Court and the U.S. District Court for D.C. The D.C. Jury Project recommends their use in both civil and criminal cases. Preliminary instructions are given before opening statements, and the Jury D.C. Project encourages judges to make sure such instructions, as well as jury instructions given at other stages of the trial, are case specific. Case specific instructions would generally reference the actual names of the parties, rather than just their roles (e.g., as plaintiffs or defendants), and the actual transaction at issue in the case. In a civil case, the preliminary instructions ought to inform the jury of the nature of the case generally, what the plaintiff must prove, and the basis for the defense. In complex civil cases, the definitions of technical terms may also be helpful. In a criminal case, the preliminary instructions should include the elements of the offense, the presumption of innocence, and the fact that the indictment is not evidence.

Expand use of preliminary and interim instructions:

- Improves juror recall, understanding of evidence, and ability to organize
- Greater juror satisfaction
- Increased opportunity for just results

In both civil and criminal cases, the preliminary instructions should also include, at a minimum, information on the purpose of opening statements, the nature of circumstantial and eye-witness evidence, the burden of proof, the roles of the judge and the jury, the opportunity for juror note-taking, the use of exhibit notebooks, and the methods for receiving juror questions for witnesses.

Interim instructions, (i.e., those given after evidence has been presented but before final instructions and closing arguments) should be used to explain items that arise in the course of the trial, such as leading questions and the purpose of closing arguments.

Research indicates that the more jurors are told in advance, the better will be their recall and understanding of the evidence and their ability to organize it and apply the rules to it. With that better

comprehension comes greater juror satisfaction and an increased opportunity for a just result.[89]

[89] *JURORS: THE POWER OF 12: Report of The Arizona Supreme Court Committee on More Effective Use of Juries*, 81, (November 1994) and citations therein.

## RECOMMENDATION 28

Consider allowing pre-deliberation juror discussions

**THE D.C. JURY PROJECT RECOMMENDS THAT THE COURTS CONSIDER LATER IN 1998 THE ISSUE OF WHETHER JURORS SHOULD BE PERMITTED TO DISCUSS TESTIMONY AND EVIDENCE OF A TRIAL IN THE JURY ROOM, DURING RECESSES FROM TRIAL WHEN ALL JURORS ARE PRESENT, AS LONG AS THEY RESERVE JUDGMENT ABOUT THE OUTCOME OF THE CASE UNTIL FINAL DELIBERATIONS COMMENCE. THE DECISION AT THAT TIME SHOULD BE INFORMED BY THE EXPERIENCE OF ARIZONA TRIAL COURTS, WHICH NOW ARE PERMITTING SUCH DISCUSSIONS IN CIVIL CASES ON AN EXPERIMENTAL BASIS.**

Traditional instructions against use contrary to human nature, lead to frustrations

Social science research and anecdotal reports from jurors indicate that the traditional instruction ordering jurors to refrain from discussing the evidence during trial prior to deliberating runs contrary to human nature and is a source of frustration for jurors, especially in long or complicated trials. A number of advantages have been cited for modifying these instructions to permit discussions in specified and controlled circumstances. These advantages include: improved juror comprehension and recollection of the evidence, enhanced juror satisfaction and jury cohesion, and opportunity for the court to more effectively regulate juror discussions that may already be taking place.

Advantages

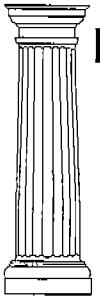
Several disadvantages of allowing pre-deliberation discussions have also been postulated. Chief among these is the potential for jurors to become locked into positions before all the evidence is in, thus presenting the possibility for unfairness to the party who has not completed his or her case. Other possible disadvantages include: reduced quality of deliberations resulting from jurors having already become familiar with each other's views, and a detraction from the ideal of the juror as a neutral decision maker.

Disadvantages

Final action should await Arizona results and evaluation in April 1998

Because the potential impacts of allowing pre-deliberation discussions are not yet well understood, a majority of the D.C. Jury Project members determined that it would be premature to make a recommendation regarding this matter at this time. Experiments with allowing regulated juror pre-deliberation discussions of the evidence are underway in Arizona, and the National Center for State Courts is conducting an evaluation of the experiment. A final report is scheduled for completion in April 1998. The D.C. Jury Project recommends that this topic be deferred for action until the evaluation report has been published and is available for study.

## Reader's Notes



# Enhance the Effectiveness of Jury Deliberations

## RECOMMENDATION 29

**THE D.C. JURY PROJECT RECOMMENDS THAT GUIDANCE REGARDING THE DELIBERATION PROCESS BE INCLUDED IN FINAL JURY INSTRUCTIONS.**

In discussions with former jurors, many of them expressed frustration at not receiving guidance on how to proceed in the deliberation room. According to these jurors, considerable time is often wasted while a jury simply tries to figure out how to get started. Indeed, many jury experts have also noted the need for the judge to provide a brief discussion about the deliberation and group decision-making processes.[90] In order to ease juror concerns and to facilitate the decision making process, the D.C. Jury Project recommends that judges in the D.C. Superior Court and the U.S. District Court for D.C. include in their final instructions some guidance on how to proceed in deliberations.

Final instructions need to provide guidance on deliberative process

A sample of such instructions follows:

### DELIBERATION INSTRUCTIONS

**Sample Instructions**

Now is the time where it is your duty as jurors to consider all of the facts and evidence presented, and accept the law as stated by the Court. You should determine the facts without prejudice, fear or favor, solely from a fair consideration of the evidence and consider the truth of that evidence in light of your own observations and experience. You should consider all the instructions as a whole, and may not disregard any instructions, or give special attention to any one instruction, or question the wisdom of any rule of law. Keep in mind, the Court's actions in ruling on motions and objections by counsel; or in comments to counsel; or in questions to witnesses; or in setting forth the law in these instructions are not to be taken as any indication of the Court's opinion as to how you should determine the issues of fact.

The Court will now ask you to consult with one another to deliberate and to reach agreement if you can do so. Your verdict must be unanimous. I suggest, and this is merely a suggestion, that you discuss the evidence and the law to your satisfaction before you take a

---

[90] *JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, November (1994), citing: S. Kassim and L. Wrightsman, *The American Jury On Trial*, Psychological Perspectives, 131 (1988) and Hastie, Penrod, and Pennington, *Inside the Jury*, 230 (1988).

vote. If you find differences of opinion, and if it would be helpful to do so, I also suggest that you identify issues where there are differences and that you discuss those to see if your differences can be resolved.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence and the law, discussed the case fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right. Each of you must make your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. Nothing that I have said or done is intended to suggest what your verdict should be — that is entirely for you to decide.

I [am] [am not] sending the exhibits which have been received in evidence with you as you retire for your deliberations. You may examine any or all of them as you consider your verdict. I suggest that you begin your deliberation and then, if it would be helpful to you, you may ask for any or all of the exhibits by sending a note to me through the clerk.

[*Insert final instructions on note-taking if appropriate*]

If it becomes necessary during your deliberations to communicate with me, you may send a note by the clerk or the marshal, signed by any member of the jury. No member of the jury ever should try to communicate with me by any means other than a signed note, and I will never communicate with any member of the jury on any matter touching the merits of this case, except in writing or orally here in open court.

Bear in mind also that you are never, under any circumstances, to reveal to any person — not to the marshal or the clerk or me — how the jury stands as to any of the counts or causes of action until after you have reached a unanimous verdict on a count. This means, for example, ladies and gentlemen, that you never should state to the court or send a note to me saying that the jury is divided — 6 to 6, 7 to 5, 11 to 1, or in any other fashion, whether for the plaintiff or the defendant, on any count.

The Court will now ask you to retire to the jury room and begin your deliberation. If the Court may suggest, the jury should first elect one person from the group to be the foreperson. That person will speak for you here in court.

I emphasize that there are no hard-bound rules for selection of a foreperson. Indeed the manner in which you select your foreperson is totally your business and may be the product of the unique chemistry which flows from your coming together for jury service in this case. Also, however, be ever mindful, as you select the foreperson, of your solemn mission — to reach a fair and just verdict based on the evidence. Your foreperson can be someone who may facilitate fruitful discussions, help you organize the evidence, warmly invite each juror to speak up about the evidence, and promote a fair and careful review of the evidence.

[*Discuss the verdict form*]

If the jury needs further assistance or clarification, please feel free to submit questions to the Court. If and when a question comes up, the Court will request all parties to return and attempt to assist your needs in the best way possible.

## Minority View - Recommendation 29

Twelve citizens deliberating upon the application of the law to the facts of a given case should be protected from pressure and interference. Great care should be taken not to encroach upon the cherished prerogative of the deliberating jury. To this end, judicial instructions on how a jury should discharge its deliberative function should be kept to a minimum. By adopting the view of "jury experts" and some jurors that citizen-jurors need remedial education in decision-making, the majority's recommendation is both patronizing and invasive of the jury's exclusive prerogative. As citizens of a democracy, jurors should be left to determine for themselves how best to proceed with their work without judicial involvement in the process.

The proposed instruction on the selection, qualities and role of the foreperson greatly exaggerates the purpose of this ad hoc and subsidiary function. The foreperson is simply a convenience of the Court, a conduit between the deliberating jury and the judge. The only purpose of the foreperson is to relay messages from the entire jury, such as whether or not the jury has agreed upon a verdict, and, if so, what that verdict is. By describing the qualities of the ideal foreperson, there is a grave danger of creating the impression that this one juror's judgment is superior to their peers. Thus the "qualified" foreperson will exercise a disproportionate influence on the "unqualified" jury members. Rather than give prescriptive and potentially distorting instructions on the nature and character of the foreperson, the responsibility and power of individual jurors should be emphasized. In the absence of such an emphasis, the present jury instructions should remain unchanged.

## RECOMMENDATION 30

**THE D.C. JURY PROJECT RECOMMENDS THAT JUDGES PROVIDE A WRITTEN COPY OR COPIES OF THE FINAL JURY INSTRUCTIONS TO THE JURY FOR THEIR USE IN DELIBERATIONS.**

Provide written copy of instructions

Studies have shown that providing jurors with written copies of the jury instructions increases their understanding of the instructions, facilitates deliberations, reduces the number of questions about instructions during deliberations and increases jurors' confidence in their verdict.[91]

Thus, the D.C. Jury Project recommends that judges in the D.C. Superior Court and the U.S. District Court for D.C. provide a written copy or copies of final instructions to the jury for their use in deliberations. If the instructions, as delivered from the bench, differ substantially from the written version, a transcription of the actual instruction given should be the one supplied to the jury. The number of copies supplied should be determined by the judge's evaluation of the jury's needs in the particular case. Counsel should be given the opportunity to review the instructions before they are submitted to the jury.

[91] *JURORS: THE POWER OF 12: Report of: The Arizona Supreme Court Committee on More Effective Use of Juries,* 107-108, (November 1994), and citations therein.

## RECOMMENDATION 31

### THE D.C. JURY PROJECT ENCOURAGES TRIAL JUDGES TO CONSIDER ASSISTING DELIBERATING JURIES IN REACHING A VERDICT IN CASES WHERE A WINTERS CHARGE HAS ALREADY BEEN GIVEN AND THE JURY CONTINUES TO REPORT THAT THEY ARE DEADLOCKED.

Court should consider assisting apparently deadlocked jury:
- After *Winters* charge
- Avoiding coercion, undue influence

After reporting to the judge that they have reached an impasse in their deliberations, some juries in the D.C. Superior Court and the U.S. District Court for D.C. are needlessly discharged and a mistrial is declared when it could be appropriate and helpful for the judge to offer some assistance in hopes of improving the chances for a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive, or unduly intrusive, and should be delivered only after anti-deadlock instructions according to *Winters*[92] have been given.

A significant advantage of this process is that it can help avoid unnecessary mistrials, which are associated with substantial costs. Among these costs are: increased congestion in the court system; relitigation costs; and demands on additional jurors.[93] Additionally, offering assistance to deadlocked juries can enhance the truth-seeking aspects of the trial, and provide jurors with more satisfaction that they have done their best to reach an accurate verdict.[94]

Recommended by the Arizona Supreme Court Committee on More Effective Use of Juries[95], this procedure appears to be permitted by relevant case law. For example, the trial judge has long had discretion whether to re-open the case during deliberations for read-backs of

---

[92] *Winters v. United States*, 317 A.2d 530 (D.C. 1974).

[93] "It has been said that the only thing worse than trying a case once is having to try it twice." The Honorable B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind. L.J. 4 (Fall 1993).

[94] G. Thomas Munsterman, Paula L. Hannaford and G. Marc Whitehead,eds., *Jury Trial Innovations*, p. 192, National Center for State Courts (1997).

[95] "After hearing from deliberating jurors that they are at an impasse, the trial judge should invite the jurors to list the issues that divide them in the event that the judge and counsel can be of assistance, e.g., by clarifying the instructions or rearguing certain points." *JURORS: THE POWER OF 12: Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, (November 1994).

testimony or additional arguments, instructions[96], or evidence.[97] Indeed, the court's inherent power has been found to be sufficient to authorize additional assistance to the jury after deliberations have commenced.[98] The trial judge should exercise this discretion to maximize the chances for a verdict and avoid an unnecessary mistrial. The court, however, must use caution in communicating with jurors who have reported to be deadlocked so that there is no danger of coercion or undue influence.

Possible measures of assistance

The D.C. Jury Project recommends that judges caution jurors to not disclose how they are divided numerically. The judge could ask jurors to consider listing the issues or questions that continue to divide them. The judge may then determine if one of the following measures would be likely to assist the jurors in reaching a verdict: clarification of instructions, provision of further instructions, read-backs of testimony. The judge may also determine that it is not legally or practically possible to respond to the concerns of the jury. A sample instruction is included as Appendix G to this report.

**Sample instructions**

[96]*Bouknight v. United States*, 641 A.2d 857, 859-60 (D.C. 1994); *Whitaker v. United States*, 617 A.2d 499-501 (D.C. 1992); *Atkinson v. United States* 322 A.2d 587, 588-589 (D.C. 1974).

[97]*Rambert v. United States*, 602 A.2d 1117, 1119-20 (D.C. 1992); *Morgan v. United States*, 111 U.S. App. D.C. 127; 294 F.2d 911 (1961); *Williams v. United States*, 94 U.S. App. D.C. 173; 213 F.2d 25 (1954); *United States v. Burger*, 419 F.2d 1293 (5th Cir. 1969); *Fernandez v. United States*, 329 F.2d 899 (9th Cir. 1964); *State v. Booton*, 329 A.2d 376 (N.H. 1974); *People v. Scott*, 120 Misc. 2d 313; 465 N.Y. S.2d 819 (Cty. Ct. 1983); *See also U.S. v. Greely*, 138 U.S. App. D.C. 161; 425 F.2d 572 (1970).

[98]*Withers v. Ringlein*, 745 F. Supp. 1271, 1274 (E.D. Mich. 1990).

## Minority View - Recommendation 31

The D.C. Jury Project recommends that trial judges consider assisting deliberating juries who indicate that they have reached an impasse by giving additional instructions after a *Winters* charge has been given. We oppose this recommendation on the ground that the coercive nature of an anti-deadlock charge like the *Winters* charge has been recognized by appellate courts, which have prohibited further anti-deadlock instructions after the charge is given. The charge is as thorough an exposition as could be given to jurors about the obligation to reach a verdict, consistent with honestly-held convictions. To give any additional anti-deadlock instructions would violate precedent and would signal to jurors that their honestly held convictions are secondary to the need to avoid retrial.

## RECOMMENDATION 32

**THE D.C. JURY PROJECT ENCOURAGES TRIAL JUDGES TO JOIN JURORS AT THE CLOSE OF A TRIAL IN ORDER TO PERSONALLY AND INFORMALLY THANK THEM FOR THEIR SERVICE, TO ANSWER QUESTIONS ABOUT THE COURT AND JURY SYSTEMS, AND TO PROVIDE ASSISTANCE FOR ANY JUROR WHO MAY HAVE EXPERIENCED EXTREME STRESS CAUSED BY THE TRIAL.**

**Court expressions of gratitude essential**

Serving as a trial juror can be an emotional and sometimes stressful experience. To underscore the importance of their service and the gratitude of the community, the D.C. Jury Project recommends that judges in the D.C. Superior Court and the U.S. District Court for D.C. always formally thank jurors for their service at the conclusion of a trial.

Provide opportunity for informal post-verdict discussions about experience

After jurors are discharged, the judge may then provide additional opportunity for jurors who express a need to relieve tension by meeting personally in a more informal setting and receiving comments about their experience. Potential advantages of such an informal meeting include the following: (1) provide closure to the jury experience, especially in stressful cases; (2) provide an opportunity for the judge to emphasize the importance of jury service as a civic responsibility and educate the jurors about the legal system; (3) the judge can solicit useful information for court administrators about jury system performance and the concerns of jurors.[99]

**Sample closing comments**

Jurors appreciate the judge taking the time to thank them and ask about their concerns.[100] Judges also note that they have learned from jurors during the meetings.[101] Judges who choose to meet with jurors informally after a trial should caution jurors regarding any limits of such conversations related to the verdict. See Appendix H for sample closing comments.

---

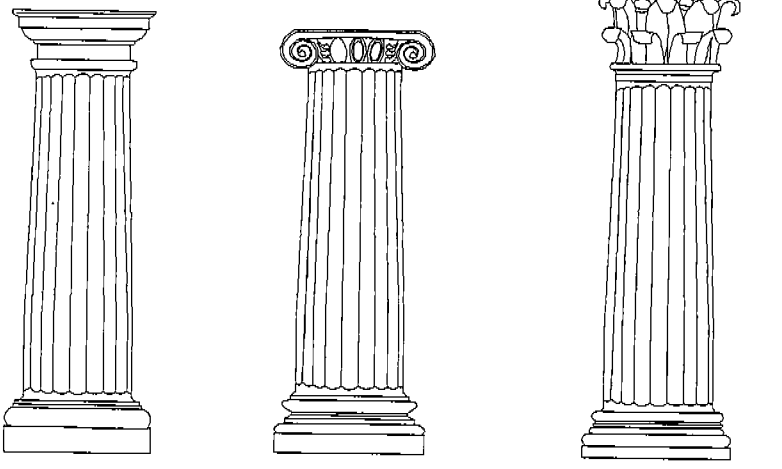
[99]G. Thomas Munsterman, Paula L. Hannaford and G. Marc Whitehead, eds., *Jury Trial Innovations*, 200-201, National Center for State Courts (1997).

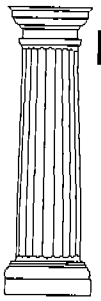
[100]*Id.* at 201.

[101]*Id.*

## Reader's Notes

# Appendices





# Mission Statement

## District of Columbia Jury Project

In consideration of the importance of the right to a trial by jury in the United States, and in consideration of recent scrutiny and criticism of the jury trial system, the Council for Court Excellence, in cooperation with the leadership of the D.C. Superior Court and the U.S. District Court for D.C., seeks to evaluate and strengthen the institution of the jury in the District of Columbia.

To this end, a committee comprised of judges, court staff, interested members of the public, former jurors, attorneys, civic and business leaders, academicians, and others has been established under the auspices of the Council for Court Excellence. The Council is a nonprofit, non-partisan, civic organization which works to improve the administration of justice in the local and federal courts.

The overall goal of the Committee is to support citizens in their roles as jurors and to improve the effective administration of justice through juries. Specifically, the D.C. Jury Project Committee will:

1. Study and evaluate the utilization of juries and the conduct of jury trials in both the United States District Court for the District of Columbia and the Superior Court of the District of Columbia. This evaluation will include examinations of jury representativeness, jury selection, the trial process, juror comprehension of complex legal issues, and the jury service experience in general.

2. Publish and disseminate, by December 31, 1997, the District of Columbia Jury Study. The Study will contain findings and, where appropriate, recommendations of specific ways to enhance jury trials.

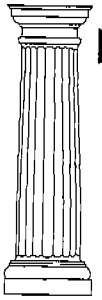
3. Encourage and support testing of proposed improvements through pilot projects in courtrooms of the D.C. Superior Court and the U.S. District Court for D.C.

4. Support implementation of recommendations contained in the D.C. Jury Study.

5. Suggest educational programs for the bench, the bar, jurors and the public concerning any prospective jury reforms.

6. Establish methods to periodically examine the utilization of any newly adopted rules and procedures to determine their effects, and suggest modifications when necessary.

Adopted by the D.C. Jury Project Planning Committee September 26, 1996



# Executive Summary

## An Examination of Low Juror Yield

### Background

The problem recruiting jurors in the District of Columbia was recognized in 1990, when Chief Judges Aubrey Robinson (U.S. District Court for the District of Columbia) and Fred Ugast (District of Columbia Superior Court) asked the Council for Court Excellence to undertake a program to promote public awareness regarding jury service. Among the factors cited by these Chief Judges was that "a number of citizens who, when summoned for jury duty, either request to be excused from jury service or ignore the summons...". More recent anecdotal evidence, from both the U.S. District Court for the District of Columbia (District Court) and the District of Columbia Superior Court (Superior Court), suggest that the juror yield in their respective courts in 1997 may be as low as 30%.

The Council for Court Excellence sponsored the District of Columbia Jury Project to examine all aspects of the D.C. jury system and to offer the bench, bar, and community at large a list of recommendations to improve the quality and efficiency of the jury systems. In framing the broad issues, the D.C. Jury Project commissioned an empirical study to learn why so many citizens fail to report for jury duty when summoned. The Jury Project sought to learn whether revising the mechanisms of encouraging jury service, incorporating both sanctions and incentives, and other approaches, might lead to an appreciable increase in juror yield. To undertake this research Dr. Richard Seltzer, Professor of Political Science at Howard University, and a member of the D.C. Jury Project Committee, designed and coordinated the survey research.

### Findings

The District of Columbia master jury wheel is created at present by the merging of lists from both the Board of Elections and Ethics (BOEE) and the Department of Motor Vehicles (DMV). A total of three lists are used, with two supplied by DMV (licensed drivers and those having non-driver identification cards), and one from BOEE (registered voters).

The current wheel holds 323,992 names, of which 90% are reserved for Superior Court and 10% for District Court. Superior Court uses the one-day/one-trial system and mails out between 1,000 and 1,650 summonses per day. District Court calls jurors for two weeks and summons approximately 900 per two-week time period.

Statistical analysis reveals that, of every 100 District of Columbia residents summoned for Superior Court, approximately 18 return the questionnaire and are qualified for service; 7 were deferred or would have been deferred had they returned the questionnaire, 13 were disqualified or would have been disqualified had they returned the questionnaire; 18 probably ignored the questionnaire; 43 never received the questionnaire, and 1 said they had contacted the Court. (This data is summarized in a chart following this Executive Summary.) Thus the problem of low juror yield in

the District of Columbia is attributable both to inadequate governmental performance (bad list management) and to citizen apathy (non-response to the summons).

Major findings include:

Approximately 25% of summonses mailed out are returned to the courts as undeliverable.

Almost half of summonses not returned to the courts are actually undeliverable.

Approximately 20% of citizens summoned for jury duty are ignoring the summons. Reasons for this include:

1) the amount paid for jury service does not compensate for lost work,
2) jury duty is inconvenient and time consuming,
3) distrust of the judicial system, and
4) not wanting to judge others.

Increasing the juror payment by $10 is unlikely to increase citizen response to summonses.

## Recommendations

The two primary source lists, Board of Ethics and Elections and the Department of Motor Vehicles, provide addresses which are insufficiently accurate for the purpose of notifying the District of Columbia citizenry of its obligation of jury service. The fact that approximately forty percent of juror summons go to people who had moved represents a large resource drain on the court system, in terms of time, labor, and budgetary expenditure.

Furthermore, as the duration of the jury wheel gets shorter, the same citizens are repeatedly called. This has the potential to create a more unrepresentative jury pool, as well as lead to, or increase, disillusionment with the jury system in the District of Columbia.

Given that approximately half of summonses classified as non-response are actually undeliverable, the imposition of sanctions for non-response should be carefully considered prior to enforcement.

The source list difficulties noted above could be diminished in two ways. One is through the courts' assuming responsibility for the creation of a "living", or "smart", jury wheel, wherein information gleaned from the previous wheel is used by the courts to update the next wheel. Therefore, if a citizen's questionnaire is returned as undeliverable one year, a computer program can "tell" the next wheel not to mail a questionnaire to the same citizen at the same address. At current rates, this has the potential of saving roughly 100,000 pieces of mail per year.

Another way to diminish source list difficulties is to add new source lists more

likely to have current addresses, such as those on public assistance, recently naturalized citizens, tax rolls, and others who volunteer. The courts need to assure that when source lists are merged and duplicates eliminated, preference is given to the lists more likely to have current information. Verifying current addresses could be further enhanced by employing National Change of Address (from vendors licensed by the U.S. Post Office) information.

It appears the most agreeable method for the courts to encourage participation in jury service is through positive, non-monetary approaches, such as letting jurors know personally that they are needed, educating jurors about the jury system and its history, and "empowering" jurors. Data suggests that increasing the juror payment by $10 is unlikely to have any effect on the non-response rate[1]. Imposing severe sanctions for non-response, such as prohibiting driver's license renewal or imposing a $100 fine[2], appears likely to create a double-edged sword effect - it may lead to greater participation, but may also to greater resentment of the jury system. These findings are consistent with recommendations which the D.C. Jury Project will present to the courts at year's end.

[1] Approximately 60% of those "non-respondents" interviewed indicated this would have "little effect" on increasing the likelihood of their serving.

[2] Of the "non-respondents" interviewed, approximately 63 % and 57%, respectively, indicated these would make them "much more likely" to serve.

## Response To Juror Summonses in D.C.

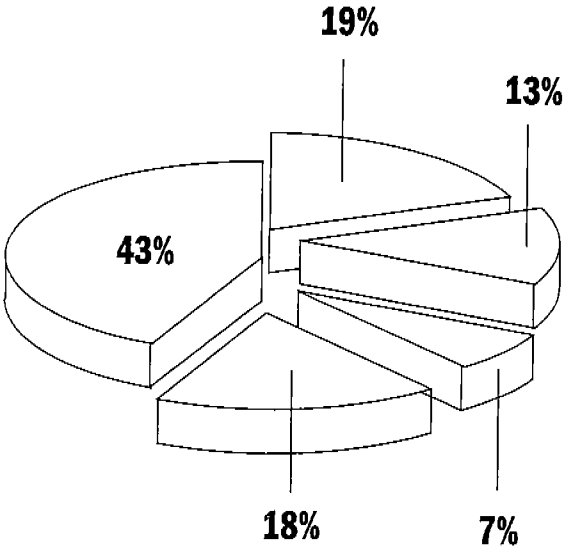
**43%**
Never received summons

**19%**
Ignored summons

**18%**
Responded and served

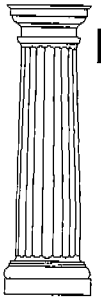
**13%**
Responded, but not qualified

**7%**
Responded, deferred service




> "...Statistical analysis reveals that, of every 100 District of Columbia residents summoned for Superior Court, approximately 18 return the questionnaire and are qualified for service; 7 were deferred or would have been deferred had they returned the questionnaire; 13 were disqualified or would have been disqualified had they returned the questionnaire; 18 probably ignored the questionnaire; 43 never received the questionnaire; and 1 said they had contacted the Court ... Thus the problem of low juror yield in the District of Columbia is attributable both to inadequate governmental performance (bad list management) and to citizen apathy (non-response to the summons)."

SOURCE: Council for Court Excellence, Civic Apathy or Governmental Deficiency? An Examination of Low Juror Yield in the District of Columbia, Richard Seltzer (December 1997)



# Background Research — Recommendation 6

## Improving the Quality of Current Juror Source Lists & Using Additional Source Lists for the Master Wheel

### Findings

The master jury list in the District of Columbia is created by merging the 1) list of registered voters, 2) the list of licensed drivers who are age 18 and above, and 3) the list of D.C. residents who have received a non-driver's identification card and who are age 18 and above. Both the D.C. Superior Court and the U.S. District Court for D.C. use this master jury list. The first list is provided to D.C. Superior Court by the D.C. Board of Elections and Ethics (BOEE); the other two lists are provided by the D.C. Bureau of Motor Vehicles. Due to the low jury yield described above, this master list is now exhausted and restarted approximately every nine to 16 months.

The Jury Pool and Summoning Working Committee ("Project's Committee") met with the Chief of Permit Control of the D.C. Bureau of Motor Vehicles, the Executive Director and the Public Information Officer of the D.C. Board of Elections and Ethics, and the Jury Administrators of both trial courts in D.C. After speaking with these officials, the Project's Committee determined that the source list suffers from a significant number of address problems and investigated options for improving the quality and scope of the list. It is clear that citizens in the District do not regularly update address changes with the Bureau of Motor Vehicles or with the BOEE. Therefore, the Project's Committee specifically considered lists which would be likely to have more accurate addresses and which would add more names to the current master wheel.

### Experience in Other Jurisdictions

While most jurisdictions in the United States are like D.C. in that they use lists of registered voters and/or licensed drivers to create their master juror source lists, several states supplement these lists with one or more other lists maintained by the state or local government. In New York, for example, jury administrators utilize both the state income tax rolls and the public assistance rosters in addition to voters and drivers lists. Legislation in New York authorizes usage of these names for the jury list and prohibits disclosure of juror information to the public. Additionally, the implementing legislation in the New York Social Services Law ensures safeguards regarding privacy rights of individual citizens.

Courts in Wisconsin are authorized by statute to use any number of specified or unspecified lists for the jury wheel. While most jurisdictions in Wisconsin choose to utilize the standard list of licensed drivers or identification card holders, jurisdictions may opt to combine this list with the list of registered voters, phone listings, utility lists, property tax lists, lists of high school graduates, and persons receiving Aid to Families with Dependent Children. A Wisconsin statute explicitly states that courts are

not limited to lists mentioned.[3]

Courts in Indiana also use supplemental juror source lists — property tax rolls and power company lists. Jury administrators in Indiana note that there was little problem in obtaining the tax lists from the government; an order was simply issued by a judge requiring production of such list.[4]

### Implementation of Recommendation

It is the Project Committee's view that D.C. income tax lists and public assistance lists would contain reliable address information, due to the financial incentive for citizens to keep these agencies informed. Further, we believe that these lists and the list of newly naturalized citizens, as produced by the office of Immigration and Naturalization Services, could identify citizens eligible for jury duty who may not already be listed on the current source list.

The Project's Committee investigated the feasibility of implementing these techniques in the District of Columbia by meeting with counsel from the D.C. Department of Finance and Revenue and Public Information Officers from the D.C. Department of Human Services (DHS). DHS maintains a merged, unduplicated list of persons who receive AFDC, food stamps, and general public assistance. Because this department repeatedly sends out a high volume of life sustaining financial benefits to fellow citizens, this list is reasonably presumed to be accurate. Similarly, the Department of Finance and Revenue have what is presumed to be an accurate list.

Representatives of both agencies initially raised concerns about state and federal statute privacy protections which might prohibit them from sharing their lists with the courts for the purpose of construction the jury source list. The D.C. Department of Finance and Revenue has since stated to the Project's Committee that, in its view, there are no privacy related impediments to the release of the requested information.

As noted above, the Project's Committee found that the lists received from the

---

[3] Similarly, an enabling statute in the state of Hawaii designates several agencies to supply lists for the master jury wheel; among these are the Department of Motor Vehicles list, the voter registration list, and the state income tax list. It is important also to consider that the Arizona Supreme Court Committee on More Effective Use of Juries, whose work we have looked to for inspiration and guidance throughout the D.C. Jury Project, recommended in 1994 that Arizona's jury source list be supplemented with state income tax rolls, including recipients of welfare and public assistance programs.

[4] It is worth noting that each of these lists which we recommend for use in D.C. — income tax lists, public assistance lists, and lists of newly naturalized citizens — are all innovations included in *Jury Trial Innovations*, a compilation of jury system modernization techniques published by the National Center for State Courts in 1997.

D.C. Bureau of Motor Vehicles and the list of registered voters suffer from many outdated or incorrect addresses. Additionally, duplications on the combined list are not always eliminated in the court's merging and purging process, as names and addresses are not always presented in identical format. Further, if the additional lists which the Project's Committee recommends here are added to the master jury list, more duplications will certainly occur. Thus, there is a compelling need to utilize a reliable system for eliminating duplicates and verifying list accuracy. We recommend the use of social security numbers, in addition to names and addresses, for this purpose. A 1993 amendment to the Social Security Act allows for the use of social security numbers for this purpose.

In considering implementation of this recommendation, the Project's Committee found that the Bureau of Motor Vehicles' list of licensed drivers and identification card holders includes social security numbers. The Board of Elections and Ethics does not currently require a social security number as part of the voter registration process. However, there is an optional portion of the voter registration form which requests citizens to include their social security number.

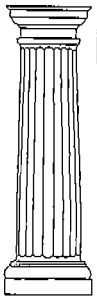
The Department of Finance and Revenue and DHS both maintain lists which include social security numbers, along with names and addresses, as an identifying factor. However, the Finance and Revenue mailing lists indicates only the identity of the primary household taxpayer for those
who file joint returns, and therefore may not be a comprehensive list of qualified jurors in such households.[5]

Since an expanded juror source list would invariably increase the number of duplications on the master list, and since implementation of the recommendation to use social security numbers would take time, the Project's Committee encourages the court to ensure efficient list maintenance. As additional source lists are combined, increasingly sophisticated methods of merging lists and purging duplications are required. To address this need, the courts should consider contracting with a private firm for this purpose, as estimated costs are surprisingly low.

---

[5] At first blush, one might say that such a list of primary household taxpayers could over-represent the adult male population within this source list. The Project's Committee, however, determined that the benefits of adding this list would outweigh any significant disadvantages. Moreover, it is likely that the pouring of this source list into the large, enhanced jury pool universe would result in the dilution or elimination of the initial overrepresentation. One must keep in mind that the Project recommends resorting to the income tax list as a supplemental source which has the benefit of social security number inclusion. Social security number access will enhance the de-duplication process applied to the entire master wheel universe. It is likely that the adult females in a household filing a joint income tax return will be picked up through the DMV or voters source lists, thus preserving the overall representativeness of the enlarged master wheel.

The Project's Committee met with representatives of Wang Federal, Inc., a list management firm currently under contract with the Administrative Office of Federal Courts to create and maintain juror source lists for participating federal courts. U.S. District Court for D.C. is currently considering taking part in this contract; the cost would be approximately $.10 per record, and the District Court would share the resulting list with D.C. Superior Court. The Project's Committee also contacted a firm which currently manages juror source lists in at least two Maryland counties. After a one-time setup fee of $1,500, Data Services Inc. charges $5 per 1,000 records each time they create a master wheel. Assuming the combined lists would result in approximately 1 million records to be merged, the cost would be about $5,000 per jury wheel.



# Peremptory Challenges by State

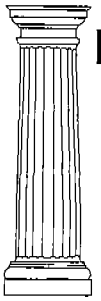
## Civil Cases

| Jurisdiction | Number of Challenges | Number of Jurors |
|---|---|---|
| Minnesota | 2 | 12 |
| Rhode Island | 2 | 12 |
| Alaska | 3 | 12 |
| Arkansas | 3 | 12 |
| Connecticut | 3 | 6 |
| Delaware | 3 | 12 |
| **District of Columbia** | **3** | **6** |
| Federal Court System | 3 | 6 |
| Florida | 3 | 6 |
| Hawaii | 3 | 12 |
| Indiana | 3 | 6 |
| Kansas | 3 | 12 |
| Kentucky | 3 | 12 |
| Maine | 3 | 8 |
| Michigan | 3 | 6 |
| Missouri | 3 | 12 |
| Nebraska | 3 | 12 |
| New Hampshire | 3 | 12 |
| New York | 3 | 6 |
| Ohio | 3 | 12 |
| Oklahoma | 3 | 12 |
| Oregon | 3 | 12 |
| South Dakota | 3 | 12 |

| Jurisdiction | Number of Challenges | Number of Jurors |
|---|---|---|
| Utah | 3 | 8 |
| Virginia | 3 | 7 |
| Washington | 3 | 6 |
| Wisconsin | 3 | 6 |
| Wyoming | 3 | 6 |
| Arizona | 4 | 8 |
| Colorado | 4 | 6 |
| Idaho | 4 | 12 |
| Iowa | 4 | 8 |
| Maryland | 4 | 12 |
| Massachusetts | 4 | 12 |
| Mississippi | 4 | 12 |
| Montana | 4 | 12 |
| Nevada | 4 | 12 |
| North Dakota | 4 | 6 |
| Pennsylvania | 4 | 12 |
| South Carolina | 4 | 12 |
| Tennessee | 4 | 12 |
| West Virginia | 4 | 6 |
| Illinois | 5 | 6 |
| New Mexico | 5 | 12 |
| Alabama | 6 | 12 |
| California | 6 | 12 |
| Georgia | 6 | 12 |

| Jurisdiction | Number of Challenges | Number of Jurors |
|---|---|---|
| Louisiana | 6 | 12 |
| New Jersey | 6 | 12 |
| Texas | 6 | 12 |
| Vermont | 6 | 12 |
| North Carolina | 8 | 12 |

Source: Munsterman, G. Thomas, Paula L. Hannaford & G. Marc Whitehead, editors. *Jury Trial Innovations*. National Center for State Courts. 1997. Pg. 235.



# Peremptory Challenges by State

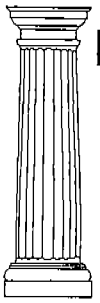
## Misdemeanor Cases

| Jurisdiction | Number for Defense | Number for State | Number of Jurors |
|---|---|---|---|
| Missouri | 2 | 2 | 12 |
| Alabama | 3 | 3 | 12 |
| Alaska | 3 | 3 | 6 |
| Arkansas | 3 | 3 | 12 |
| Colorado | 3 | 3 | 6 |
| Connecticut | 3 | 3 | 6 |
| **District of Columbia** | **3** | **3** | **12** |
| Federal Court System | 3 | 3 | 12 |
| Florida | 3 | 3 | 12 |
| Hawaii | 3 | 3 | 12 |
| Kansas | 3 | 3 | 6 |
| Kentucky | 3 | 3 | 12 |
| Michigan | 3 | 3 | 12 |
| Nebraska | 3 | 3 | 12 |
| New Hampshire | 3 | 3 | 12 |
| New York | 3 | 3 | 6 |
| Ohio | 3 | 3 | 8 |
| Oklahoma | 3 | 3 | 6 |
| Rhode Island | 3 | 3 | 12 |
| South Dakota | 3 | 3 | 12 |
| Tennessee | 3 | 3 | 12 |
| Utah | 3 | 3 | 8 |

| Jurisdiction | Number for Defense | Number for State | Number of Jurors |
|---|---|---|---|
| Virginia | 3 | 3 | 7 |
| Washington | 3 | 3 | 12 |
| Georgia | 4 | 2 | 6 |
| Iowa | 4 | 4 | 6 |
| Maine | 4 | 4 | 12 |
| Maryland | 4 | 4 | 12 |
| Massachusetts | 4 | 4 | 12 |
| Nevada | 4 | 4 | 12 |
| West Virginia | 4 | 4 | 12 |
| Wisconsin | 4 | 4 | 12 |
| Wyoming | 4 | 4 | 12 |
| Illinois | 5 | 5 | 12 |
| Indiana | 5 | 5 | 6 |
| Minnesota | 5 | 3 | 6 |
| New Mexico | 5 | 5 | 12 |
| Pennsylvania | 5 | 5 | 12 |
| South Carolina | 5 | 5 | 12 |
| Texas | 5 | 5 | 12 |
| Arizona | 6 | 6 | 6 |
| Delaware | 6 | 6 | 12 |
| Idaho | 6 | 6 | 12 |
| Louisiana | 6 | 6 | 12 |
| Mississippi | 6 | 6 | 6 |
| Montana | 6 | 6 | 12 |

| Jurisdiction | Number for Defense | Number for State | Number of Jurors |
|---|---|---|---|
| North Carolina | 6 | 6 | 12 |
| North Dakota | 6 | 6 | 12 |
| Oregon | 6 | 6 | 6 |
| Vermont | 6 | 6 | 12 |
| California | 10 | 10 | 12 |
| New Jersey | 10 | 10 | 12 |

Source: Munsterman, G. Thomas, Paula L. Hannaford & G. Marc Whitehead, editors. *Jury Trial Innovations*. National Center for State Courts. 1997. Pg. 234.



# Peremptory Challenges by State

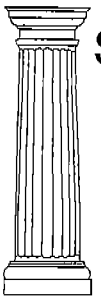
## Non-Capital Cases

| Jurisdiction | Number for Defense | Number for State | Number of Jurors | Exceptions in Life Sentence Cases |
|---|---|---|---|---|
| Hawaii | 3 | 3 | 12 | |
| New Hampshire | 3 | 3 | 12 | |
| Massachusetts | 4 | 4 | 12 | |
| Nevada | 4 | 4 | 12 | |
| Ohio | 4 | 4 | 12 | |
| Utah | 4 | 4 | 8 | |
| Virginia | 4 | 4 | 12 | |
| Wisconsin | 4 | 4 | 12 | 6 |
| Colorado | 5 | 5 | 12 | |
| Michigan | 5 | 5 | 12 | |
| Minnesota | 5 | 3 | 12 | 15 |
| New Mexico | 5 | 3 | 12 | |
| Oklahoma | 5 | 5 | 12 | |
| Alabama | 6 | 6 | 12 | |
| Arizona | 6 | 6 | 8 | |
| Connecticut | 6 | 6 | 6 | 15 |
| Delaware | 6 | 6 | 12 | |
| Florida | 6 | 6 | 6 | |
| Idaho | 6 | 6 | 12 | |
| Iowa | 6 | 6 | 12 | |
| Mississippi | 6 | 6 | 12 | |

| Jurisdiction | Number for Defense | Number for State | Number of Jurors | Exceptions in Life Sentence Cases |
|---|---|---|---|---|
| Missouri | 6 | 6 | 12 | |
| Montana | 6 | 6 | 12 | |
| Nebraska | 6 | 6 | 12 | |
| North Carolina | 6 | 6 | 12 | |
| Oregon | 6 | 6 | 12 | |
| Rhode Island | 6 | 6 | 12 | |
| Vermont | 6 | 6 | 12 | |
| Washington | 6 | 6 | 12 | |
| West Virginia | 6 | 2 | 12 | |
| Pennsylvania | 7 | 7 | 12 | |
| Arkansas | 8 | 6 | 12 | |
| Kentucky | 8 | 5 | 12 | |
| Maine | 8 | 8 | 12 | |
| Tennessee | 8 | 4 | 12 | |
| Wyoming | 8 | 8 | 12 | |
| Alaska | 10 | 6 | 12 | |
| California | 10 | 10 | 12 | 20 |
| *District of Columbia* | 10 | 10 | 12 | |
| Federal Court System | 10 | 6 | 12 | |
| Illinois | 10 | 10 | 12 | |
| Indiana | 10 | 10 | 12 | |
| Maryland | 10 | 5 | 12 | |
| North Dakota | 10 | 10 | 12 | |

| Jurisdiction | Number for Defense | Number for State | Number of Jurors | Exceptions in Life Sentence Cases |
|---|---|---|---|---|
| South Carolina | 10 | 5 | 12 | |
| South Dakota | 10 | 10 | 12 | |
| Texas | 10 | 10 | 12 | |
| Georgia | 12 | 6 | 12 | |
| Kansas | 12 | 12 | 12 | |
| Louisiana | 12 | 12 | 12 | |
| New York | 15 | 15 | 12 | 20 |
| New Jersey | 20 | 12 | 12 | |

Source: Munsterman, G. Thomas, Paula L. Hannaford & G. Marc Whitehead, editors. *Jury Trial Innovations*. National Center for State Courts. 1997. Pg. 233.



# Sample Instruction
## Juror Notetaking

### Before Trial

Now let me note that when you took your seats you found a notebook and a pencil waiting for you. That is because I permit jurors in this courtroom to take notes during the trial if they want to and to have their notes with them during deliberations.

I want to emphasize that you do not have to take notes if you do not want to. It's entirely up to you. Indeed, you should not take notes if you think that notetaking might distract your attention from the testimony or the evidence or the demeanor of the witnesses in the case. On the other hand, if you think that taking notes might better help you to focus your attention on the evidence and the testimony or might better help you to recall what went on during the course of the trial, then you may feel free to take notes.

I leave it up to each of you individually what you decide to do in this regard because I think each of us knows best how he or she learns, absorbs, and remembers information. Some of us do it best by just looking and listening; others do it best by taking lengthy notes. So, it's up to each one of you individually. If your notebooks are more a hindrance than a help — if you don't need them — just put them under your chairs and ignore them.

If you do take notes, please remember that your notes are only intended to be a help to your memory. They are not evidence in the case and they should not take precedence over your own independent memory of the evidence. Moreover, those jurors who do not take notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror is taking notes because the notebooks are only for the notetaker's own personal use in assisting his or her memory of the evidence.

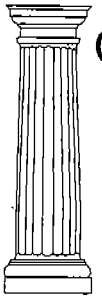
Whenever there is a recess in the trial, I will ask you to please leave your notebooks and pencils in your seats. They will be kept there during short recesses when I remain on the bench or when the courtroom is locked. During overnight recesses they will be taken to my chambers and kept there under lock and key. At no time either during or after this trial will anyone, including the courtroom clerk and me, look at any notes that any juror has taken. At the end of the trial after you have come back and delivered your verdict, I will ask you pass your notebooks to the clerk. [S]he will tear out your notes from the notebooks and give them to me, and I will immediately destroy them after the trial. Again, neither of us will look at any notes you have taken.

### Final Instructions

During the trial I have permitted those jurors who wanted to to take notes. You may take your notes with you to the jury room and use them during your deliberations if you wish. As I told you at the beginning of the trial, your only intended to be an aid to your memory and should not take precedence over your own

independent recollection. Those jurors who have not taken notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror has taken notes, since the notes are only for the notetaker's own personal use in assisting his or her memory of the evidence.

At the end of your deliberations, please tear out from your notebooks any notes you have made and give them to your foreperson. The clerk will collect your notebooks and pencils when you return to the courtroom, and your notes will be destroyed immediately after the trial. Until then, no one, including myself, will look at them.



# Commentary and Sample Instruction

## Juror Submission of Written Questions

**Part 1**

Federal cases holding that trial the court did not err in permitting jurors to pose questions to witnesses include *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995), *United States v. Stierwalt*, 16 F.3d 282, 286 (8th Cir. 1994), *United States v. Cassiere*, 4 F.3d 1006, 1017-18 (1st Cir. 1993), *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986), *DeBenedetto v. Goodyear Tire and Rubber Co.*, 754 F.2d 512 (4th Cir. 1985), *United States v. Callahan*, supra, *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970), and *United States v. Witt*, 215 F.2d 580, 584 (2d Cir. 1954). In *Bush*, supra, and *United States v. Ajmal*, 67 F.3d 12, 14 (2d Cir. 1995), the Second Circuit noted that "the practice of allowing juror questioning of witnesses is well entrenched in the common law and in American jurisprudence," and that "courts of appeals have uniformly concluded that juror questioning is a permissible practice, the allowance of which is within a judge's discretion." In *United States v. Evans*, 542 F.2d 805, 812-13 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977), the court found no error in the trial judge's refusal to permit jurors to take notes or ask questions, concluding that these were "matters within the discretion of the trial court." 542 F.2d at 813. In *Witt*, Judge Jerome Frank concluded for a unanimous circuit panel, like Judge Clark in *Callahan*, that whether to allow jurors to question witnesses was within the trial court's discretion. 215 F.2d at 584. No federal cases hold to the contrary. However, one federal court has held that a trial judge abused his discretion in encouraging and permitting extensive juror questioning of witnesses over the defendant's objection. See *United States v. Ajmal*, supra, and infra, note 3.

Appellate courts in at least eighteen states have taken the view that whether to permit the submission of questions to witnesses by jurors is within the sound discretion of the court, and have permitted the practice. See e.g. *State v. Graves*, 907 P.2d 963 (Mont. 1995); *Commonwealth v. Urena*, 632 N.E.2d 1200 (Mass. 1994); *People v. Bacic*, 608 N.Y.S.2d 452 (N.Y.AppDiv. 1994); *People v. Stout*, 323 N.W.2d 532 (Mich.Ct.App. 1982); *People v. Heard*, 200 N.W.2d 73 (Mich. 1972); *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. 1993); *Sparks v. Daniels*, 343 S.W. 2d 661 (Mo.App. 1961); *State v. Jumpp*, 619 A.2d 602 (N.J. 1993); *Transit Authority of River City v. Montgomery*, 836 S.W.2d 413 (Ky. 1992); *Gurliacci v. Meyer*, 590 A.2d 914 (Conn. 1991); *State v. Barrett*, 297 S.E.2d 794 (S.C. 1982); *Cheeks v. State*, 361 N.E.2d 906 (Ind. 1977); *Scheel v. State*, 350 So.2d 1120 (Fla.App. 1977); *Ferrara v. State*, 101 So.2d 797 (Fla. 1958); *Nelson v. State*, 513 S.W.2d 496 (Ark. 1974); *State v. Sheppard*, 128 N.E.2d 471 (Ohio 1955); *State v. Crawford*, 104 N.W. 822 (Minn. 1905); *Story v. State*, 278 S.E.2d 97 (Ga. 1981); *Rudolph v. Iowa Methodist Medical Center, Inc.*, 293 N.W.2d 550 (Iowa 1980); and *State v. Rodriguez*, 762 P.2d 898 (N.M. 1988). Several of the states permitting the practice have suggested that allowing the jurors to question witnesses could prove to be beneficial. *People v. Stout*, 323 N.W.2d at 733 (juror's question aided the fact-finding process); *Transit Authority of River City v. Montgomery*, 836 S.W. 2d at 416

(the practice of a juror asking a question of a witness is encouraged if it is likely to aid the jury in understanding a material issue involved); *People v. Heard*, 200 N.W.2d at 188 (it would aid the fact-finding process if a juror were permitted to ask a question); and *Rudolph v. Iowa Methodist Medical Center, Inc.*, 293 N.W.2d at 556 (jurors should receive help in resolving unresolved questions that trouble them). The Court of Appeals of Virginia recently upheld a trial court's decision to allow a juror in a first-degree murder case to submit a written question that was posed to a defense witness. *Williams v. Commonwealth*, 24 Va. App. 577, 582, 484 S.E. 2d 153, 155 (1997). ("We do not discourage trial judges from exercising their discretion to permit juror questioning, provided they adopt procedures that assure control over the process and avoid the pitfalls that have potential for prejudice.") Similarly, several states have expresses concerns with the practice, but have not expressly forbidden it. See e.g. *Carter v. State*, 234 N.E.2d 650, 652 (Ind. 1968)(the practice of permitting jurors to ask questions of witnesses "should not be encouraged by the Trial Court, but it should not be forbidden by preliminary instruction."); *Commonwealth v. Urena*, 632 N.E.2d at 1206 ("the practice of allowing jurors to question witnesses has the potential for introducing prejudice, delay, and error into the trial, and should be utilized infrequently and with great caution."; *State v. Munoz*, 837 P.2d 636, 640 (Wash. 1992)("Potentially serious problems could arise from juror questions."); and *Cheeks v. State*, 361 N.E.2d at 910 ("this practice is not to be encouraged").

One state supreme court has held that it was reversible error to instruct a jury before trial that jurors were forbidden from asking questions of the witnesses, the parties or their counsel during trial because the trial judge was required to exercise sound discretion whether to permit such questions as might be propounded during trial. *Carter v. State*, 234 N.E.2d 650 (Ind. 1968). Several other state appellate courts have concluded that while the practice does not constitute error, it is not to be encouraged. See, e.g., *Lucas v. State*, 381 So.2d 140 (Miss. 1980); *Raynor v. State*, 447 S.W.2d 391, 393 (Tenn. Crim. App. 1969); *State v. Anderson*, 158 P.2d 127, 128-29 (Utah 1945). Only one state appears to prohibit the practice, *Hall v. State*, 244 S.E.2d 833 (Ga. 1978), while another has held that it is reversible error to instruct jurors that they are prohibited from asking questions during trial. *Carter*, 234 N.E.2d at 652.

See also Heuer & Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256, 259-62 (1996) [hereafter "Heuer & Penrod"]; Dann, "Learning Lessons and Speaking Rights": Creating Educated and Democratic Juries, 68 Ind. L.J. 1229, 1244-46, 1253-55, 1260 (1993); Harms, *The Questioning of Witnesses by Jurors* [hereafter, "Harms"], 27 Am. U.L. Rev. 127 (1977); *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 387 (1968).

## Part 2

In *State v. Martinez*, 326 P.2d 102 (Utah 1958), the trial judge invited and encouraged jurors to ask questions, "even inviting them, after retiring to deliberate, to

question a witness who had not been called by either prosecution or defense, resulting in an indiscriminate posing of more than 50 questions to such witnesses by various jurors." 326 P.2d at 103. While reversing the defendant's conviction, the Utah Supreme Court noted that it previously had "approved the principle that, within sound discretion, the trial court might permit jurors to ask an unsolicited question . . ." Id. In *Krause v. State*, 132 P.2d 179 (Okla. Crim. 1942), while recognizing the propriety of juror questions under some circumstances, the court found reversible error where a juror assumed the role of the prosecutor, asking prejudicial and argumentative questions reflecting that the juror had become prejudiced against the defendant. In *State v. Sickles*, 286 S.W. 432 (Mo. Ct. App. 1926), the trial court's failure to halt a juror who asked questions about the defendant's citizenship and national origin was found to constitute reversible error. See also *Bostic v. State*, 278 S.E.2d 97 (Ga. Ct. App. 1981)(error to permit two jurors to question seven-year old child molestation victim over defense counsel's objection).

In *United States v. Ajmal*, supra note 1, the Second Circuit concluded that where a trial judge actively invited juror questioning and asked jurors as each witness finished testifying whether the jurors had any questions, and jurors took "extensive advantage" of the opportunity to pose questions throughout the trial, as a matter of course and over defendant's objection, the trial court "abused its discretion in allowing such questioning as a matter of course." Id., 67 F.3d at 14. While the D.C. Jury Project does not necessarily recommend that trial judges affirmatively invite juror questioning such as was inferable from the trial judge's procedure in *Ajmal*, we nevertheless do not find the Second Circuit's opinion to be a barrier to this recommendation. The *Ajmal* holding is unpersuasive because it does not contain either the record below or any other authority to support untested and unproven assumptions — that when acting as "inquisitors" jurors will find themselves "removed from their appropriate role as neutral factfinders," that if allowed to formulate questions jurors may "prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts," that trials will be delayed, that "litigation strategies" will be undermined, and that "awkwardness" will be created for lawyers who wish to object to juror questions. Id. In fact, available research suggests that the *Ajmal* decision's assumptions are wrong on virtually every count; counsel are not reluctant to object to inappropriate juror questions, jurors allowed to ask questions do not become advocates rather than neutrals, and juror questions have no prejudicial effect on trials. Heuer & Penrod, at 260-61.

**Part 3**

The law in this jurisdiction is that a "criminal trial . . . is a quest for the truth." *Gregory v. United States*, 125 U.S. App. D.C. 140, 143, 369 F.2d 185, 188 (1966). The judicial process is not "an adversary game" but a "search for the truth." *Middleton v. United States*, 401 A.2d 109, 116, n.11 (D.C. 1979). See also *Washington v. United States*, 404 A.2d 197, 200 (D.C. 1979)("Criminal trials remain a search for the truth . . .", citing *United States v. Stevenson*, 138 U.S. App. D.C. 10, 13-14, 424 F.2d 923,

926-27 (1979)).

Thus, the Supreme Court has approved procedures designed to enhance the search for truth in criminal trials, while criticizing and limiting procedures with the contrary effect — and reversing convictions where the defendant was prejudiced by actions which inhibited the search for truth. See, e.g., *Williams v. Florida*, 399 U.S. 78, 82 ] (1970)(upholding constitutionality of an alibi notice rule as "designed to enhance the search for truth"); *Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (limiting an accused's standing to move to suppress evidence and criticizing the exclusionary rule as "deflect[ing]" the search for truth); *Estes v. Texas*, 381 U.S. 532, 551 (1965) (holding that trial publicity, failure of trial judge to control proceedings, and televising of hearing "inherently prevented a sober search for the truth"); *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) (reversing a conviction where prosecution obtained names of defendant's alibi witnesses but did not provide reciprocal discovery, and observing that the "[s]tate may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses").

Moreover, in deciding the appropriate remedy for various constitutional violations, the Court has repeatedly stated its belief that the harmless error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Indeed, several commentators have persuasively posited that, since the 1980's, the Court, in its harmless error analyses, has made clear that only when errors seriously undermine the central truthfinding function do they merit reversal on appeal. See Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 Yale L.J. 93, 107, 116 (1996); Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369 (1991); Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 126-42 (1988).

**Part 4**

Harms, supra, note 2, described in some detail how the opportunity of jurors to pose questions helps the jury fulfill its fact-finding function by permitting two-way communication which, in turn, is more accurate communication:

> The jury's basic function is to determine questions of fact arising in a trial. Jurors are required to fulfill this function within established trial procedure, which calls for the parties involved to marshal evidence in court while a jury listens. A major problem with this process is that it does not promote effective communication between attorneys who

present evidence and jurors who receive it. As a result, the jury is prevented from fulfilling its fact-finding function.

In ordinary conversation, messages travel in both directions. One person sends a message; the other is stimulated and responds. This dynamic quality comprises an essential element of accurate communication. It produces a mechanism for refining and clarifying each message to insure that a receiver has understood a sender's meaning. In common conversation, a party who fails to understand a message can always request clarification or repetition to obtain a reliable communication.

Conversely, a one-way communication process prohibits a receiver from responding to a sender, and invariably results in distortion of the principle [sic] message. A jury trial typifies one-way communication in operation because jurors ordinarily cannot respond to the stimuli produced by witnesses and attorneys. As a one-way communication process, a jury trial creates problems that do not arise under a two-way system. First, it is impossible to determine whether jurors understand the evidence. As long as they sit in silence, jurors, even though they may be confused, convey no indication that evidence is too complicated, or that it is being elicited too quickly, or that anything is wrong with the presentation. . . .

The communication process is vital and goes to the very heart of the jury system. If jurors fail to understand facts, or if they are confused or bewildered by evidence or procedure, they cannot be expected to pass judgment rationally. Consequently, their basic fact-finding function cannot always be fulfilled . . . . Harms, supra, note 2, at 129-132. (Emphasis added; citations omitted throughout quoted portions.)

**Part 5**

It hardly is surprising that it generally is thought that the opportunity for students in an educational environment to ask questions plays "a significant role in learning"; indeed, pedagogical literature places increased emphasis on the need for more student questioning to enhance the learning process. See Dillon, *The Multidisciplinary Study of Questioning*, 74 J. of Educ. Psychol. 147, 153 (1982).

Dr. Gordon I. Zimmerman, a Professor of Speech and Theater at the University of Nevada who has written and lectured extensively on speech communication and has served on the faculty of the National Judicial College for over twenty years, emphasizes in his presentations to new trial judges the importance of "two way communication" in the courtroom. Two-way communication, in his view, (1) imparts information more accurately, (2) encourages "receivers" of information to pay more attention to "senders," (3) enhances the chance that receivers of information will be able to clarify what they think they hear, and (4) increases the effort put forth by listeners to accurately understand what they hear because they know they may ask questions if they do not understand. See also Harms, supra, note 2.

**Part 6**

## Model Preliminary Instruction on Juror Questioning of Witnesses

Generally only the lawyers and I ask witnesses questions. If you are concerned about whether a witness will testify about a matter that seems important to you, usually, if you are patient, the matter will be covered by further questions asked by me or the lawyer.

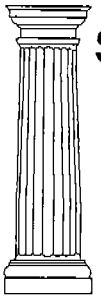
Occasionally, however, a juror feels that an important question has not been asked. Now I am not encouraging any of you to pose questions to the witnesses in this case. However, if it happens during trial that you feel an important question has not been asked, you may write out the question on a blank piece of paper from your notebook, raise your hand when the lawyers are finished with their examination of the witness but before the witness leaves the witness stand and pass the proposed question to the juror in seat number 1, who should then raise his or her hand when I will ask the clerk to hand me any question.. I then will decide if the question is a proper one after consulting with the lawyers. If it is, and if it relates to a factual matter about which the witness can testify, I will ask the witness the question.

If I do not ask the question, that means I have decided that it is not legally proper for some reason, just like I might sustain an objection to a question asked by a lawyer for the same reason. Thus, if I do not ask the question, the juror posing it should not be offended, and should not guess or speculate about what the answer might have been, nor may the juror consider the question or discuss it with other jurors during deliberations. If I decide that the question deals with a legal issue, I may decide to wait until my final instructions and answer it then if it is relevant to your consideration of the case.

No juror ever may pose questions orally to a witness at any time during the trial. Moreover, you may pose a question to a witness only to help you understand the testimony, to clarify the evidence or to seek information, not to discredit or argue with a witness. This is because you, as jurors, are impartial judges of the facts, not advocates for either side in this trial.

[*Model in-trial instruction where juror Submits legally improper question*]

Ladies and gentlemen, I have decided not to ask this witness a question written out by one of the jurors because the question is not legally proper. I do not know what the answer to the question would have been, and I must direct the juror who submitted the question not to guess or speculate about the answer because it is not relevant to your consideration of this case. Consequently, that juror must put the question out of his or her mind and may not consider it or discuss it with other jurors during deliberations.



# Sample Instruction

## Assisting the Jury at Impasse

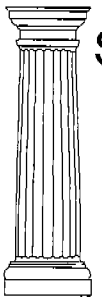
The court is pleased to respond to the note you recently shared about being [deadlocked, at an impasse...]. The court feels a responsibility to try to do whatever it can to assist you without in any way coercing you. I have thought about your communication, and I have talked about it with the attorneys. Consequently, I want you to know the following at this time.

First the court wants to compliment you on following so carefully the earlier instruction that whenever you send a note, you not mention how you are divided on an issue. I have no idea of the lines along which you are divided, what the numbering of that division might be. I am very thankful that I do not know that. I want to continue to be left without knowledge of that unless and until you reach a unanimous verdict on the remaining issue [issues, count or counts, etc.].

In addition, the court is not interested in forcing a decision. What I am interested in is offering help to you, if you think the court can be of help to you. And when I say, "if the court can be of help to you," I may enlist the assistance of attorneys for each side in trying to help you.

The goal here is not to force you to reach a verdict or to suggest in any way what your verdict should be. I am proposing that it may be helpful for you, in the privacy of the jury room, to identify areas of agreement and areas of disagreement that you are having. If you care to make such identification, you may then wish to discuss the law and the evidence as they relate to those areas of disagreement. If you still have disagreement, I invite you, but I do not require you, to identify for the court any questions about the evidence or the final instruction of law regarding which you would like assistance from the court or counsel. If you choose this option, then please list, in writing, in as clear and simple language as you can fashion, where further assistance might help you in bringing about a verdict.

In closing I want to repeat that the court does not wish or intend to force a verdict. I am merely trying to respond to your latest note about a deadlock. If you think this offer of assistance might help you, then it might be wise to give it a try. I am not asking you to stay in that jury room without limit. If you quickly conclude that this is not going to be of help, then you can write a note as soon as you like to say it will not be of help. If you think it will be of help, then tell me as soon as you care to, whether and how the court can be of help.



# Sample Instruction

## Post-Trial Juror Debriefing

Ladies and gentlemen, your service has ended. I would ask you to wait in the jury room for just a moment so that I can come in and personally thank you for the very fine service you provided in this case. My comments now are not directed at the verdict, but rather to the quality of your service in coming here and having served in the interest of justice and being the jury in this case.

We have a very unique system of justice as compared to systems throughout the rest of the world. Representatives come to this country on a daily basis, officials of foreign governments, judges, and others, to study how our system of justice works. In fact, many countries are attempting now to make revisions in the way their own systems work based on how our system operates, and, to many, the most wondrous part of it all is the fact that we are able to recruit members of the community to come forward and to serve in these sometimes very difficult, sometimes very complex and always serious and important matters. And the reason our system works is because people like yourselves are willing to come forward and dedicate yourself by spending the time and dedicating the energy that it takes to arrive at just and appropriate verdicts in cases that come before us all. Without you, the system would not be able to operate, and we are all indebted to you for that. So we thank you very much.

I'd ask you to retire now and just to wait for just one minute, and I will come in and say good-bye personally to each of you. You may be approached after you leave the courthouse or on the way out of the courthouse by media or other persons. You are free to speak or not to speak to anyone. It is totally up to you. If counsel in the case wish to talk to you, you are free to speak or not to speak to counsel who have represented the parties in this case. The choice is up to you. All right. You may retire at this time.

I find the verdict to be unanimous, and with that, ladies and gentlemen, your service is completed, and I want to thank you all on behalf of the entire court for your investment of time and great amount of attention and work that you did in this case. And before I send you back to the jury room to collect your belongings, I just want to mention a couple of things that the United States Supreme Court said, among many things, about the institution of the jury in this country in a case called *Powers versus Ohio*, back in 1991. And there the Court said at one point: "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." And elsewhere, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."

As you cast your votes perhaps many times in these recent days, you worked with your fellow citizens, strangers before you met, but with your fellow residents of

the District. In doing so, you were called upon to cast not a majority or plurality vote, which is what everyone is going to be called upon to render in a simple election for public office, but a unanimous vote on a very serious matter. To each of you I would say you should be proud of yourself for undertaking that very significant responsibility. After you retire the jury room, I will soon come back to the that jury room I estimate in less than two minutes to give you my personal thanks, entertain any comments, questions or concerns you may have, and receive any information you may want me to pass on to the court administration regarding jury service. That gathering is totally optional.

With the discharge of the jury also comes your freedom to talk about this case with anyone else, family members, friends, the attorneys. It is up to you individually whether you would like to talk about the case.

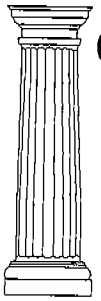
So, with that, I may see some or all of you in a couple of minutes. I have to attend to one narrow matter, and then I will be back there. At this point please go back with courtroom clerk/bailiff, and give any notes you have taken as well as the verdict form to courtroom clerk/bailiff.

All right, ladies and gentlemen. My comments now are directed not at the verdict, the outcome of this trial, but at your service. I want to thank you very much for your diligent service in this case. I know it's been inconvenient in more than one regard and that this has been a difficult case. They're all difficult, especially when there are liberty interests at stake.

However, let me say, as well, that in our system of justice, which is relatively unique — that is to say in most countries throughout the world, these types of decisions are made by executives of government, not by the members of the community that are affected by the issues that are brought to bear. In our system of government, people from the community are brought forward and are charged with this very difficult task of making decisions about people's credibility, about applying principles of law to complex factual situations. This is a heavy burden, but I'm very proud to say that the system works well because of people like yourselves who are ready, willing, and able to give up your time, to dedicate your energy, and to make a valiant effort to meet these challenges and to administer justice.

As I said to you at the beginning of this trial, there is no task that is higher or more important to the members of our community than to administer justice. I'm sure I speak on behalf of all the parties and certainly on behalf of the court. And I thank you for you diligent service in this case.

You may retire at this time, and before leaving the jury room, I'll come in to thank you individually before you are dismissed for the day.



# Council for Court Excellence
## Board of Directors

**1998 Council for Court Excellence Board of Directors**

| | |
|---|---|
| William F. McSweeny | *Chairman of the Board* |
| Kenneth W. Starr | *President* |
| Charles McC. Mathias | *President Emeritus* |
| James P. Mercurio | *Vice President* |
| William C.E. Robinson | *Secretary* |
| Allen Jones, Jr. | *Treasurer* |

* Executive Committee Member
** Ex Officio

Elliott B. Adler, Esquire
*Powell, Goldstein, Frazer & Murphy*

Robert I. Artisst, Sr., Ph.D.

Ronald D. Aucutt, Esquire
*Miller & Chevalier*

Mark L. Austrian, Esquire
*Collier, Shannon, Rill & Scott*

San Juan W. Barnes

Honorable James A. Belson
*District of Columbia Court of Appeals*

Caryl S. Bernstein, Esquire
*The Bernstein Law Firm*

James D. Berry, Jr.

William A. Bradford, Esquire
*Hogan & Hartson*

Jay Brozost, Esquire
*Lockheed Martin Corporation*

Edward J. Burger, Jr., M.D.
*Institute for Health Policy Analysis*

Honorable Arthur L. Burnett, Sr.
*Superior Court of the District of Columbia*

G. Brian Busey, Esquire
*Morrison & Foerster*

Victoria S. Cashman *

Bruce J. Casino, Esquire
*Baker & Hostetler LLP*

Paulette E. Chapman, Esquire
*Koonz, McKenney, Johnson, DePaolis & Lightfoot*

Commissioner Evelyn B. Coburn
*Superior Court of the District of Columbia*

Professor Sherman L. Cohn
*Georgetown University Law Center*

Edwin I. Colodny, Esquire
*Paul, Hastings, Janofsky & Walker*

Aubrey M. Daniel, III, Esquire
*Williams & Connolly*

Charles Davies, Esquire
*GEICO Corporation*

Frederick A. Douglas, Esquire
*Leftwich & Douglas*

Julian R. Dugas, Esquire

Ellen Watson Eager *

Frank J. Eisenhart, Esquire
*Dechert, Price & Rhoads*

Charles M. English, Jr., Esquire
*Ober, Kaler, Grimes & Shriver*

Honorable Jack Evans **
*Council of the District of Columbia*

Cary M. Feldman, Esquire *
*Schwalb, Donnenfeld & Silbert*

Honorable John M. Ferren, Esq. **
*D.C. Corporation Counsel*

T. Mark Flanagan, Jr., Esquire
*McKenna & Cuneo, L.L.P.*

J. Gordon Forester, Jr., Esquire *

J. Edward Fowler, Esquire *
*Holland & Knight*

Steven Gallagher, Esquire
*American Arbitration Association*

Geoffrey P. Gitner, Esquire
*Galland, Kharasch & Garfinkle, P.C.*

Stephen H. Glickman, Esquire
*Zuckerman, Spaeder, Goldstein, Taylor & Kolker*

Stephen W. Grafman, Esquire *
*Kirkpatrick & Lockhart, L.L.P.*

Leonard C. Greenebaum, Esquire
*Baker & Hostetler LLP*

Newman T. Halvorson, Jr., Esquire *
*Covington & Burling*

Honorable Eugene N. Hamilton **
Superior Court of the District of Columbia

Ulysses B. Hammond, Esquire **
*District of Columbia Courts*

Samuel F. Harahan
*Council for Court Excellence*

Michael D. Hays, Esquire
*Dow, Lohnes & Albertson*

James P. Hourihan, Esquire
*Hogan & Hartson*

James H. Hulme, Esquire
*Arent Fox Kintner Plotkin & Kahn*

A. Stephen Hut, Jr., Esquire
*Wilmer, Cutler & Pickering*

N. Richard Janis, Esquire
*Janis, Schuelke & Wechsler*

Ronald C. Jessamy, Esquire *
*Jessamy, Fort & Botts*

Allen Jones, Jr., Esquire *
*Wilkes, Artis, Hedrick & Lane*

Boisfeuillet Jones, Jr., Esquire
*The Washington Post*

Barbara K. Kagan, Esquire
*Steptoe & Johnson*

John K. Keane, Jr., Esquire *
*Washington Gas Light Company*

Anastasia D. Kelly, Esquire
*Fannie Mae*

Dennis S. Klein, Esquire
*Hughes Hubbard & Reed*

Maryanne Lavan, Esquire
*Lockheed Martin Corporation*

James F. Lee, Jr. Esquire
*Carr Goodson Lee & Warner*

Linda Lee *
*South Island Restaurant, Inc.*

David Lesser, Esquire *

Nancy Lesser, Esquire
*Williams & Connolly*

Victor E. Long, Esquire
*Regan, Halperin & Long*

Richard W. Luchs, Esquire
*Greenstein DeLorme & Luchs, P.C.*

Charles McC. Mathias, Esquire *
*First American Bankshares, Inc.*

Timothy J. May, Esquire *
*Patton Boggs, L.L.P.*

Victoria A. McEneney, Esquire
*McKenna & Cuneo, L.L.P.*

William F. McSweeny *

Carol D. Melamed, Esquire *
*The Washington Post*

James P. Mercurio, Esquire *
*Arent Fox Kintner Plotkin & Kahn*
Frederic R. Miller, CPA
*Coopers & Lybrand, L.L.P.*

John C. Millian, Esquire
*Gibson, Dunn & Crutcher*
Honorable Gregory E. Mize *
*Superior Court of the District of Columbia*

John C. Morland, Esquire *
*Freddie Mac*

Sanford M. Morse, Esquire
*The Bureau of National Affairs, Inc.*

James E. Nathanson, Esquire *

Richard B. Nettler, Esquire
*Robins, Kaplan, Miller & Ciresi*

John Jude O'Donnell, Esquire
*Thompson, O'Donnell, Markham, Norton & Hannon*

Jack H. Olender, Esquire
*Jack H. Olender & Associates, P.C.*

Rodney F. Page, Esquire
*Bryan Cave LLP*

Thomas C. Papson, Esquire
*McKenna & Cuneo, L.L.P.*

Paul D. Pearlstein, Esquire
*Paul D. Pearlstein & Associates*

Annie King Phillips

John E. Prominski, Jr., Esquire
*Wilkes, Artis, Hedrick & Lane*

Suzanne V. Richards, Esquire

William C. E. Robinson, Esquire *
*Travelers Property Casualty Corporation*

Honorable Judith W. Rogers
*U.S. Court of Appeals for the D.C. Circuit*

Honorable Vanessa Ruiz
*District of Columbia Court of Appeals*

John E. Scheuermann, Esquire

David E. Sellinger, Esquire *
*Tucker, Flyer & Lewis*

Theodore A. Shell, D.D.S.

Jeffrey M. Sherman, Esquire
*Morrison & Hecker, L.L.P.*

Marc B. Sherman, Esquire *
*KPMG Peat Marwick*

Maurice Simpkins
*The Ryland Group, Inc.*

Donald K. Smith, Esquire

Kenneth R. Sparks, Esquire
*Federal City Council*

Kenneth W. Starr, Esquire *
*Kirkland & Ellis*

Mrs. Potter Stewart

Michael J. Taylor
*RR Donnelley Financial*

Steven M. Umin, Esquire
*Williams & Connolly*

Honorable Ricardo M. Urbina *
*U.S. District Court for the District of Columbia*

Curtis E. von Kann, Esquire

Honorable Annice M. Wagner **
*District of Columbia Court of Appeals*

Michael L. Waldman, Esquire
*Fried, Frank, Harris, Shriver & Jacobson*

Jo-Ann Wallace, Esquire **
*Public Defender Service for D.C.*

Roger E. Warin, Esquire
*Steptoe & Johnson*

Honorable Walter E. Washington

Keith W. Watters, Esquire *
*Keith W. Watters & Associates*

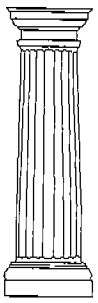
Honorable Paul R. Webber, III
*Superior Court of the District of Columbia*

Robert H. Wilbur
*Smith, Bucklin & Associates, Inc.*

Aurelius K. Wilson, Esquire
*Travelers Property Casualty Corp.*

Peter L. Winik, Esquire
*Latham & Watkins*

Warren Y. Zeger, Esquire
*COMSAT Corporation*



# Mission Statement

## District of Columbia Jury Project

In consideration of the importance of the right to a trial by jury in the United States, and in consideration of recent scrutiny and criticism of the jury trial system, the Council for Court Excellence, in cooperation with the leadership of the D.C. Superior Court and the U.S. District Court for D.C., seeks to evaluate and strengthen the institution of the jury in the District of Columbia.

To this end, a committee comprised of judges, court staff, interested members of the public, former jurors, attorneys, civic and business leaders, academicians, and others has been established under the auspices of the Council for Court Excellence. The Council is a nonprofit, non-partisan, civic organization which works to improve the administration of justice in the local and federal courts.

The overall goal of the Committee is to support citizens in their roles as jurors and to improve the effective administration of justice through juries. Specifically, the D.C. Jury Project Committee will:

1. Study and evaluate the utilization of juries and the conduct of jury trials in both the United States District Court for the District of Columbia and the Superior Court of the District of Columbia. This evaluation will include examinations of jury representativeness, jury selection, the trial process, juror comprehension of complex legal issues, and the jury service experience in general.

2. Publish and disseminate, by December 31, 1997, the District of Columbia Jury Study. The Study will contain findings and, where appropriate, recommendations of specific ways to enhance jury trials.

3. Encourage and support testing of proposed improvements through pilot projects in courtrooms of the D.C. Superior Court and the U.S. District Court for D.C.

4. Support implementation of recommendations contained in the D.C. Jury Study.

5. Suggest educational programs for the bench, the bar, jurors and the public concerning any prospective jury reforms.

6. Establish methods to periodically examine the utilization of any newly adopted rules and procedures to determine their effects, and suggest modifications when necessary

Adopted by the D.C. Jury Project Planning Committee September 26, 1996

***About the Council for Court Excellence***

The Council for Court Excellence, founded in 1982, is a nonprofit civic organization that works to improve the administration of justice in the local and federal courts, and related agencies, in the Washington metropolitan area and in the nation. The Council accomplishes its goals by: improving public understanding of the justice system; enhancing public support for the justice system; identifying and analyzing public policy issues; developing and advocating solutions; and facilitating the adoption of new technology and procedures.

Printed as a public service by The Bureau of National Affairs, Inc.

Council *for* Court Excellence
1150 Connecticut Avenue, N.W., Suite 620
Washington, D.C. 20036-4104
phone (202) 785-5917 fax (202) 785-5922
email jury@courtexcellence.org