Table 5

Perspectives in Litigation: Juror's Perspective and *Voir Dire*

Materials Index

Heather V. Menezes
McDowell and Osburn, P.A.
603-623-9300
hmenezes@mcdowell-osburn.com

Thanks for Sharing: Effective Ways to Get Jurors Talking in Voir Dire

The spectrum of success in voir dire goes from what I like to refer to as "cue the crickets" to what it is meant to be – voluntary disclosure by jurors of their life experiences that could affect how they decide the case. While attorneys strive for the latter, this is easier said than done. Our presentation includes a transcript from a voir dire in a legal malpractice case where the plaintiff's lawyer successfully got jurors talking about very personal life experiences. This article provides some tips to get jurors talking during voir dire using the transcript as a model.

Background of the Case

The plaintiff was an obstetrician and the defendant had been his attorney in a medical malpractice case. In the underlying medical malpractice case, the doctor spoke with his attorney and disclosed that he had four pages of detailed personal notes about the case that were not part of the patient's records. The doctor faxed the notes to his attorney that day. This all happened before the lawsuit in the underlying medical malpractice lawsuit had been filed. However, after suit was filed, the attorney failed to turn over the notes in response to a discovery request.

Nine months later, the attorney turned over the notes, but redacted the fax date on the notes and led plaintiff's counsel in the medical malpractice case to believe the doctor only just gave him the notes. At his deposition in the medical malpractice case, the doctor was extensively questioned by plaintiff's counsel about the late disclosed notes. Despite knowing the doctor had disclosed the documents early on, the attorney never said anything, instructed the doctor not to answer questions about when he turned over the notes and continued to lead

plaintiff's counsel to believe that the doctor had withheld the notes. Plaintiff's counsel became suspicious that the doctor was withholding further information. Plaintiff's counsel later accused the doctor of perjury, yet the attorney still said nothing about when the doctor had disclosed the notes to him.

Things only got worse from there. Even after the plaintiff filed a motion for sanctions, the attorney still did not reveal that the doctor had disclosed the notes to him pre-suit and that it was the attorney who had withheld the documents. The attorney continued to withhold this information in his objection and at the hearing on the sanctions motion.

Then, the insurance carrier advised the doctor that it reserved the right to deny coverage based on willful obstruction of discovery and perjury in his deposition. The doctor hired an attorney at his own cost on the coverage issue.

After the medical malpractice case was over, the doctor, now represented by the attorney he had privately hired in the medical malpractice case, filed a complaint against the doctor's former attorney for professional negligence. He claimed damages for emotional distress and loss of business reputation. The case proceeded to a jury trial.

During voir dire, the doctor's attorney focused on three issues: betrayal, humiliation and reliance on a professional. There are several things the plaintiff's counsel did that effectively got jurors talking during voir dire.

Tips for Effective Voir Dire

1. **Focus on the themes of the case.**

In voir dire, counsel questioned the jury on the main themes of the case. Focusing on these themes, counsel questioned whether jurors had any similar experiences. This is how

counsel identified those jurors who would be sympathic – or not – to his client. By focusing on broader themes, counsel was able to appeal to a wider range of conduct rather than just the conduct that was at issue in the case. Counsel also avoided the off limits area of asking jurors to place themselves in the plaintiff's shoes and instead had them identify experiences similar to that of the plaintiff. *See Forrestal v. Magendantz*, 848 F.2d 303, 308 (1st Cir. 1988)("There can be little doubt that suggesting to the jury that it put itself in the shoes of a plaintiff to determine damages is improper argument. This so-called "Golden Rule" argument has been universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.") (quotations omitted).

2. Research and know your jurors.

Researching potential jurors is of critical importance. This research provides the foundation for the exercise of challenges – both for cause and peremptory. In the voir dire example, the plaintiff's attorney called all the jurors by name. He knew their occupations. Knowing the jurors names and backgrounds helps establish rapport with the jury.

It is helpful to organize the jurors into a chart and know the backgrounds of the people that are seated in the jury box during voir dire. A sample jury chart is included in the materials. In New Hampshire, attorneys are provided with the questionnaires filled out by potential jurors. This only provides basic information. In addition, given the breadth of information on the internet, research of jurors' online presence is advised. Juror research on the internet can be quite time consuming and, as with anything, the time spent researching potential jurors on the internet should be proportionate to the size of the case. Further, counsel should be aware of the proper parameters of online juror research. *See, e.g.* ABA Comm. on Ethics and Prof'l

Responsibility, Formal Op. 466 (2014) (Lawyer Reviewing Juror's Internet Presence). Generally, sites that are publically viewed are permissible for the attorney to view. There is disagreement about whether sites such as LinkedIn that provide notification to the potential juror that an attorney is looking at him or her is considered prohibited contact. In Formal Opinion 466, the ABA Committee on Ethics and Professional Responsibility concluded, "The fact that a juror or a potential juror may become aware that a lawyer is reviewing his internet presence when a network setting notifies a juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)." However, courts and state bar opinions have found to the contrary. *See, e.g.*, Ass'n of the Bar of the City of New York, Formal Opinion 2012-2: Jury Research and Social Media ("The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer and even such minimal contact raises the specter of the improper influence and/or intimidation that the rules are intended to prevent.").

3. **Thank the jurors for disclosing information.**

Whether the information is good or bad, thanking the jurors will help to get other jurors talking and will help the attorney to establish rapport with the jurors.

4. **Remind jurors that there are no right or wrong answers.**

Telling the jury that there are no right or wrong answers will help put them at ease and make it more likely that the juror will be forthcoming. Explain that the goal of voir dire is disclosure of any relevant experience. For example, on page 8 of the transcript, after one prospective juror states, "Yah, that's kind of a little weird, I know, but just," the attorney states,

"No, that's what we are about, it is to self-disclose. And that takes some courage to that, I thank you for doing that."

5. Listen to the jurors' answers and follow up with questions.

One of the things the attorney in the legal malpractice case did well was to follow up with the jurors after their initial answers. In addition, the attorney paid attention to what the other jurors were doing and followed up with jurors who were probably nodding their heads or indicated in some way that they had something to say. For example, one juror shared that he had significant depression and in the context of this suffered professionally. In keeping with the theme of the trial and the damages sought, the attorney followed up with the following question: "How did it feel when it looked like you were losing everything, everything that you had worked all your life for?" The juror's response indicated that he would be favorable to serve on this jury: "I spent a lot of time in, you know, the fetal position in tears, to be quite honest with you, brother. I mean, I am a man; but I am a human being with a heart. And it was painful."

The attorney was also aware of what the other jurors were doing. For example, one follow up question after a juror had finished speaking was, "Thank you. Anyone else? Mr. Pindall, I sense maybe there might be something you want to share?" That juror then did go ahead and share an experience that was relevant to a betrayal on a professional level. Important too, but sometimes overlooked, is to pause after asking questions and give the jurors an opportunity to respond to a question.

6. Open up the question to the remaining jurors after a juror's disclosure.

After a juror discloses information, an attorney should ask whether anyone else feels this way. Once you get one juror talking, it is easier to get others talking. For example, after the juror

disclosed he had depression that impacted his career, the attorney thanked that juror and then asked, "Any of the rest of you. Mr. Wagnor, do you have anything?" After that juror spoke, the attorney invited other jurors to speak.

Similarly, at the end of voir dire the attorney reached out to any jurors he had not heard from: "And some of you, I haven't talked to: Mr. Martinez, and Mr. Mumby, and Mr. Lewis. Anything that you have to say about betrayal or humiliation?" Mr. Mumby spoke up. The attorney concluded by thanking the jurors for their openness and stated that he looked forward to working with them.

Conclusion

What truly worked well in this voir dire was that the attorney focused on overarching themes of his case that would broadly apply to several different types of experiences. The attorney obviously prepared, but was also able to be in the moment to observe and listen to the jurors' responses. He asked good follow up questions designed to probe further into the disclosed experience. By focusing on overarching themes of betrayal, humiliation and being let down by a professional, the attorney identified whether the juror could identify (or not) with his client. He did this without directly questioning whether the juror would be unable to award a large damages in a case, which is often done. This strategy apparently worked - the jury awarded the plaintiff $3.5 million.

Hillsborough Superior Court -- Southern District
30 Spring Street
Nashua, NH 03061
Juror Line 855-207-8888

SUMMONS for PETIT JURY SERVICE

TEST TEST TEST
45 CHENELL DR
CONCORD NH 033018541

REPORTING INFORMATION

REPORT DATE: 02/01/2016
TIME: 08:15 AM
REPORTING LOCATION:
Hillsborough Superior Court -- Southern District,
30 Spring Street
Nashua, NH 03061
CANDIDATE ID: 0001500998
PIN#: B5E6

You have been selected at random to serve as a petit juror at Hillsborough Superior Court -- Southern District, and are hereby summoned to appear for Jury Service at the Date, Time, and Location shown above. **You will be required to present picture identification when you arrive for jury service.** Your term of service will be approximately 4 to 7 weeks. Most jury trials last 1 to 5 days. You will be given more specific information about your dates of service on the first day you report.

The juror questionnaire can be found online at www.courts.state.nh.us/jury

YOU MUST GO ONLINE WITHIN 10 DAYS OF RECEIPT OF THIS SUMMONS TO COMPLETE THE JUROR QUESTIONNAIRE

Please have this summons with you when you go online, as you will need your Candidate ID and PIN Numbers shown in the box above. If you do not have internet access, call the Jury Center at 1-855-207-8888 for further information.

Requests to be Excused or Rescheduled: Requests should be made through the court's jury website www.courts.state.nh.us/jury. If you are unable to make your request online, please call the Jury Center at 1-855-207-8888. **All requests for excusal or to be rescheduled to another date must be made at least 10 working days BEFORE your Report Date.** You will be notified if your request is granted, denied or if your service has been rescheduled.

If you have any questions about jury service, including reasons for excusal, pay, your report status, directions to the courthouse and information about parking, please go the court's website www.courts.state.nh.us/jury or call the Jury Center at 1-855-207-8888.

Please wear appropriate clothing when you appear for jury service. Shorts, shirts with slogans, tank tops and flip-flops are NOT considered appropriate.

Please be advised that it is a Class B felony to carry a firearm or other deadly weapon as defined in RSA 625:11, V in a courtroom or area used by a court.

PLEASE BRING THIS SUMMONS WITH YOU WHEN YOU REPORT FOR JURY SERVICE

Do not detach badge prior to check-in

JUROR BADGE

NEW HAMPSHIRE SUPERIOR COURT
JURY CENTER
30 SPRING STREET, SUITE 105
NASHUA, NEW HAMPSHIRE 03060

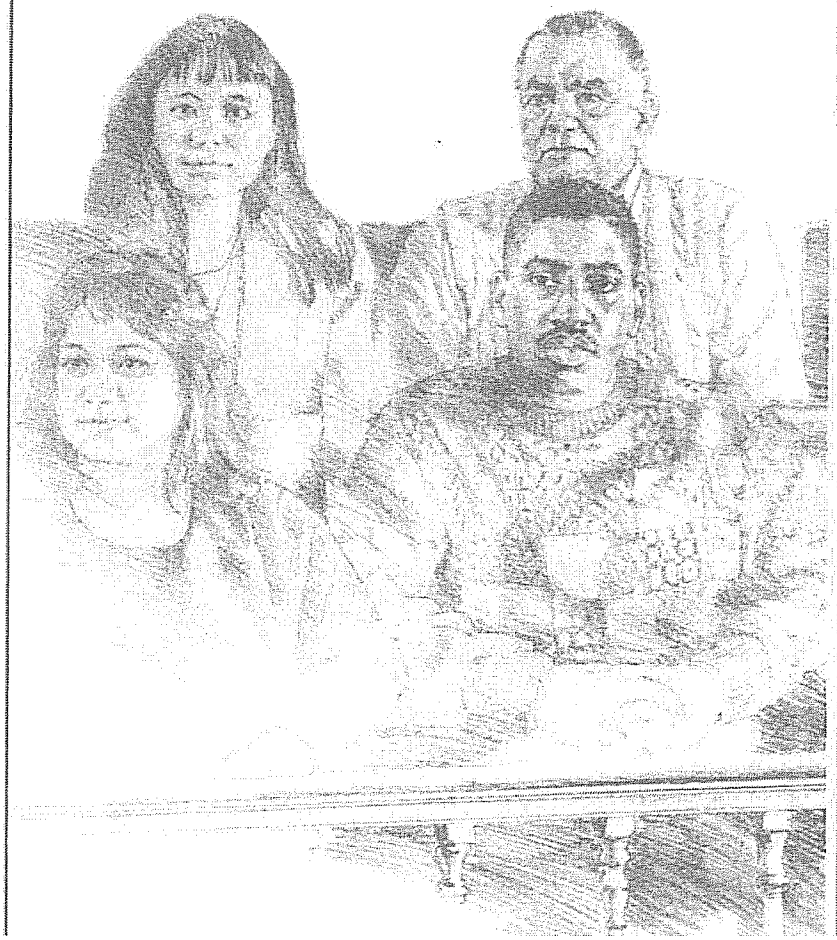
TEST TEST TEST
45 CHENELL DR
CONCORD NH 033018541

IMPORTANT: JURY SUMMONS ENCLOSED

IMMEDIATE ATTENTION IS REQUIRED

NEW HAMPSHIRE
JUDICIAL BRANCH

Juror's HANDBOOK



NEW HAMPSHIRE SUPERIOR COURT

TRIAL BY JURY - THE NOBLEST INSTITUTION

CONTENTS

The Jury represents the common sense of the common man.
A. Lincoln

GREETING TO JURORS

Dear Juror:

The Superior Court is pleased to welcome you to your service as a juror in the New Hampshire Superior Court system and trust that you will find this experience both rewarding and interesting.

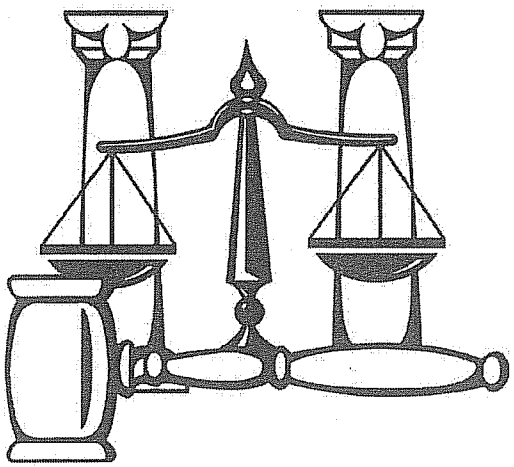
As a citizen of New Hampshire, you have certain rights and responsibilities including the duty imposed by both the Constitution of the United States and the State of New Hampshire to serve as a partner in the administration of justice. This is an awesome responsibility and a vital public service which you should assume with pride. While we all recognize that jury service places a significant burden on you by interrupting your personal and business lives and imposing substantial financial hardship on some, it also represents a unique privilege we have as citizens. Jury service not only represents a responsibility but also a unique opportunity to participate in the justice system, to learn firsthand how it works, and to help us make it work better.

This handbook outlines some of the procedures that are followed in the courtroom and answers some commonly asked questions. Please take the time to read it carefully. There is a glossary in the back that defines commonly used legal terms. There is also a short description of the New Hampshire court system. If you have any questions after reading this handbook, court personnel will be pleased to answer them.

You may be assured that the judges and court staff will make certain you are not inconvenienced any more than necessary consistent with your duties as jurors. On behalf of the judges and staff at the Superior Court, thank you for your commitment and effort in representing the citizens of New Hampshire.

THE PURPOSE OF A JURY

The jury is one of the most critical parts of the American legal system. Both the United States Constitution and the New Hampshire Constitution guarantee everyone the right to a jury trial. Our justice system depends on jurors like you to serve and make critical decisions about their cases.



YOUR JOB AS A JUROR

In your role as a juror, you will be called upon to decide important issues that affect the lives of people in your community. The promise you make in the juror's oath to help decide a case fairly and impartially is one that must not be taken lightly.

Jury service is an essential obligation of citizens in a democratic society. As a citizen in your community, you are being called upon to resolve conflicts between people in civil cases and determine guilt or innocence in criminal cases. Your task is critical to a determination of what is justice.

Your specific job as a juror is to sit through the trial and to decide what the facts are based upon the evidence. Then you must make a final decision based on those facts and your application of the law, which the judge explains. The judge will tell you what is and what is not evidence in each case. The judge will also instruct you as to the law that applies in the case. After you decide the facts, based on the evidence, you apply those facts to the law that the judge gives you to determine whether the party who has the burden of proving the case (generally, the State in a criminal case and the plaintiff in a civil case) has met that burden.

There are a few things you must keep in mind as you serve as a juror. The most important is the Golden Rule for Jurors: treat everyone in the courthouse—particularly, the parties and the witnesses—the way you would like to be treated if you were appearing in court. If you were accused of a crime, involved in a civil case, or called as a witness, you would want the jury to treat you with respect and dignity regardless of the disposition or outcome of the case.

You should keep an open mind about the evidence in the cases you will hear. You should not form any preconceived ideas about the case or be influenced by anything other than the evidence produced at trial. This is what it means to be fair. Listen and observe carefully to everything that you hear and see. You will need to determine who is telling the truth when witnesses are asked questions. You must then listen carefully to your fellow jurors when you discuss the case privately. Everyone on the jury has a right to express his or her opinion and thoughts about the case. However, in the end, you should make up your own mind about the case and not be afraid to stand by your opinion if you think you are right.

It is also very important that you listen to what the judge says about bias and prejudice. You should not talk about the case with anyone until the judge tells the entire jury to discuss the case privately and reach a decision. You should not read or listen to any news about the case from the radio, television or newspaper. You should make sure to tell the judge immediately if you think for any reason that you cannot decide the case fairly and impartially—that is if you discover some personal connection to the case or if you feel you cannot be fair when making a decision.

This may seem like too many things to remember, but they will all become much clearer as you get familiar with the job of being a juror. There will be many people in the courtroom who will be depending on you and your good sense of fairness to help decide their case.

JUROR ETIQUETTE

Here are just a few things to keep in mind when you begin your jury service:

- You should dress appropriately when coming to court. Appropriate attire consists of clothing that you would wear to a business meeting. You may not wear shorts, tank tops, beach shoes or t-shirts, or any clothing with offensive language or logos. Your clothes should be neat, clean and comfortable. As a juror, you are representing the court system and should dress consistent with the dignity of court proceedings. If you appear in court wearing unacceptable clothing, you may be ordered by the judge to go home and return to the courthouse properly attired.

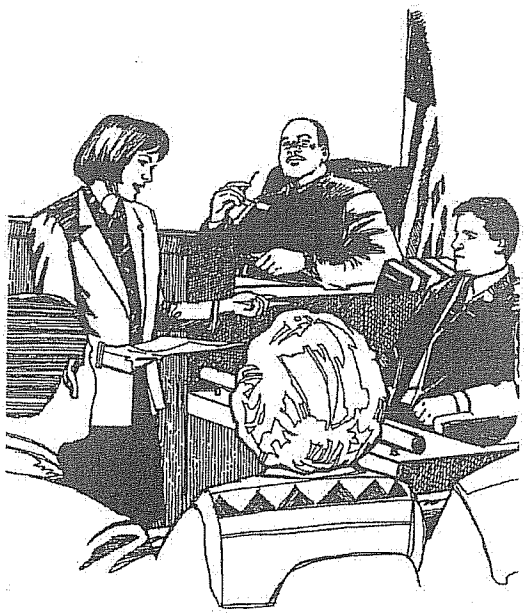
- Do not chew gum or eat snacks during the proceedings. You will be given breaks during the proceedings when you can have a snack or something to drink.

- It is important to be on time when reporting for jury duty. The case cannot begin until all the jurors are ready. If you think you may be delayed for some reason, you should call the clerk's office immediately.

- Remember not to talk to anyone about the case before the judge instructs you to. This means family members, friends or other jurors. If anyone tries to contact you or influence your decision, you should tell the judge or a court officer immediately.

• Everyone at the Superior Court will strive to treat all people fairly and with equal respect. Everyone entering a courthouse must be treated equally regardless of gender, race, religion, ethnic background, disability, sexual orientation, age, or ability to speak English. You should not make assumptions about a person because of any of these factors and should avoid remarks that may in any way be construed as discriminatory.

• FINALLY, remember to be fair and keep an open mind about what you hear and see during the proceedings. Set aside your personal feelings. By remaining impartial, you will be able to reach the best decision in this case for the benefit of your fellow citizens.



FREQUENTY ASKED QUESTIONS BY JURORS

What are the qualifications of a juror?

According to the law, a juror must be 18 years old, a citizen of the United States, a resident of the judicial district, and be able to read, speak and understand the English language. A juror must not have any physical or mental disability that would prevent him or her from performing satisfactory jury duty. A juror convicted of any felony that has not been annulled is not eligible to serve. Anyone summoned to jury duty who is seventy (70) years or older can be excused on request but is otherwise eligible to serve.

How are juries selected?

In New Hampshire, people who are called to serve as jurors are randomly selected from lists provided by the Division of Motor Vehicles and the town or city voter lists. These lists are provided to the Clerks of the Superior Court, who then send out a summons to each juror selected. Juries are drawn to represent a cross section of the community. According to the law, very few people are exempt from jury service. You do not need to have any special skills, education, job experience or legal knowledge to be a juror.

How can I be excused from jury service?

According to the law, no one is excused from jury service on a permanent basis. If you have a problem with serving at a particular time, it may be possible for the judge to defer your jury service to another month. You should speak to the judge about your problem. Only a judge can make a decision about your jury service.

What is the jury summons I received in the mail?

This is the official notice that you receive from the Court that requires you to be a juror. You should read this notice carefully

and follow the instructions on the summons. If you have questions, you should call the telephone number on the instructions.

How long will I have to serve as a juror?

According to the law, a juror can be required to serve no more than 30 days unless the juror is sitting on an ongoing trial, in which event the juror must serve until the end of the trial.

How much will I get paid to be a juror?

The state legislature has provided that jurors are paid $10.00 for each half-day of service or $20.00 for a full day. Mileage is paid only if the juror lives in a different town from where the courthouse is located. The mileage rate is 20¢ per mile. The Clerk of Court will keep track of how many days you have served. If you have any questions about payment, you should ask someone in the Clerk's office.

What will happen to my job during my service as a juror?

The law requires that your employer not hold the fact that you are called as a juror against you. Your employer could be found guilty of contempt of court if your position of employment is affected or you are threatened not to attend jury service.

What happens if I don't show up for jury service?

If you do not obey the summons to jury duty and other rules of the court during your term of service, you will be subject to contempt of court proceedings. You could also be subject to criminal prosecution that could result in a misdemeanor charge (punishable by up to a $2,000 fine and 12 months in the House of Corrections).

What is an alternate juror?

A jury normally consists of 12 jurors. In some cases, additional jurors may be selected to serve as alternates. The alternate jurors sit with the jury during the trial and can take the place of any juror who becomes ill or must be excused before the trial ends.

What is a foreperson?

Before the judge tells the jury to discuss and decide the case privately, the judge will either appoint a foreperson or ask the jury to select one. The foreperson should keep order during the deliberations and make sure that all jurors have a chance to freely express their views.

Can I take notes or ask questions during the case?

This will be up to the judge in each case. If a judge allows jurors to ask questions or take notes, the judge will explain the procedures. You should follow these procedures carefully.

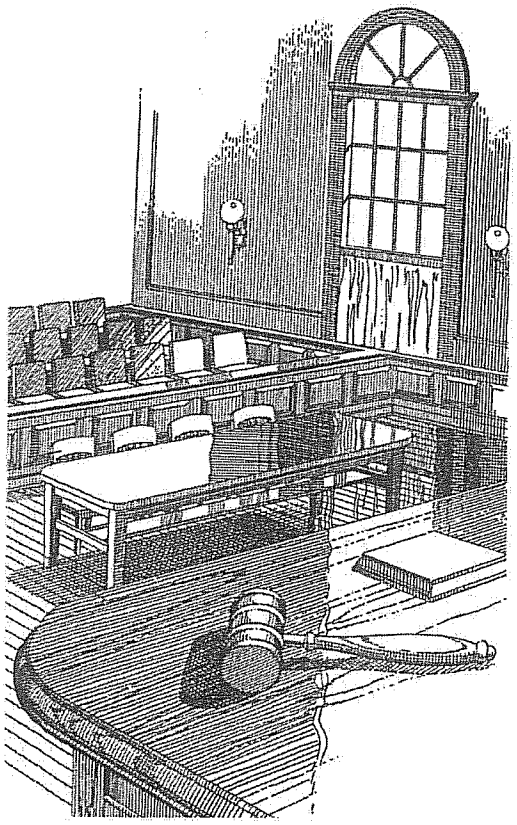
Why are there so many delays during the trial?

Many times during a trial, jurors are asked to wait while the judge reviews legal matters with the attorneys trying the case. While it may seem like a lot of time is being wasted while the attorneys and judges are talking privately, you should understand that legal issues are frequently complex and may require large blocks of time to resolve. Once these issues are resolved, however, the result is that the time of the trial is reduced and questions and evidence can move along more quickly. Rest assured that everyone connected with a trial wants the process to conclude as promptly as possible with the assurance that all parties are given an opportunity to present their case.

When can I talk about a case in which I participated as a juror?

Once a jury has returned the verdict in a case, the jurors are permitted to discuss the trial, verdict and deliberations with anyone they wish, other than the parties and their attorneys. No attorney, party involved in the case, or any person acting for them, is permitted to interview, examine or question any juror or member of the juror's family for a period of 30 days after jurors have completed their jury service. After that time has passed, communication is permitted. How-

ever, jurors are not required to discuss any matter concerning their jury service with anyone unless they wish to do so. Jurors should let the court know if they are contacted within the 30 day period or if anyone has asked them questions or made comments that were calculated to embarrass or harass the juror or to influence his or her actions in future jury service.



DESCRIPTION OF TRIAL PROCESS

You will be informed of when the trial is to start when you have been selected to serve on a jury. All trials follow an established order of events and the role of the jury is essentially the same in all of them.

The party that initiated the action—the plaintiff in a civil case or the State in a criminal case—will present its side first. The defense may then present its evidence. Then, sometimes the plaintiff or State will give additional evidence as rebuttal. The defense may then do the same. This order of presentation is one reason the jurors are told to form no opinions until the evidence is completed.

VIEW

A view is an opportunity for the jury to go to the scene of an accident or alleged crime. In the event a view is to be taken by the jury, the attorneys may make a pre-view statement and explain what the jury will see on the view. What the jury sees on a view is evidence and an aid in understanding the later testimony of witnesses.

OPENING STATEMENTS

After the view, if there is one, the attorney for the plaintiff (the party who brought the action) or the attorney for the State (in a criminal case) makes an opening statement telling the jury what the attorney expects to prove in the case. These statements are not evidence; they are merely a presentation of what the attorneys intend to prove during the trial. The attorney for the defendant may also make an opening statement either after the plaintiff/State opens its case or after the plaintiff/State has completed its case.

EVIDENCE

The evidence is the sworn testimony of witnesses or physical exhibits such as documents, records, weapons or various other articles and what you see on a view.

Most testimony will be given by witnesses who answer questions from the attorneys. The attorney calling a witness will question the witness first, in what is called direct examination. The opposing attorney may then question the witness in what is called cross-examination.

There are many complex rules about presenting or admitting evidence. These rules are applied in each case by the judge. It is the judge's responsibility to make all decisions about what testimony, documents or other matters the jury can legally consider as evidence. The jury must never consider any matter that has been ruled inadmissible by the judge.

OBJECTIONS

Occasionally one attorney may object to an action or question by the opposing attorney or to a statement by a witness. The judge will rule on the objection, and the jurors must abide by the ruling. If the judge sustains the objection, the jury may be told to disregard the statement of the witness. In that case, the statement must not be considered as evidence and jurors must not use it in reaching their decision in the case. If the objection is overruled, the case continues.

Sometimes the judge will rule on the objection without comment by the attorneys. Sometimes the attorneys and the judge will discuss it in front of the jury. On other occasions, the discussion will be at the judge's bench out of the hearing of the jury. In some instances, the jury will be asked to go temporarily to the jury room to allow full discussion in the courtroom on questions of law or procedure, which must be decided by the judge.

Understandably, jurors can get frustrated by frequent or long waiting periods in the jury room. All that can be asked of jurors is that they be patient because important issues of law or procedure are being resolved that are necessary to the proper presentation of evidence to the jury.

FINAL ARGUMENTS

When all parties have finished presenting their evidence, the attorneys will make their final arguments to the jury. The defendant argues first; then the plaintiff or State argues. These arguments are not evidence; they are merely the attorneys' comments on the evidence that has been presented and how it fits with their theory of the case.

JURY INSTRUCTIONS

After all of the evidence has been presented and either directly before or after the attorneys give their final arguments, the judge gives instructions to the jury. The instructions by the judge are extremely important because it is a statement of the law as it applies to that particular case. The jury must apply the judge's instructions on the law to the facts of the case as they determine them.

DELIBERATIONS

The case is now in the hands of the jury. The jury must now try to reach a verdict in the case. Even at this point, jurors should keep an open mind and respectfully consider the opinions of others. The free exchange of all ideas among the jurors is essential. If at first the jury is not unanimous, it must continue to discuss the case and try to reach a verdict. A juror should never be afraid to change his or her mind when it seems reasonable to do so. A juror should not change his or her mind, however, unless convinced that the change should be made. To reach a verdict, the jurors must weigh and consider the evidence that was presented according to the judge's instructions on the applicable law. No other matters should be considered. Jurors must not be swayed by prejudice or sympathy.

VERDICT

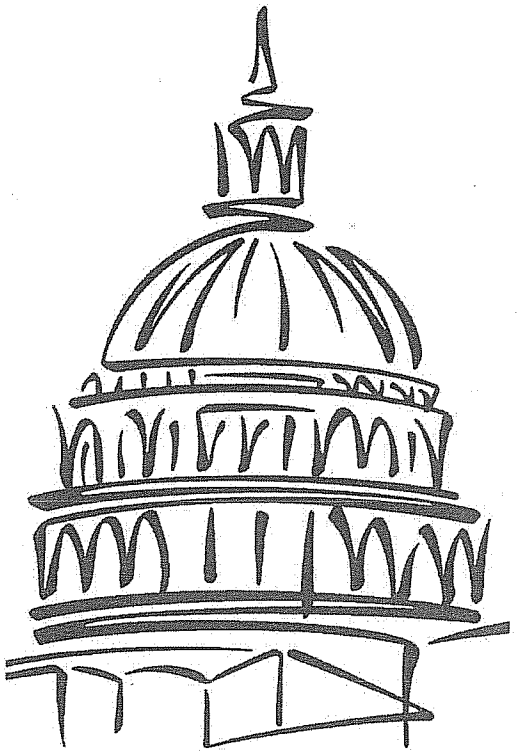
The jury must reach the final verdict by reason and careful deliberation. In all cases, the verdict must be unanimous—that is, all the jurors must agree with the verdict.

When a verdict has been reached in a criminal case, the court officer will communicate with the judge and court will be called back into session. The jury will return to the courtroom and in the presence of the judge, the parties and their respective attorneys, the verdict will be announced aloud in

open court by the foreperson. At this point, the jurors may be asked individually whether they agree with the verdict.

In a civil case, the verdict will be delivered according to the judge's instructions.

After the verdict, the jury will be discharged to return to their homes and personal affairs until they are next needed in court.



GLOSSARY OF COMMON TERMS

APPEAL – a complaint to a higher court that an injustice was done or that a mistake was made in a trial. The higher court is asked to correct or reverse the decision of the trial court by reviewing the lower court record.

APPROACH THE BENCH – a request by the judge or attorneys for a private discussion with the judge at the bench about an issue of law or procedure, which is necessary to the proper presentation of evidence to the jury.

CIVIL CASE – a lawsuit between persons in which the plaintiff usually seeks money damages.

COUNSEL – another word for attorney, sometimes used to refer to all attorneys collectively.

COURT – often used in place of "judge" since a judge acts for the court system and not as an individual.

COURT SECURITY OFFICER (BAILIFF) – court security officers (bailiffs) will be assigned to assist jurors during the trial and to protect the jury from outside influences. Any question that may arise during the trial should be addressed to the bailiff who will take it to the judge.

CROSS-EXAMINATION – the questioning of a witness by an attorney other than the one who called the witness to testify.

DEFENDANT – person against whom a suit is brought in a civil case or a person charged with a crime in a criminal case.

DELIBERATE – to weigh, consider and discuss the evidence given in a trial in order to reach a verdict.

DEPOSITION – the sworn testimony of a witness taken outside of the court, written down and used during the trial. A deposition is often used when a witness is not able to be in court personally.

DIRECT EXAMINATION – the questioning of a witness by the attorney for the party who called the witness to testify.

EVIDENCE – the sworn testimony of witnesses, physical exhibits, a view of the scene or other matters allowed in the trial for the jury to consider.

FELONY – a criminal case brought by the State of New Hampshire for which the law provides for a maximum punishment of one year or more in prison.

MISDEMEANOR – a criminal case brought by the State of New Hampshire for which the maximum punishment is a fine of not more than $2,000 and/or not more than one year in the House of Corrections.

MOTION TO STRIKE – a formal request to the judge not to allow testimony to be considered as evidence after it has been spoken by a witness. The judge will instruct the jury to disregard what was said if the motion is granted.

OBJECTION OVERRULED – the judge denies an objection. The matter offered as evidence becomes evidence.

OBJECTION SUSTAINED – the judge upholds an objection and the matter offered as evidence is not allowed in the case.

PARTY – the State of New Hampshire in a criminal case, the plaintiff in a civil case and the defendant in a criminal or civil case.

PLAINTIFF – person or group seeking damages in a civil case.

PROSECUTOR – person who brings charges on behalf of the State in a criminal case – usually a county attorney or an attorney from the attorney general's office.

SEQUESTER – to keep members of the jury together at all times and apart from their normal contacts so that there is no chance they will see or hear anything about the case until they have reached a verdict.

TESTIMONY – evidence given by a witness under oath.

VERDICT – the formal decision of a jury on the questions given to the jury by the judge. Everyone on the jury must agree to the verdict.

WITNESS – a person who gives testimony during a case. Usually this is a person who tells what he or she has seen, heard or knows about the case.

DESCRIPTION OF NEW HAMPSHIRE COURT SYSTEM

The New Hampshire court system consists of the Supreme Court, the Superior Court, the District Court and the Probate Court.

The SUPREME COURT, the State's highest court, consists of a chief justice and four associate justices, each of whom is appointed by the Governor and Council. For the most part, it hears appeals of cases that have been decided by the Superior, District or Probate courts. No evidence is presented during an appeal; the attorneys file written documents called briefs that outline their position as to why they think the decision in the lower court should be changed or remain the same. They have a limited amount of time to argue in person before the Supreme Court to summarize their argument. If the Supreme Court overrules the decision of the lower court, it is done only on issues of law. The Supreme Court does not review the jury's decision on the facts.

The Supreme Court also has overall administrative control of the court system and makes rules for all courts that affect how the courts operate.

The SUPERIOR COURT is the trial court of general jurisdiction and consists of a chief justice and twenty-eight associate justices, each of whom is appointed by the Governor and Council. It hears civil cases, divorce proceedings, equity matters and all felony criminal cases and provides jury trials in appropriate cases.

There are eleven Superior Courthouses, two in Hillsborough County (Manchester and Nashua) and one located at the county seat in the remaining nine counties.

The DISTRICT COURTS hear misdemeanor criminal cases, violations and civil cases where the amount being requested is not more than $25,000.00. It also hears juvenile cases, small claims and landlord and tenant actions.

District Courts in the larger cities have full-time judges while the smaller communities have part-time judges, all appointed by the Governor and Council.

The COURTS OF PROBATE handle the probate of wills, the settlement of estates, adoptions, guardianships, commitment of the mentally ill, name changes, and termination of parental rights. There is a Probate Court located in each county. There are ten probate judges who are likewise appointed by the Governor and Council.

JURORS OATH

The following oath shall be administered to jurors in criminal cases:

You solemnly swear or affirm that you will carefully consider the evidence and the law presented to you in this case and that you will deliver a fair and true verdict as to the charge or charges against the defendant. So help you God.

The following oath shall be administered to jurors in civil cases:

You swear that, in all cases between party and party that shall be committed to you, you will give a true verdict, according to law and evidence given you. So help you God.

JURY DUTY: Tips for Citizens

- When you receive your notice for jury duty, read it carefully and follow the instructions for filling out and returning the questionnaire and reporting to court. Jury duty is an important civic responsibility and among the highest duties a citizen can perform in a democracy. Your voice as a juror is needed to ensure fairness and justice in our community.

- Be sure to take the notice seriously. If you fail to complete the questionnaire or appear for jury duty, the Court can order you to appear and show cause for your failure to do so. If you cannot explain to the judge why you didn't report for jury duty, you may be sanctioned by the court by a fine or incarceration.

- No one eligible for jury service is excused from serving except in cases of undue hardship, extreme inconvenience or public necessity. All requests to be excused or deferred to another date must be presented to and acted upon by a Presiding Judge and must be accompanied by the completed juror questionnaire. Requests to be excused for medical reasons must be accompanied by a letter from the juror's attending physician.

- As a juror you should be prepared to spend time waiting. Judges conduct many other court proceedings that do not need jurors, but the judge may need you at a moment's notice. Knowing that jurors are in the courthouse and ready to hear a case often encourages parties to resolve a case without going to trial.

- Don't take it personally if you are not selected as a juror for a trial. Voir dire (the process of selecting a jury) is designed to examine a large number of potential jurors and then to select a smaller number to serve on a trial. Lawyers have many reasons for not choosing a person for a jury. Not being selected does not imply that you lack ability or honesty. You may be selected later for a different trial.

- Bring things to do while you are waiting. Books, magazines, newspapers, laptops, cards, and other quiet activities are permitted in the jury assembly area.

- It is the law that you cannot be discriminated against by your employer for taking time out of work to serve jury duty. Certificates of proof of attendance are available upon request from the clerk's office. Ask the clerk's office to help you if your employer is uncooperative.

Visit the court's website
www.courts.state.nh.us

FINAL SCRIPT

	NH JURY ORIENTATION VIDEO **INTRODUCTION**
OPEN WITH JUROR COMMENT ON THEIR EXPERIENCE	
BEGIN NADEAU CJ	Welcome to jury service. My name is Tina Nadeau. I am the Chief Justice of the New Hampshire Superior Court. On behalf of the judges and staff of the superior courts throughout the state, I want to thank you for coming here today to take part in one of the most important duties we have as citizens. The jury system is essential to our democratic form of government. It is remarkable

	when you think about it that, under our system of government, some of the most serious decisions concerning individuals are made by a panel of their fellow citizens -- a jury. People like you, representing a cross section of the community, determine the facts in a case, apply the law and render a verdict. That is a solemn duty and one that I know you will carry out faithfully.
END NADEAU JUROR CLIP ON DUTY AND RESPONSIBILITY BEGIN NARRATOR	The right to a trial by a jury of your peers is written into both the United States Constitution and the New Hampshire Constitution. For more than 200

	years, citizens have demonstrated that they are willing to take on the hard work and commitment required to be a fair and impartial juror. As a result, citizens are confident they can come here to the courthouse and be treated fairly and justly, without prejudice or bias. They trust you, as jurors, to treat them impartially, just as you would want to be treated if you were involved in a trial. They are willing to put their future in your hands, in the hands of a jury of their peers, because they believe that you will be fair and just.
END NARRATOR	
JUROR CLIP/REACT TO SUMMONS AND CONCERN	

ABOUT INCONVENIENCE BEGIN DELKER At 4:34 B Roll of jury	**HOW JURORS ARE SELECTED** I know that jury duty may seem like an inconvenience and that it disrupts your day to day routine taking you away from your family and your jobs We will do our best to make this go as smoothly as possible for you and to avoid as many delays as we can. You may be wondering how you were chosen for jury service. In New Hampshire, jurors are selected randomly from lists of registered voters and people who have a driver's license. The names are drawn at random so that our juries will represent a very diverse group of citizens and

B ROLL OF BENCH CONFERENCE	a true cross section of the community. That is the strength of the jury system—citizens from all walks of life whose solemn duty is to be fair and impartial, make decisions based on facts, without prejudice or bias toward any person, or issue, involved in a trial. You don't have to be an expert to be a juror. You should draw on your common sense and life experience. We know that you have opinions on various subjects, everyone does. But when you are serving as a juror, you need to put those opinions aside and look at the facts in the case, and the law, and then make a decision. You are not here to

	promote any social causes or to express your disagreement with certain laws. If you have concerns about this, or if you feel so strongly about certain crimes that you think you cannot sit as a juror, you will have an opportunity to talk to the judge about that during jury selection.
END DELKER	
JUROR CLIP—CAN YOU BE FAIR?	.
	IN THE COURTROOM
BEGIN NARRATOR	In the courtroom, the judge in the case acts like a kind of referee. The judge will provide instructions on the law that applies to the case and the judge will rule when the attorneys in the case object to any evidence that
B ROLL COURTROOM SCENE BAILIFF	

ETC @26:43 @27:50 END NARRATOR	is being presented at the trial. The clerk of court and his or her deputies attend to all the administrative functions involved in the court's business. Proceedings in every jury trial are recorded by the court monitor who sits in front of the judge's bench. There are also security officers in the courtroom. Their function as you probably already know, is to assist the judge in maintaining order in the court, to take care of the needs of the jury, and to maintain security throughout the court's portion of the courthouse. Do not hesitate to ask them for help.

BEGIN WAGELING J. B ROLL EVIDENCE OR COURTROOM ACTIVITY	**JUROR'S RESPONSIBILITIES** A trial is a search for the truth. The parties have entrusted you with the responsibility of determining the facts and rendering a fair and just verdict, and it is therefore critical that you pay careful attention to all the evidence as it is presented. Your job is to decide the facts of the case, that is, the who, what, when, where, how and why of what did or did not happen. You will be listening to the witnesses in the case and you will be seeing certain documents, records, objects or pictures which will be marked into evidence. It is important to remember that jurors are not allowed to

END WAGELING JUROR INTERVIEW CLIP	discuss the case while the case is going on, either among themselves or with others such as friends and relatives. The reason for this rule is that, as a case is being tried, you are hearing one side of it at a time and it would be unfair to have you draw conclusions when you have not heard all of the evidence. It would also be unfair to allow anyone to attempt to influence you when they have not been in court to hear the evidence. If you do talk about the case, the judge may have to declare a mistrial and start the case all over with another jury.

BEGIN NARRATOR B ROLL SOCIAL MEDIA @13:11	If you are selected to be a juror on a case, it is very important that you not read, anything about the case in the newspaper or on the Internet and you should not watch or listen to any information about the case on television or on the radio. Do not try to find out about the case by visiting the scene or by doing your own research on the Internet or in the library. You must not go on Facebook or Twitter or use any other social media to talk about what it's like to be a juror on a case, or about the evidence or the witnesses We want you to keep an open mind and maintain an impartial outlook while the trial is underway. While you are a juror do not comment

END NARRATOR	in any way about the trial to anyone, in person, on e-mail or through social media.
BEGIN KISSINGER J	**TYPES OF CASES** In general, there are there are two types of cases that juries hear in this court: civil and criminal. In a criminal case, the State of New Hampshire claims that a defendant has violated the criminal law in some fashion, such as an accusation of theft, burglary, robbery, sexual assault, manslaughter, or murder. In these cases, the State is represented by a prosecutor, either from the County Attorney's Office or the Attorney General's

	Office, and the defendant is represented by his or her attorney. .A civil case is a private dispute between two or more parties or litigants: a plaintiff, who is the person who brings the suit; and the defendant, the person who is sued. In a civil suit, the plaintiff seeks redress for some sort of alleged private wrong. The wrong may be the allegedly negligent operation of a motor vehicle which caused someone to be injured in an accident; a malpractice action against a doctor, lawyer, engineer, architect, or other professional; or a trespass case for damage to property. Or, perhaps, the private

	wrong is an alleged breach of contract in a transaction between two businesses or between a buyer and seller of goods or real estate.
END KISSINGER	
	HOW THE JURY IS SELECTED
BEGIN NARRATOR B ROLL/	At the beginning of jury selection, the judge tells the group of potential jurors about the case, who the parties are, who the lawyers are, and who may be called as witnesses. The judge then reads a list of questions for you to think about. The judge's purpose in asking questions is to have potential jurors search their minds and memories to determine whether they have any potential bias, prejudice, or

NARRATOR CONTD	conflict or other reasons that might prevent them from serving as fair and impartial juror. For example, the judge may ask whether you are related to the parties; whether you have anything to gain or lose by what may happen in the case; whether you have helped either party prepare the case; and whether you have formed or given an opinion as to the case. . After the judge has read all the questions, the clerk will draw names of jurors at random. As each name is drawn, the judge will ask that potential juror if their answer is "yes" to any of the questions asked. If so, that

	potential juror will be asked to come up to the judge's bench to talk over their concerns privately with the judge and the lawyers in the case. If you think there is any reason why you may not be able to be a fair and impartial juror it is your responsibility to make that fact known to the court. The judge will determine whether you can sit as a juror in the case.
END NARRATOR CUT FROM KISSINGER J ON WHY QUESTIONS ARE ASKED AND WHAT IT MEANS TO BE RECUSED	
BEGIN NARRATOR B ROLL BENCH CONFERENCE	Twelve jurors will be seated in the jury box. The judge may also decide to select some alternate jurors who could be needed if a juror became sick or had to be

@45:01 END NARRATOR	excused. Once the jurors and alternates are selected the lawyers for the parties will have an opportunity to ask that a juror be removed and another juror selected at random. The lawyer does not have to state any reason for having a prospective juror excused. Don't take it personally if you are excused; you probably will be selected for another jury at another time.
BEGIN DELKER J	**THE TRIAL** Before the trial begins, the judge will talk with you about the burden of proof. In a criminal case, the State must prove each and every element of the crime charged

	beyond a reasonable doubt. What does the term "beyond a reasonable doubt" mean? A reasonable doubt is a doubt based upon reason that remains after consideration of all the evidence that the State has offered to prove its case. In our court system, a person is presumed innocent until a jury determines that the state has proved the defendant's guilt "beyond a reasonable doubt." In a criminal trial, the defendant has the right to remain silent. A defendant does not have to testify during the trial. And the jury cannot hold it against a defendant if the defendant decides not to testify. You also

END DELKER	need to remember that just because a person was charged with a crime, or indicted by a grand jury, the jury cannot consider that as evidence that the defendant committed the crime. A defendant is innocent until proven guilty at trial by the state. In a civil case, the party asserting a claim – the plaintiff -- must persuade you by a preponderance of the evidence that his version of the facts is true. What does preponderance of the evidence mean? It means that it is more likely than not that the claim brought by the plaintiff is true.

NARRATOR B Roll Evidence at 39:20	The trial begins with the opening statements. The purpose of a lawyer's opening statement is simply to explain to you what it is he or she expects to prove in the case; in other words, to give you a description of what the evidence is that the lawyer expects will be presented during the trial. Neither a lawyer's opening statement nor a lawyer's closing argument constitutes evidence. The evidence comes from what the witnesses say, and from the documents, writings, pictures, or objects which are admitted and marked as evidence during the trial, which we refer to as the exhibits. After the plaintiff in a civil

	case or the State in a criminal case has presented all its witnesses and evidence, it will "rest" or conclude its case. The opposing party, the defendant in either a civil or criminal case, then has the opportunity to present his or her evidence.
END NARRATOR	
JUROR CLIP—WAS IT HARD TO UNDERSTAND WHAT'S GOING ON / I AM NOT AN EXPERT	
BEGIN WAGELING	**TYPES OF EVIDENCE** There are two types of evidence which a jury can consider in reaching a decision. The first type is called direct evidence. Direct evidence consists of the testimony of a

	person who claims to have personal knowledge of a fact or facts relevant to the case, such as an eyewitness. The second type of evidence is circumstantial evidence. Circumstantial evidence is proof of a chain of facts or circumstances that tends to show something is true. It is the jury's job to decide how much weight to give to any evidence presented in a case. When the presentation of all the evidence is concluded, the case is ready for the final or "closing" arguments from the lawyers on each side of a case. Either just before or just after the lawyers make their closing

	arguments, the judge will instruct the jury about the law that applies to the case. The jury will then retire to deliberate and decide upon a verdict.
END WAGELING	
	REACHING A VERDICT
BEGIN NARRATOR B Roll Jury deliberations @48:39	When you retire to deliberate, only the jurors will be in the jury room. No one else will be listening to your discussions or controlling your deliberations in any way. The jury will select a foreman. All of the exhibits that were introduced into evidence during the trial will be in the deliberation room with the jury.
JUROR CLIPS ON EXPERIENCE IN THE DELIBERATION ROOM	

B ROLL OF VERDICT BEING DELIVERED END NARRATOR	The jury foreman will alert the bailiff that a verdict has been reached. The jury will return to the courtroom where its verdict will be announced.
FINAL JUROR CLIPS –WOULD THEY SERVE AS A JUROR AGAIN? SERVICE END NARRATOR	In New Hampshire in both civil and criminal cases, the verdict of the jury must be unanimous; that is, all twelve members of the jury must agree upon the verdict.

BEGIN NADEAU END NADEAU	I hope this video has given you a good idea of what it means to be a juror and what your responsibilities will be during the trial and deliberations. Remember, a trial is a search for the truth . Your job is to listen to the facts, apply the law and render a verdict , fairly and without any bias or prejudice. Thank you for participating in our justice system and thank you for your service to your fellow citizens, and to our state. ##########################

Sample Juror List

	Name, Address	Age	Ed.	Occupation	Prof. Ass'n	Spouse Occ.	Children/ Occ.	Siblings	Past jury	Lawsuits/convictions/crime victim/Military/Police
1	Bing, Chandler	28	College	IT Procurement manager		Monica Geller-Bing, Chef				
2	Buffay, Phoebe	31	HS	Massage Therapist, Musician		Mike		Ursela, 31 Frank Jr., 26	n	Theft
3	Geller, Ross	30	Ph.D.	Paleontologist			Ben, 5 Emma, 2	Monica, 28	Y	
4	Green, Rachel	28	College	Waitress			Emma, 2	Jill, 30; Amy 25	N	
5	Tribbiani, Joseph	28	HS	Actor					N	

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JACKSON

MICHAEL RULON, Plaintiff,	)	
vs.	)	Case No. 103209-L2
MICHAEL HOFFMAN and HOFFMAN, HART & WAGNER, LLP, an Oregon Limited Liability Partnership, Defendants.	)	

EXCERPT TRANSCRIPT OF PROCEEDINGS
PLAINTIFF'S JURY VOIR DIRE
Tuesday, June 11, 2013
BEFORE THE HONORABLE PHILIP ARNOLD

BE IT REMEMBERED That the above-entitled matter came On regularly for hearing before The HONORABLE G. PHILIP ARNOLD, Judge of the Circuit Court of the County of Jackson, State of Oregon, commencing at the hour of 9:00 a.m. on Tuesday, the 11th day of June, 2013 .

COURT REPORTER: DEBRA J. DUGAN
Certified Shorthand Reporter
Registered Professional Reporter

APPEARANCES OF COUNSEL

FOR THE PLAINTIFF:

LAW OFFICES OF KELLY L. ANDERSEN, P.C.
BY: KELLY L. ANDERSEN, ESQ.
BY: FAITH MORSE, ESQ.
1730 E. McAndrews, Suite A
Medford, OR 97504
(541) 773-7000
kelly@andersenlaw.com

FOR THE DEFENDANTS:

BRISBEE & STOCKTON LLC
Attorneys at Law
BY: LARRY A. BRISBEE, ESQ.
139 NE Lincoln St.
Hillsboro, OR 97123
(503) 648-6677
lab@brisbeeandstockton.com

MEDFORD, OREGON - TUESDAY, JUNE 11, 2011 - 9:00 A.M.

TRIAL PROCEEDINGS

EXCERPT OF JURY VOIR DIRE

* * *

(Beginning of requested excerpt of jury voir dire.)

THE COURT: This is the opportunity that the attorneys have to ask you questions. This is not meant to pry into your personal life or make you feel embarrassed or uncomfortable, but rather it's to explore even further than I have done of whether you can be a fair and impartial juror, and give these two sides the attention and objective analysis that they deserve.

So we'll start that process with Mr. Andersen.

MR. ANDERSEN: Thank you, Your Honor, very much. Good morning, again, to all of you.

PROSPECTIVE JURORS: Good morning.

MR. ANDERSEN: Thank you. I'm going to ask some questions, not about this case, but about life itself. And I'm going to ask some questions that will ask you to be revealing of maybe some sensitive matters. And no one is forcing you to talk; I hope that you will open up.

And the first question that I have is have any

of you ever felt betrayed by someone that you trusted. Could be a spouse, it could be anyone else. Has anyone ever felt betrayed? Ms. Kress?

PROSPECTIVE JUROR KRESS: Yeah, I think really everybody has, probably. Growing up, my parents were both alcoholics; I felt betrayed.

MR. ANDERSEN: I'm having trouble hearing you.

PROSPECTIVE JUROR KRESS: Since growing up, both my parents were alcoholics and I felt betrayed by them for years. So yeah, I think probably if you think about it, everybody has felt that way.

MR. ANDERSEN: Thank you. And that's what I'm asking; is just dig into your memory, and maybe some of you have never felt that. Ms. Marple, tell me about it.

PROSPECTIVE JUROR MARPLE: Yes. My first husband -- which is, to me, one of the worst betrayals, is your spouse -- he cheated several times.

MR. ANDERSEN: How did it make you feel?

PROSPECTIVE JUROR MARPLE: Horrible. You know, this is a man I gave my life to, I had two children with. And, you know, and found out about it one night -- the worst part was I found out the night

when we had, just before I went into the hospital to have our second son, he had had an affair with a nurse in that same hospital. That was really hard.

So needless to say, I didn't bond with my sone for like three days; I just was so focused on what he did to me.

MR. ANDERSEN: Is there anything that you felt in your life that shook you more than that betrayal?

PROSPECTIVE JUROR MARPLE: Uhm, no, not really.

MR. ANDERSEN: Do you still feel the effects of it today?

PROSPECTIVE JUROR MARPLE: I do. Anger, yeah; it's never really went away. You live with it.

MR. ANDERSEN: How many years ago was it?

PROSPECTIVE JUROR MARPLE: 25. Last April, my son turned 25.

MR. ANDERSEN: Thank you for sharing that with us. Has what Ms. Marple said triggered any memories with the rest of you? An experience of being betrayed by someone that you depended upon and trusted? Mr. Conway, and then Mr. Sherbourne.

PROSPECTIVE JUROR CONWAY: Yeah. My brother-in-law and I used to drink a lot together.

And, you know, one day, he just -- he's one of those people that should probably stop drinking altogether, but isn't going to. And, you know, one day he just got just a little bit too, too much, and he ended up pushing my sister.

And I got to thinking about my family and friends and stuff like that, and that just kind of made me snap. And I ended up probably not doing the best thing; but I wasn't the one bleeding.

MR. ANDERSEN: Took care of it in the old-fashioned way. Okay. Maybe you should have seen Mr. Wagoner for some counseling.

Mr. Sherbourne, is it Sherbourne?

PROSPECTIVE JUROR SHERBOURNE: Sherbourne, yeah. I had a situation, uhm, where in the past, I had, in maybe 1997, suffered with some clinical depression. And my wife had made an assumption, based on some circumstances, that I was going through some symptoms of that, and actually had me committed by police force into a hospital. And I was perfectly healthy and fine. That's a pretty big one to swallow.

And, but I was, you know, checked by medical staff and I was able to be released. And, but I had to work through the anger and, you know, to come to

forgive and to be able to let go of that. Because it's a betrayal, it's just something that just seems so far out of the box, you know.

So I would say that that's like the deepest I've been stung by someone who I trusted and cared deeply for. And to have to still show mercy in understanding that she didn't know what she was doing, but was just acting upon fear. But even in those circumstances, your ability, sometimes, to handle the level of hurt is pretty tough; it takes time.

MR. ANDERSEN: Thank you for sharing. How many years ago was that? You may have mentioned it; I didn't hear.

PROSPECTIVE JUROR SHERBOURNE: That was, that was about four years ago that that happened.

MR. ANDERSEN: And did the marriage survive?

PROSPECTIVE JUROR SHERBOURNE: It's, it's surviving, yes. So, but, you know, with a lot of grace and a lot of prayer, so it's -- but yeah.

MR. ANDERSEN: Okay. Thank you for sharing.

PROSPECTIVE JUROR SHERBOURNE: Yeah, that's kind of a little weird, I know, but just --

MR. ANDERSEN: No, that's what we're about, is to self-disclose. And that takes some courage to do that, and I thank you for doing that. Have you experienced anything that hurt you more than that betrayal, or your perception that it was a betrayal?

PROSPECTIVE JUROR SHERBOURNE: I would say that was the deepest. And then my brother committed suicide, that was the second.

MR. ANDERSEN: So that was actually worse than the --

PROSPECTIVE JUROR SHERBOURNE: Her betrayal was actually worse than the suicide, to be honest with you.

MR. ANDERSEN: Thank you. And Ms. Beaver, I can't tell if you're nodding yes. Do you want to share something?

PROSPECTIVE JUROR BEAVER: Well, my step-dad, who's my dad for 15 years since I was five, cheated on my mom while she was having surgery here, because he didn't want to be married to her anymore.

MR. ANDERSEN: How did that make you feel?

PROSPECTIVE JUROR BEAVER: Betrayed.

MR. ANDERSEN: How old were you?

PROSPECTIVE JUROR BEAVER: 17.

MR. ANDERSEN: I know better than to ask

your age; but I see tears coming to your eyes.

PROSPECTIVE JUROR BEAVER: A little bit, yeah.

MR. ANDERSEN: Is it still something that bothers you even today?

PROSPECTIVE JUROR BEAVER: A little bit, yeah; he's the only dad I had, so --

MR. ANDERSEN: Thank you. Any of the rest of you willing to share an episode in your life where you have been betrayed? Ms. Wright?

PROSPECTIVE JUROR WRIGHT: My parents divorced, I was in middle school, so it's like a rough time. Uhm, just, like all precursors and everything, getting to find things out afterwards, just definitely made me think a little bit less of my father.

Luckily we're in a good place now; nothing is really off. So some good came of that. But at the same time, it's a little rough to think of some stuff that you think your father would do. But that's what happens when someone is never honest. So a little rough.

MR. ANDERSEN: Thank you. Anyone else? Mr. Pindell, I sense maybe there might be something you want to share?

PROSPECTIVE JUROR PINDELL: Well, I've, you know, experienced both personal and professional betrayal on a lesser or greater degree. And, you know, working with the population I work with, I experience that in my workplace with families who are economically and behaviorally stressed; and so I witness it quite often.

MR. ANDERSEN: With the youth that you're counseling?

PROSPECTIVE JUROR PINDELL: With the youth that our agency counsels; and now with the adults, as well.

MR. ANDERSEN: I know that you can't reveal client confidences, and I'm certainly not asking that. But you indicated a personal and a professional betrayal; did I hear that right?

PROSPECTIVE JUROR PINDELL: You did.

MR. ANDERSEN: Two different betrayals, or it was both?

PROSPECTIVE JUROR PINDELL: Uhm, life lessons on a personal level, you know. Uhm, professionally, it was contractual in nature; just a feeling of betrayal in the abruptness of a discontinued contract, so --

MR. ANDERSEN: Somebody broke the contract

and left you hanging?

PROSPECTIVE JUROR PINDELL: Correct. Correct.

MR. ANDERSEN: How did that affect your core?

PROSPECTIVE JUROR PINDELL: It was a difficult time in that it affected our agency, which affected, in turn, affected 50 individuals. And so it was a real struggle to overcome that, that blow. So, you know, I went through the full spectrum of emotion, as you may well imagine, you know, in dealing with it.

MR. ANDERSEN: Okay. Thank you for sharing.

PROSPECTIVE JUROR PINDELL: Sure.

MR. ANDERSEN: How about personal betrayal?

PROSPECTIVE JUROR PINDELL: Uhm, you know, I think in life we all have been dealt cards that are, in deference to our card player over there, that have, you know, been hurtful. Uhm, it was, you know, a betrayal of a personal relationship when I was young.

But, you know, life is a funny thing; and I thank those individuals very profoundly as I met the woman who I love and have a very wonderful family as

an indirect result down the road.

MR. ANDERSEN: All right. Thank you again, Mr. Pindell.

PROSPECTIVE JUROR PINDELL: Sure.

MR. ANDERSEN: Anyone else want to share an episode in your life where you have been betrayed? Ms. Scott?

PROSPECTIVE JUROR SCOTT: I think the hardest one was living with a husband that beat me for ten years, that was the hardest.

MR. ANDERSEN: I'm sorry. How did you, how did you deal with that?

PROSPECTIVE JUROR SCOTT: I divorced him, finally.

MR. ANDERSEN: The right thing to do. I'd like to ask now, how many of you have ever felt humiliated? Not just, you know, your zipper was undone or something like that; I mean to the core humiliated, absolutely humiliated. Have any of you ever experienced that? Mr. Conway?

PROSPECTIVE JUROR CONWAY: Well, I was over at our friends house and I went to go dive for a football, and I ended up falling into an overflowing septic tank.

PROSPECTIVE JUROR SHERBOURNE: Man, that's

bad.

MR. ANDERSEN: I won't ask any more. Thank you for sharing.

PROSPECTIVE JUROR SHERBOURNE: I would just share that, you know, I talked a little bit about the fact that I had gone through depression. Well, prior to that, I had gone on a fairly fast track of success and was working for a company in Portland. I was promoted at age 27 to a vice president and general manager. And that's what triggered the episode of depression. It was a six figure deal, and I had a wife and kids and all that.

And that depression became so aggressive; it took four years, but ultimately I lost my home, I lost my business, I lost pretty much all of the material and physical things that I had. And I ended up on State disability, and had gone through three episodes of mental hospitals.

And that was kind of, that was -- I don't think you could be stripped to anything, any single, any deeper. And then in 1997, I attempted suicide and was locked in a mental hospital. So that was humiliating for me at the highest degree and the most painful degree.

But then I would go on to come out of that and

surge forward and achieve even greater success financially, and end up with everything restored, almost double. And then in 2008, I lost it all again. I mean, so that was double humiliation.

But let me tell you something, I never entered into depression. And I give that credit to my faith and the strength that I've found there and being able to cling to that. And I've been able to do some great things.

But yeah, as a man, you know, you're a provider. And my image was kind of attached to my net worth and my self worth, which I know that's not right now. But at the time, I'm just telling you, that's what it is. So when that's being stripped away, and the reason that's happening is outside of your control, you lose control. Usually that causes anxiety, which usually causes depression.

So you have to, you know, deal with some pretty -- and the humiliation, because you don't even want to see your friends, you don't want to see anybody because you just feel like a loser, you know. And when it happens twice, it's like, oh, my gosh, you know, I can't believe it.

So yeah, I've been up and down. I've had that kind of here and I'm there and here and here. And

now I'm kind of sailing here and it's a little bit smoother. But that's life, you know, it brings a lot of different things.

MR. ANDERSEN: How did it feel when it looked like you were losing everything, everything that you had worked all your life for?

PROSPECTIVE JUROR SHERBOURNE: I spent a lot of time in, you know, the fetal position in tears, to be quite honest with you, brother. I mean, I'm a man; but I'm a human being with a heart. And it was painful.

MR. ANDERSEN: Thank you. That had to be hard to share; so thank you very much.

Any of the rest of you. Mr. Wagoner, do you have anything?

PROSPECTIVE JUROR WAGONER: Sure. I can relate to the gentleman here. I've gone through some serious depression in my life, as well. In 2000 -- well, the last year, due to some circumstances, we lost our home and relocated. Uhm, my wife just got done with some major surgery.

Uhm, and all through that, I had to attest to a strong faith in something, in the Lord, besides myself, because I could never make it without knowing that there's extra strength out there. But also,

that those things that we hold on to physically will pass anyway. And it's your friends and family, those things, if you invest in those things, you can survive the other things much better.

MR. ANDERSEN: Thank you for sharing. Anyone else back here? Mr. Mayer, anything you want to share at all?

PROSPECTIVE JUROR MAYER: No, I'm okay.

MR. ANDERSEN: How about up here, anybody experienced just profound humiliation? Okay. The third thing I'd like to ask you about is how many of you have been in a place in your life where you needed to depend on a profession, that the information and your vulnerability depended on a profession to navigate through the problem that you were in?

It could be needing a doctor to do a surgery, it could be needing an architect to design a home, it could be needing to trust a minister or counselor. Have any of you been in a vulnerable place where you needed to reach out to a professional? Anybody ever been there? Ms. Hill?

PROSPECTIVE JUROR HILL: Well, within the last year, I was diagnosed with VRCA, breast cancer, ovarian cancer high risk. And so I've had to have a

doctor give me surgery.

MR. ANDERSEN: I hope things are well for --

PROSPECTIVE JUROR HILL: Things are fine; it's all preventative. But I needed to depend on the doctor for that.

MR. ANDERSEN: All right. Thank you. Have any -- yes, Ms. Phillips?

PROSPECTIVE JUROR PHILLIPS: My husband had prostate cancer, so we had to have a professional; and reached out to them to know what to do, go through the process we did.

MR. ANDERSEN: Okay. Have any of you ever needed to hire an attorney? Ms. Kress, and Mr. Pendleton, and Ms. Scott.

PROSPECTIVE JUROR KRESS: It was probably 20, 30 years ago, it was an auto accident. A guy turned left in front of me and his insurance company was trying to say it was my fault, so I had to take them to court to get paid.

MR. ANDERSEN: What did you expect of your attorney in terms of honesty?

PROSPECTIVE JUROR KRESS: I expected him to know what he was doing. I expected him to know the limits. I ended up having an argument with the

attorney after that, because he ended up billing more than the policy was worth. It was on a contingency, and so he said we won this amount of money, but we're keeping it all.

So luckily, luckily the check was made out to both of us. And I told him I wouldn't sign the check. And so he ended up giving me a couple thousand of it.

MR. ANDERSEN: Sounds like it wasn't a real good experience.

PROSPECTIVE JUROR KRESS: No. That was my only experience, but it worked out okay since I got some money.

MR. ANDERSEN: Okay. Would you expect -- well, what would you expect of an attorney in terms of putting his or her interest first versus putting your interest first as a client?

PROSPECTIVE JUROR KRESS: Oh, they should put yours first, because you are paying them. Even if it is on contingency, if they win, you're still paying them; so your interests should go first.

MR. ANDERSEN: Thank you. Thank you very much. Mr. Pendleton, I believe you raised your hand?

PROSPECTIVE JUROR PENDLETON: Yes, I hired a lawyer for a civil case.

MR. ANDERSEN: Do you feel comfortable sharing any of that? You don't need to if you don't want to.

PROSPECTIVE JUROR PENDLETON: It was when I was working at the bank up north, had a gentleman come in and took me for another person and held me hostage for 15 minutes. And so, you know, did a trial first on that one, and then I did a civil case after that, so --

MR. ANDERSEN: And were you satisfied with your attorney?

PROSPECTIVE JUROR PENDLETON: Yes, he did a very well job, very good job.

MR. ANDERSEN: From that experience, or just from what you know about attorneys, what would you expect in an attorney who represented you?

PROSPECTIVE JUROR PENDLETON: I think it's just the same as, you know, you're paying for a professional to do, you know, a job. And just do the utmost best that they can and be professional about it.

MR. ANDERSEN: Would you expect the attorney to put your interest ahead of the attorney's interest?

PROSPECTIVE JUROR PENDLETON: Yes,

obviously.

MR. ANDERSEN: And why?

PROSPECTIVE JUROR PENDLETON: Uhm, well, I think -- well, you mean my interest as in just what I want?

MR. ANDERSEN: Yeah, if, if you decide that you want to go this way, and let's say the attorney decides that earning a bigger fee is more important than resolving the case against --

MR. BRISBEE: Your Honor, I object to this; I don't think goes to the qualifications of the jurors. I think it's just anecdotal kinds of things.

THE COURT: I'm going to allow you to continue, Mr. Andersen.

MR. ANDERSEN: You can answer.

PROSPECTIVE JUROR PENDLETON: So you're saying that if the lawyer wants to get a bigger fee, but you want to go another direction, do you think that's right, is that what you're asking me?

MR. ANDERSEN: Yes.

PROSPECTIVE JUROR PENDLETON: I don't think that's right.

MR. ANDERSEN: And why wouldn't you?

PROSPECTIVE JUROR PENDLETON: Well, uhm, I'm not a person who goes after money, or seeks money

in that way. So I think a fee is too large or too big, I think it's just not right.

MR. ANDERSEN: Thank you. Ms. Scott, I believe you said that you hired an attorney? Probably in connection with your husband?

PROSPECTIVE JUROR SCOTT: Divorce, yeah.

MR. ANDERSEN: What did you expect, or would you have expected of your attorney?

PROSPECTIVE JUROR SCOTT: More than I got.

THE WITNESS: Tell me more about that, please.

PROSPECTIVE JUROR SCOTT: Well, I just didn't have a very good attorney.

MR. ANDERSEN: In what way did the attorney fail you?

PROSPECTIVE JUROR SCOTT: In every way.

MR. ANDERSEN: Tell me more about that.

PROSPECTIVE JUROR SCOTT: Everything. I got a divorce, let's -- that's all I got.

MR. ANDERSEN: Okay. Any of the rest of you hire an attorney or have a family member who has? Ms. South?

PROSPECTIVE JUROR SOUTH: Oh, I just hired an attorney to set up a living trust. And that was successful.

MR. ANDERSEN: Did that work out okay?

PROSPECTIVE JUROR SOUTH: Uh-huh.

MR. ANDERSEN: Anyone else want to -- Ms. Beaver?

PROSPECTIVE JUROR BEAVER: My mom hired an attorney for her divorce, which was a little complicated because he lived in America Samoa, so it took a longer time than we expected. And then a lot of things that were stated in the divorce didn't happen. And we feel like it was because the attorney was too busy getting married than to finish his clients' cases at the time.

MR. ANDERSEN: How did that make you feel?

PROSPECTIVE JUROR BEAVER: It was hard, because there's, you know, there's a little bit of money involved, not a lot; but, you know, like a vehicle that was supposed to be transferred into my mom's name that never was. And so that's, it's making our life difficult still today. So --

MR. ANDERSEN: Okay. My last line of questions is, and this is going to be hard for each of us to answer, but how many of us at some point in our life have told a lie?

PROSPECTIVE JUROR: Have what?

MR. ANDERSEN: Have told a lie?

(Show of hands.)

MR. ANDERSEN: All right. How many of you have later gone back and corrected the lie and confessed?

(Show of hands.)

MR. ANDERSEN: How many of you have, under pressure and not having time to really think and get your thoughts together, have said something that wasn't true, not a lie, but something that wasn't true because you guessed or you didn't have time or weren't prepared to speak about the subject? Have any of you ever had that experience?

(Show of hands.)

MR. ANDERSEN: I'm going to pick on a couple of you. Ms. Cline, you have been so talkative this morning. Do you have anything to say about that, where you had --

PROSPECTIVE JUROR CLINE: I can't think of the exact situation, but I'm sure.

MR. ANDERSEN: Mr. Ruden, how about you?

PROSPECTIVE JUROR RUDEN: In my case, it was a friend of mine asked me for my opinion on a settlement she was going through for a divorce. And because I didn't have all the information, I didn't side with her. And that put a rift between us.

MR. ANDERSEN: Anyone back here who's been mistaken and may have corrected it later? Mr. Wagoner?

PROSPECTIVE JUROR WAGONER: Yeah, on few computer jobs, you don't know what you're getting into until you get into it. And your quote for, you know, how long it's going to take you to fix, your time exceeds that, and I, I just don't bill the customer if it's -- or once I'm getting into it, I let them know what's going on. But yeah, there's been a few times where you just have to eat it and make it ethically right.

MR. ANDERSEN: Last question on this subject, have any of you had the opportunity to, where following a lie, you could have buried the evidence and no one would know; but instead of doing that, as hard as it was, you came forth with something that no one knew you had, but you did it because it was the right thing to do?

Have any of you ever had that struggle of, the easy thing is just shred the evidence; the right thing is to come forward with it? Yes, Mr. Conway?

PROSPECTIVE JUROR CONWAY: When I was about eight years old, my mom, she's real bad about leaving things out. And one day, she left a $20 bill. And I

was just a little kid; I'm like, you know, that amount of money was a lot to me at that time. I just took that. And I went and had that for like a week, as I'm trying to think how am I going to spend it. And they know I never have any money. I ended up giving it back and apologizing, but we --

MR. ANDERSEN: Probably hard to apologize.

PROSPECTIVE JUROR CONWAY: Oh, yeah, I was a little kid; I didn't want to give it back.

MR. ANDERSEN: All right. Ladies and gentlemen, is there anything else that I haven't asked? And some of you, I haven't talked to: Mr. Martinez, and Mr. Mumby, and Mr. Lewis. Anything that you have to say about betrayal or humiliation?

PROSPECTIVE JUROR MUMBY: On a general note, I spent a year in Vietnam. And I found out later about that it was a completely unnecessary and unjust war. I felt betrayed and lied to. I'm not to happy with little Georgie Bush and his unjustified war, either. It's the government, betrayals of government.

MR. ANDERSEN: Thank you for sharing that. And the Vietnam vets were not treated well when they came back, and that's a humiliation for the whole country. So thank you for your service.

Anyone else? Ms. Janes, you haven't told us anything yet.

Ms. Beers? Ms. Wright? Ms. Hill?

I talked to you, Mr. Pendleton.

Mr. Orr, for an attorney, I can't believe how restrained you have been.

Ms. Batterman, I don't believe we've heard from you. Any comments that you have?

PROSPECTIVE JUROR BATTERMAN: No, not right now, can't think of anything.

MR. ANDERSEN: Anything?

PROSPECTIVE JUROR: I think it's just hard to get through life these days, like any of those humiliation or betrayal. It's just a matter of how you personally handle it and get beyond it.

MR. ANDERSEN: And we're not talking here about feelings like, you know, somebody didn't pet my dog; we're not talking about that. We're talking about something that goes to the very core of betrayal and humiliation.

All right. I thank you very much. I look forward, whoever the 14 of you end up being, I look forward to us working together to try this case in a manner that you can make a decision at the end of the case that is right. So thank you for your openness

and your honesty, and I look forward to work withing you. Thank you.

(End of requested excerpt.)

CERTIFICATE

STATE OF OREGON)
) ss.
County of Jackson)

I, Debra J. Dugan, a Registered Professional Reporter and Certified Shorthand Reporter for Oregon, do hereby certify that I reported in Stenotype the foregoing proceedings and subsequently transcribed my said shorthand notes into the typewritten transcript, numbered 1 through 27, both inclusive, and that the said transcript constitutes a full, true and accurate record of requested portions of such proceedings, so reported by me, to the best of my skill and ability.

WITNESS MY HAND AND CSR STAMP at Medford, Oregon, this 27th day of September, 2013.

Debra J. Dugan, RPR, CSR
Certified Shorthand Reporter
CSR No. 90-0095

Bar News - June 6, 2008

Attorney-Conducted *Voir Dire*

By: Hon. Carol Ann Conboy

History: You (Civil Attorneys) Asked for It; You Got It

For a number of years prior to 2001, New Hampshire trial attorneys practicing civil law vociferously sought the ability to conduct *voir dire* of potential jurors. In 2001, the New Hampshire legislature authorized a pilot program in Cheshire County and Rockingham County whereby attorneys would be permitted, in civil cases, to conduct *voir dire*. In December, 2003 a legislative review committee charged with evaluating the pilot program submitted a final report recommending that the program be made permanent and expanded to all ten counties.

In its report, the review committee indicated that "[w]ith very few exceptions, the members of the bar who had participated in a *voir dire* examination found it to be [a] valuable experience." It also noted that although judges were initially concerned that the process would substantially increase trial time and that attorneys would use the process to improperly "indoctrinate" prospective jurors, such "initial misgivings had proved unfounded." The committee did not, however, address the issue of whether attorney conducted *voir dire* should be extended to criminal cases, finding such issue to be beyond the scope of its mandate.

It is noteworthy that the committee also recommended that "the State's only law school be encouraged to include instruction on conducting a *voir dire* examination in its curriculum."

As a result of the review committee's recommendations, RSA 500-A, *Jurors*, was amended, effective January 1, 2005, by the addition of Section 12-a, "Attorney Voir Dire Examination of Prospective Jurors."

The Statute (RSA 500-A:12-a)

The statute provides that in addition to the standard juror examination by the court (*see* RSA 500-A:12), counsel for each party in a civil case

shall be allowed a reasonable amount of time to address the panel of prospective jurors for the purpose of explaining such party's claims, defenses, and concerns in sufficient detail to prompt jury reflection, probing, and subsequent disclosure of information, opinion, bias, or prejudices which might prevent a juror from attaining the requisite degree of neutrality required.

The statute addresses both the process and the scope of examination. Following the judge's initial examination, counsel "shall have the right to examine, by oral and direct questioning, any of the prospective jurors to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." Specifically permitted is "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case." The scope of examination is within the judge's sound discretion, but specifically prohibited is "any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law."

The final provision of the statute states that "[u]pon agreement of all parties, the trial judge may waive *voir dire* examination by counsel...." It is this final provision that seems to have evolved into the rule, rather than the exception.

Constitutionality of the Statute and Application to Criminal Cases: Reasonable Judges Can Disagree

Shortly after the statute became effective, Superior Court Justice Edward J. Fitzgerald, III issued an order in a civil case, finding the statute unconstitutional. He concluded that the statute "impermissibly intrudes into the procedural rulemaking arena reserved to the courts by...the New Hampshire Constitution." *See LeBlanc v. Monadnock Community Hospital*, Merrimack County Superior Court, Docket No. 2003-C-0555 (Jan. 29, 2005) (Fitzgerald, J.). Moreover, in light of the statute's applicability to civil cases only, Judge Fitzgerald also questioned the constitutionality of the statute on equal protection grounds. It appears that this order was not appealed, and I am aware of no other court ruling on the constitutionality of the statute.

The only New Hampshire Supreme Court case referencing the statute is *State v. Fernandez*, 152 N.H. 233 (2005). In that second-degree murder case, the Court found no error in the trial court's denial of the defendant's request that his attorney question prospective jurors. The Court rejected the defendant's "conclusory argument" that attorney-conducted *voir dire* was necessary to gain information about juror bias and prejudice so as to meaningfully exercise peremptory challenges. The Court noted that in his brief the defendant acknowledged that "the practice in New Hampshire has been that jury *voir dire* is conducted solely by the trial judge, except in capital and first-degree murder cases." After citing a case supporting this practice, the Court then cited RSA 500-A:12-a by way of comparison. Thus, the Court was not asked to rule on the constitutionality of the statute.

It appears that the Superior Court judges are not of one mind as to whether attorney-conducted *voir dire* should be permitted in criminal cases. Requests have been both granted (by myself and other judges) and denied. It may be reasonably (and persuasively) argued that *voir dire* is more critical in criminal cases – where a defendant's liberty, as opposed to money, is at stake. On the other hand, the statute does not so provide, and in the absence of statutory direction, judges have exercised their discretion in denying such requests.

The Process

Attorney-conducted *voir dire* takes place in the context of the "struck" (federal) method of jury selection. In advance of trial, a determination is made as to how many alternates will be needed and how many peremptory challenges will be allowed. So, for example, if two alternates are needed and each side will be allowed three peremptory challenges, the total number of qualified jurors needed is twenty. There will also be a determination as to whether the alternates will be designated at the time of jury draw (that is, jurors in seats #13 and #14 in my example) or designated by random draw at the end of trial.

On the day of selection, the Court briefly describes the case,[1] has counsel introduce themselves and their clients, reads the names of potential witnesses, and asks the "standard" *voir dire* questions, as may be supplemented upon request of counsel.[2] As each juror's name is randomly drawn, the juror is asked whether he or she has any "yes" answers or other responses to the Court's questions. If the juror indicates "no," the juror is asked to take a seat in the jury box. If the juror indicates "yes," the juror is asked to approach the bench for examination by the Court and potential challenge for cause by counsel. If the juror is found qualified (that is, not excused for cause), the juror is asked to take a seat in the jury box. This process is continued until the total number of jurors needed (in my example, twenty) is seated in and in front of the jury box. It is at this point that counsel each has a turn at examining the seated jurors.

After both counsel have conducted *voir dire*, they are given the opportunity to request excusals for cause, at the bench. Thus, counsel may argue that a particular juror's responses during *voir dire* indicate a bias or other basis for excusal for cause. If a juror is excused as a result, another juror's name is drawn randomly. That juror is questioned by the Court, and if found qualified, replaces the excused juror. (At this point, the procedure may vary depending on the practice of the judge. I permit counsel to briefly *voir dire* the substituted juror.) After all requests for excusal for cause have been addressed, counsel then exercise their peremptory challenges against the panel found qualified (in my example, the 20-juror

panel). After the peremptories, the clerk impanels the necessary number of jurors (in my example, the first fourteen who have not been challenged) and excuses the remainder.

One Judge's Experience

In my experience, counsel in civil cases often agree to waive attorney-conducted *voir dire*. I think this is unfortunate because, if done well, *voir dire* is invaluable in identifying potential juror problems. It also permits counsel to establish a relationship with the jury and to immediately begin developing trial themes. I believe that agreements to waive are made because counsel are not experienced with the process and think that it requires burdensome preparation. While preparation is obviously necessary, I believe effective *voir dire* can be done without substantially adding to trial preparation.

I have not found that attorney-conducted *voir dire* adds significantly to selection time. Generally, each attorney takes about 10 minutes. And while the struck method does take a bit longer than the traditional method of jury selection in New Hampshire, I believe that the modest amount of additional time required is warranted: Counsel can exercise peremptories against a known "universe" of potential jurors (thus avoiding the situation where using a peremptory results in a substituted juror who is even less "desirable" than the juror who was struck). Also, from my perspective, it is better for the Court to learn of a juror problem before trial has begun.

What Works and What Doesn't

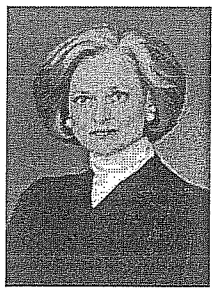
I have seen the *voir dire* opportunity squandered by counsel lecturing or making a "mini" opening statement to the panel.[3] The idea is to get the jurors to respond individually. Making a little speech and asking if everyone agrees will not be productive. Equally ineffective is addressing "prejudice" in a heavy-handed manner.

Counsel who are most effective ask questions relating to trial themes, and ask questions directly of individual jurors. Jurors are surprisingly willing to respond and do not seem to be intimidated by the formality of the courtroom. In fact, many times jurors have seemed to actually enjoy talking about their own experiences and attitudes. With a little finesse, counsel can expose, if not neutralize, many biases and preconceptions without aliening the jurors.

It is my view that attorney-conducted *voir dire* is an important tool which trial counsel should not forego. Educating oneself on the various techniques is, of course, critical. There is much literature available on the topic, and there are many experienced members of our bar who are willing to share their expertise. Try it; you might like it.

1. I have experimented with allowing counsel to give brief case descriptions to the entire *venire* before the impaneling process begins. I have found these statements to be more effective than the more generalized case descriptions traditionally given by the Court. If counsel are permitted to briefly describe the case from their relative perspectives, jurors are better able to identify issues which may potentially interfere with their ability to serve.

2. The statute also provides that the Court *shall* instruct the panel as to "[t]he specific issues for resolution," "[a] summary of the law to be used in their consideration of the evidence," and "[a]ny controversial aspects of the trial likely to invoke bias." Given that all such matters may not be apparent, or even ascertainable, at the time of jury selection, it appears doubtful that such requirements can – as a practical matter – be fully implemented.



The Honorable Carol Ann Conboy is an associate justice with the NH Superior Court. She has been a Bar member since 1978

3. Such "mini" openings are to be distinguished from case descriptions given by counsel to the entire *venire* before impaneling begins (which I have found quite effective).

The Psychology of Juror Decision-Making

by Roger D. Turgeon, Esq.

INTRODUCTION

Law school may have taught you to "think like a lawyer", but trying cases successfully requires understanding how jurors – not lawyers, but regular people – think, process information, and make decisions. The facts of your case may fit perfectly the legal definition of your cause of action, but if those facts don't make it through the jurors' mental filters and into their decision- making process, you won't win. So a trial isn't about simply marshalling the relevant facts and getting them in evidence. It is about presenting those facts in such a way that the jurors will assimilate them and act upon them in your client's favor. In short, how you present the facts can be just as important as what those facts are.

"To persuade people, you must first determine how they make their decisions. Equipped with that knowledge, you may then shape your approach to utilize the most effective means."[1]

In the last few decades, psychologists and social scientists have learned and written a lot about how people filter the information presented to them, how they shape it, and how that information affects their decisions. Although I generally refer to them here as biases, these factors range from outright pre-judgment of certain facts, or people, or ideas about the world and how it works (or should work); to less explicit biases or leanings in one direction or another; to totally subconscious decision-making mechanisms that give great weight to some facts or considerations and little or no weight to others (heuristics).

The first category, outright pre-judgment, must be dealt with through *voir dire*. As to the other two types of biases, especially the third, there are numerous opportunities throughout the trial to avoid them or even to use them to your client's advantage, if you know what they are.

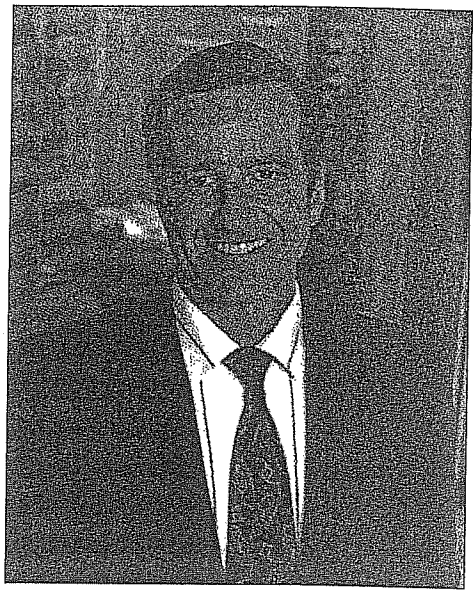
Once you understand these biases, filters, and decision-making processes, you will be better equipped to tailor every aspect of your trial presentation, from *voir dire* and opening statement through direct and cross-examination to closing argument – even pre-trial discovery – to maximize your client's chance of success at trial.

Fortunately, you don't need a Ph.D. in psychology to do this. You just need a working understanding of the various "biases" and decision-making processes at work and a good feel for how to take advantage of them (or avoid them) at various phases of trial.

The goal of this article is to give you a running start toward such an understanding and some resources for further development.

DEALING WITH OUTRIGHT PREJUDICE

In the short time you have during a trial, you have no hope of changing any juror's prejudices, so you have two goals: to keep the people with the most damaging prejudices off the jury; and to learn enough about the prejudices of those on the jury so you'll have a chance to persuade them that this case fits within the juror's idea of what is appropriate in the context of those prejudices.



ROGER D. TURGEON, ESQ

ROGER TURGEON *has been specializing almost exclusively in plaintiff's personal injury law since he graduated with honors from Harvard Law School in 1980.*

He spent several years working with two major law firms in Boston before becoming a sole practitioner. He is licensed to practice before the state and federal courts in Massachusetts, New Hampshire, and Maine, having been admitted in New Hampshire since 1995. He opened Turgeon & Associates in Haverhill, Massachusetts, in 2000.

Roger serves on the Board of Governors of NHAJ, and has been a frequent presenter at NHAJ's trial practice CLEs.

Roger was plaintiff's counsel in Debenedetto vs CLD Consulting Engineers, an engineering negligence case that resulted in what is believed to be the largest-ever wrongul death verdict in New Hampshire, though much of his work is with "smaller" damages cases. He has a particular interest in the psychological factors that affect how jurors receive and process information and reach their decisions.

For example, just about everyone has already decided that "frivolous lawsuits" are bad and all too-common. And it will come as no surprise to learn that such jurors are more likely to find for the defendant, regardless of the merits of any given case. "Jurors who think there are many unjustified lawsuits and who believe in a litigation explosion...are much more likely to find for the defendant in civil cases."[2] In the course of one trial, you won't convince these jurors that there

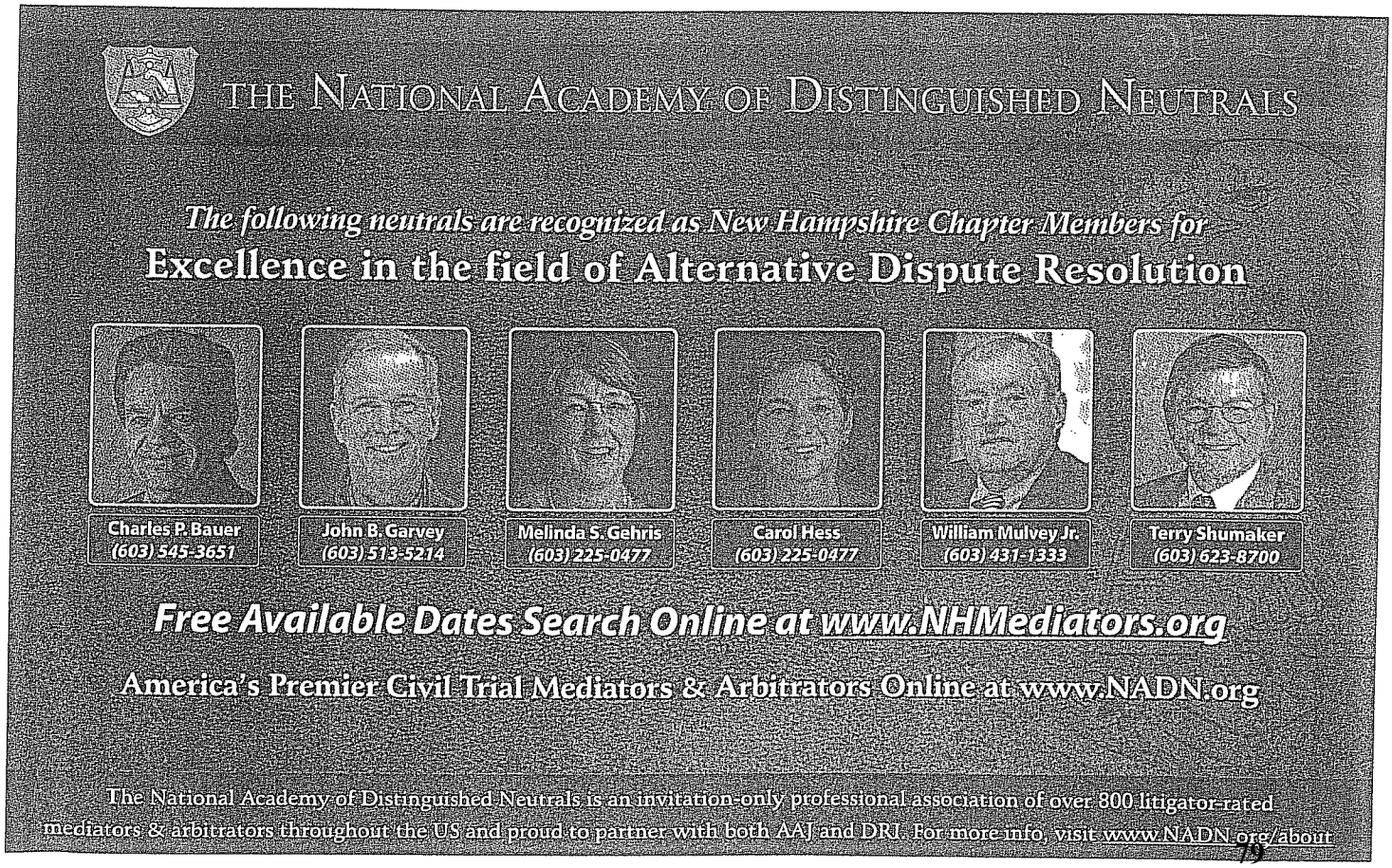
aren't too many frivolous lawsuits or that there is no "litigation explosion." So you need to find out how they define "frivolous" to know whether you have a chance of convincing them that this case is not frivolous. *Voir Dire*, of course, is your only opportunity to do this.

So don't be shy about asking your venire panel what they all think about "frivolous lawsuits" — agree with them that frivolous lawsuits are bad for all sorts of reasons — then ask them to define what makes a case "frivolous" in their minds. What aspects of your case might possibly trigger the "frivolous lawsuit" bias? That the injury is invisible, and therefore possibly easily faked? That it seems minor, so perhaps this plaintiff is just looking to "hit the litigation lottery?" That your client is partly at fault, and therefore appears to be ducking personal responsibility and simply looking for someone else to blame? Once you know how your jurors define "frivolous", you may have a chance of demonstrating that your case does not fall within that definition. Doing a focus group or mock jury trial can forewarn you of much of this, allowing you to seek the right information and to plan the right approach for dealing with whatever prejudices your *voir dire* exposes.[3]

DEALING WITH SUBCONSCIOUS DECISION-MAKING BIASES

There are many known biases and decision-making processes (heuristics) that affect how jurors process the evidence in a case. Professor of Law Thomas Mauet summed up many of them quite succinctly:

> Social science research during the past 25 years has shown that most people are affective, not cognitive, thinkers. That is, most people are emotional, symbol oriented, selective perceivers of information who base their decisions largely on previously held attitudes about people and events. Most people are also deductive, not inductive, reasoners. That is they are impulsive, use few basic premises to reach decisions, and then accept, reject, or distort other information to fit their already determined conclusions. People use their pre-existing beliefs and attitudes about people and events to filter conflicting information, accepting consistent information. People reach decisions quickly and resist changing their minds. Finally, people are unable to



> absorb most of the information they receive, since sensory overload occurs quickly; thus, they base their decisions on relatively little information that their attitudes have subconsciously filtered.[4]

Before looking at some of these individual biases, it is helpful to have a feel for the overall decision-making process within which they work. That process is called "script theory."

How biases work together — "Script theory"

At trial, facts come into evidence in a piece-meal fashion. Sure, the judge will tell the jury at the outset not to "weigh" these facts or otherwise start drawing any conclusions about how they will add up until after all the evidence is in. But the jurors will not be able to comply. They are human beings. No matter what the judge says, each piece of evidence will be sifted, sorted, weighed, and ultimately judged at the moment you present it, based on how it "fits" with what each juror already thinks he or she knows about how the world works or about your case, that is, how it fits into that juror's pre-written "script". This script, plus the newly assimilated - - and possibly altered - - facts, set the stage for each subsequent piece of evidence.

"Script theory posits that human beings do not evaluate facts in isolation, but rather tend to make sense of new information by fitting each new fact into a pre-existing picture."[5] Both that pre-existing picture, and how the jury evaluates new information in order to fit it into that picture, are affected by the various specific biases discussed below.

Decision-making biases and their implications for trial practice.

There are several important decision-making shortcuts, or "biases", that affect how your jury will receive and process the evidence and decide your case. Many of them overlap, some work counter to each other. There is space here to discuss only a very few of what I believe to be the most important ones, and their implications for trial practice.[6]

Availability Bias

Availability bias is the tendency to explain or judge events based upon the most readily available — not necessarily the most accurate —information. Thus, anecdotes from a juror's personal experience tend to trump actual data. Earlier-acquired (and believed) information tends to trump later-offered contradictory information.

In a personal injury trial, the jury is presented from the outset with the question of "why did this bad thing happen to the plaintiff?", and the availability bias tells us they will start looking for the answer, from the outset, in the most readily available information.

The most readily available information is within the facts you set out in your opening statement, in the order in which you present them (remember "primacy" and "recency"). The next most readily available information comes from the juror's own life experiences (including his or her more explicit prejudices and biases). The actual evidence you present through trial only comes later, when the juror may have already constructed a "script" against which that evidence will be evaluated before it is accepted, mentally altered, or rejected by the juror.

This has strong implications for *voir dire* and opening statement, especially, but also for the order in which you present testimony and other evidence.

The most important implication is that the story you tell in your opening statement must first vilify the defendant before discussing the plaintiff's injuries and damages, and even before discussing the plaintiff's actions leading up to the accident/injury. If the story begins with details of what the plaintiff was doing just before the injury, that's where the jurors will look to determine why that injury happened. Therefore, the story of your client's crash with a drunk driver who runs a stop sign should not start with your client approaching the intersection, or what she was doing earlier that day, or how great her family life was before the crash; it should start with the defendant sitting in the local biker bar drinking shots and beers with his buddies. The story of your client's husband's fiery death after his car exploded upon being rear-ended should not start with his car stopped in traffic just before being hit; it should start in the boardroom where the car manufacturer's top executives decided it was cheaper to pay damages to the families of the expected victims than to correct their car's design flaws. (Knowing where the story of the case has to start in turn has implications for the discovery you need to do in order to develop the most persuasive story). The story of your client's fall on a slippery floor in a big-box store should not start with

her going shopping; it should start with how the slippery mess got there and what the store employees did, or didn't do, to deal with it.

In short, the jury knows from the outset that it will be asked to decide "why did this bad thing happen?" and it will start looking for answers with the first words of the story you tell.

Those first words must be about what the defendant did wrong. That story must make the defendant's conduct, or product, or premises, look like an accident waiting to happen.

Telling such a story is also the crucial first step in dealing with the "blame the victim" bias.

"Blame the Victim" Bias

Several of the more scientifically-named biases (Attribution Bias, Denial Instinct, etc.) combine into what trial lawyers can usefully think of as the "blame the victim" bias.

This bias is basically a psychological defense mechanism. On hearing about a serious injury, no one wants to believe "that could happen to me." Therefore, subconsciously, in order to avoid facing the prospect that what happened to the plaintiff could also happen to the juror, the juror's mind looks for reasons why this could not in fact happen to her; in other words, why this is unique to the plaintiff. Perhaps the plaintiff did something wrong to bring this calamity upon himself. Or perhaps there is something unique about the plaintiff, like a prior medical condition, that caused him to suffer severe harm where a "normal" person would not have been injured. (The "eggshell skull" instruction may come way too late to overcome the resulting bias, unless of course you adequately work that concept into your case early on.) Perhaps the plaintiff's pre- existing medical condition (which the juror does not share) was entirely responsible for his subsequent problems without any help from the accident. Or perhaps even there is no real injury

— the plaintiff is just faking in hopes of hitting the "litigation lottery." Fitting your case into either of these "scripts" will allow the juror to feel safe from the possibility of suffering the same fate. In short, a defense verdict is a juror's self-defense mechanism.

Telling the story of the case so that the defendant's conduct is an "accident waiting to happen" is the first step in forcing the juror to see that the accident could indeed have happened to anyone — even her — and that this trial is not about the plaintiff's injuries so much as it is about enforcing society's rules of conduct to protect everyone. Think of it as a "Golden Rule" argument on liability.[7]

Congruity Theory – "Like Me, Like my Ideas"

This is a complicated one, but basically it says that we tend to feel most comfortable when the notions that we are presented with are congruent, or consistent, with each other, and we are uncomfortable when they are not. When they are not, we subconsciously try to harmonize them, which means changing our prior opinion/belief about one or the other, or both.

In the trial context, we are talking primarily about congruity or incongruity between how the juror feels about the messenger (you or your witness), and how she feels about the message (the evidence you are presenting; the liability theory you are arguing for).

Consider commercial endorsements by popular athletes.

If you like Kevin Garnett, and you like Nike athletic shoes, you will be comfortable if Kevin also likes Nikes. Your feelings about the messenger and the message are congruent. But if you see Kevin Garnett doing a TV commercial for Reebok, you will be uncomfortable. Your feelings about the two are incongruent. "How can an athlete I admire like an athletic shoe I don't like? Something's wrong here." You will have a subconscious tendency to resolve this conflict by adjusting your previous opinions, either by liking Reeboks more than before or by liking Kevin Garnett a little less.

If there is incongruity between the messenger and the message, if the listener likes or trusts the messenger but the message is contrary to a pre-existing belief, or if the listener distrusts the messenger but the message is consistent with a pre-existing belief — which attitude will the listener adjust? Her attitude toward the messenger or her attitude about the message?

Here is where it is important to remember that people really like and defend their own ideas, beliefs, and conclusions, and tend to resist being told what to think. People also tend to like better those people with whom they agree and to like less those people with whom they disagree: "Like me, like my idea."[8]

At trial, you and your witnesses are the messengers; your evidence and arguments are the messages.

At best, the juror's initial mindset toward you will be neutral; more likely, it will be to distrust you as a messenger, and therefore to distrust your message. If your message conflicts with the juror's pre-existing

belief about a given fact or rule of conduct — if you try to present as fact something they already "know" to be untrue — there is congruity: the juror doesn't like or trust you, and she already didn't like or believe the proffered "fact", so she has no reason to change her assessment of either. Her distrust of you as a messenger and her pre-existing belief about the fact will both be confirmed. If, on the other hand, you sponsor fact after fact that is consistent with what she already knows or believes to be true, there will be incongruity, and a resulting tendency to upgrade her assessment of your trustworthiness. ("I distrusted the messenger, but his message is accurate. Maybe I can trust the messenger after all.")

It is therefore important that you present as many clear truths and undisputed facts — facts and notions consistent with those of the juror — as possible before you present anything disputed or controversial or contrary to the juror's beliefs. Presenting these obvious "truths" gradually builds your credibility with the juror as a truth-giver, increasing the odds that by the time you offer up something more controversial — a message or suggestion that might be contrary to the way the juror thinks the world works — the juror will be more willing to adjust her attitude about her pre-existing belief.

Thus, for example, in *voir dire*, you agree with the jurors that there are too many frivolous lawsuits, hoping eventually not to change their minds about that, but perhaps at least to convince them that this case isn't one of those. In your opening statement, you say very little about damages, focusing instead on those non-controversial facts that help to vilify the defendant (or at least his actions or product). On direct examination of lay witnesses, you work your way up to important facts — for example, by using constituent facts to build up to important ultimate facts, or by laying out the witness's motivation for a given action before discussing the action (for example: "my child was in the car;...my child's safety is extremely important to me;...I wouldn't do anything to jeopardize my child's safety;...speeding would jeopardize my child's safety;...I wasn't speeding at the time of the crash.") With expert witnesses, you have the witness educate the jury about the technical issues involved, then discuss the facts that support his opinion, and only then ask for his opinion. That way, hopefully, the juror will already have formed that opinion for herself (based on the science and the facts you have just told her), and you and your expert are simply validating it. Such an opinion will affect the juror's ultimate decision-making much more than an expert opinion that is force-fed to her.

CONCLUSION

Psychologists are learning that quite often, how a message is presented is at least as important to the process of persuasion as the content of the message. Adapt the way you present your message to take advantage of known biases and decision-making shortcuts and you greatly improve your client's chances of success at trial.

END NOTES

1. Steven Lubet, *Modern Trial Advocacy, Analysis and Practice*, Second Edition (National Institute for Trial Advocacy, 1997).
2. Vidmar & Hans, *American Juries, The Verdict*, Prometheus Books, 2007, p. 274.
3. Renowned Texas trial lawyer Howard L. Nations has written an extensive article on identifying and dealing with juror bias, which I highly recommend. It is available on line at . Consider also the book, *Pattern Voir Dire Questions: Reveal Hidden Biases*, Susan Broome, Ph.D., James Publishing, 2012.
4. Thomas Mauet, *Fundamentals of Trial Techniques*, Third Edition; (Little, Brown and Company, 1992).
5. Lubet, *Modern Trial Advocacy* (Second Edition) (1997, p. 32).
6. Attorney/Professor Jim Wren's book, *Proving Damages to the Jury* (James Publishing, 2011), is built almost entirely around understanding these decision-making processes and adapting your trial techniques to avoid or take advantage of them. There is no substitute for reading that book.
7. For much more on this, see *Rules of the Road*, Rick Friedman & Patrick Malone, Trial Guides, 2007; *REPTILE: The 2009 Manual of the Plaintiff's Revolution*, David Ball and Don Keenan (2009); and related "Reptile" books.
8. I first learned this phrase and this concept from James McElhaney, author of *McElhaney's Trial Notebook*, now in its Fourth Edition from the ABA.

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Revised Statutes Annotated of the State of New Hampshire
Title LI. Courts (Ch. 490 to 505) (Refs & Annos)
Chapter 500-a. Jurors (Refs & Annos)

N.H. Rev. Stat. § 500-A:12-a

500-A:12-a Attorney Voir Dire Examination of Prospective Jurors.

Effective: January 1, 2015
Currentness

In addition to the provisions of RSA 500-A:12, the following provisions shall be incorporated into jury selection for civil and criminal cases:

I. The court shall instruct the panel of prospective jurors prior to jury selection as to:

(a) The nature and purpose of the selection process.

(b) The nature of the case to be presented.

(c) The specific issues for resolution.

(d) A summary of the law to be used in their consideration of the evidence.

(e) Any controversial aspects of the trial likely to invoke bias.

II. Counsel for each party shall be allowed a reasonable amount of time to address the panel of prospective jurors for the purpose of explaining such party's claims, defenses, and concerns in sufficient detail to prompt jury reflection, probing, and subsequent disclosure of information, opinion, bias, or prejudices which might prevent a juror from attaining the requisite degree of neutrality required.

III. The trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination shall not preclude additional non-repetitive or non-duplicative questioning in the same area by counsel.

IV. The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge shall consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or

conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed. The trial judge shall permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court shall not arbitrarily or unreasonably refuse to submit reasonable written questions, the contents of which are determined by the court in its sound discretion, when requested by counsel.

V. Upon the agreement of all parties, the trial judge may waive voir dire examination by counsel under this section.

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N.H. Rev. Stat. § 500-A:12-a, NH ST § 500-A:12-a
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Revised Statutes Annotated of the State of New Hampshire
Title LI. Courts (Ch. 490 to 505) (Refs & Annos)
Chapter 500-a. Jurors (Refs & Annos)

N.H. Rev. Stat. § 500-A:15

500-A:15 Compensation of Jurors.

Currentness

I. Grand and petit jurors' fees and mileage shall be paid by the state. The jurors' fees shall be $10 for each half day's attendance before a superior court; for each mile's travel to and from the place where the juror serves, mileage shall be paid at the rate of $.20 per mile, mileage to be allowed for each day's attendance when the juror is required to leave the town or city in which he resides.

II. For the purposes of this section "attendance for a half day" means attendance either at the forenoon session or at the afternoon session.

III. The clerk of the court attended shall determine whether a juror has attended for a half day. Said clerk may count travel time to reach the place where the juror serves in determining attendance of the juror, if the juror is required to travel more than 50 miles one way by the most direct route to reach the court.

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166 N.H. 252
Supreme Court of New Hampshire.

Tamara Dukette
v.
Daniel Brazas

No. 2013–230
|
Argued: February 26, 2014
|
Opinion Issued: May 8, 2014

Synopsis
Background: Residential tenant filed suit against landlord for injuries sustained in slip-and-fall at her apartment. The Superior Court, Merrimack, Smukler, J., entered judgment on jury's verdict for landlord, and tenant appealed.

[Holding:] The Supreme Court, Dalianis, C.J., held that trial court was not required to allow tenant's counsel to direct questions to venire panel as group during voir dire.

Affirmed.

Conboy, J., specially concurred, with opinion.

**735 Merrimack

Attorneys and Law Firms

Upton & Hatfield, LLP, of Concord (Michael S. McGrath on the brief and orally), for the plaintiff.

Primmer Piper Eggleston & Cramer PC, of Manchester (Gary M. Burt on the brief and orally), for the defendant.

Opinion

DALIANIS, C.J.

*253 Following a two-day trial in Superior Court (*Smukler,* J.), the jury determined that the defendant, Daniel Brazas, was not legally at fault for the injuries sustained by the plaintiff, Tamara Dukette, when she slipped and fell on ice at her apartment, which was owned by the defendant. The plaintiff appeals, arguing that the trial court erred in preventing counsel from addressing and examining the jury panel during attorney-conducted *voir dire.* We affirm.

The facts are not in dispute. On February 19, 2013, following the final pretrial conference in this matter, the trial court issued a written order requiring "[i]ndividual voir dire questions to be submitted *ex parte* to [the] court." In addition, although it was not memorialized in the order, the trial court stated that if any juror wished to respond to a question asked by counsel, the juror would have to approach the bench and answer the question, presumably before the judge and counsel, but otherwise out of the hearing of the remainder of the seated panel.

The plaintiff filed a motion for reconsideration, asking the trial court to reconsider: (1) its requirement that counsel submit written questions to the court prior to attorney-conducted *voir dire*; and (2) its ruling prohibiting counsel from questioning the jury as a group so that all of the jurors could hear both the questions and the answers. Prior to the trial court ruling upon the motion for reconsideration, with the date for drawing a jury only a few days away, the plaintiff filed an emergency petition for original jurisdiction with this court, raising the same two issues that had been included in her motion for reconsideration. We granted the petition in part and vacated the trial court's order insofar as it required prior submission of *voir dire* questions by counsel. See RSA 500–A:12–a, IV (2010) ("The trial judge shall permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning."). In all other respects, we denied the petition without prejudice to the rights of either party to raise the remaining issue in an appeal from a final judgment in the case. The trial court ultimately denied the motion for reconsideration.

On March 4, 2013, jury selection took place. After the trial court asked general ****736** *voir dire* questions, it stated that attorney-conducted *voir dire* ***254** would take place at the bench. Plaintiff's counsel, however, waived asking any questions of the prospective jurors. Additionally, the parties agree that counsel was never afforded an opportunity to address the panel as a whole.

The plaintiff first argues that the trial court erred in conducting *voir dire* in such a manner as to prevent jurors from hearing other jurors' answers to *voir dire* questions, as the voir dire statute requires. *See* RSA 500–A:12–a, III (2010). The defendant responds that the plaintiff's interpretation of the statute is at odds with its structure.

[1] **[2]** **[3]** Attorney-conducted *voir dire* is governed by RSA 500–A:12–a (2010), and, accordingly, this appeal requires us to interpret that statute. The interpretation of a statute is a question of law that we review *de novo*. *State v. Dor,* 165 N.H. 198, 200, 75 A.3d 1125 (2013). We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Id.* When interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. *Id.* "When statutory language is clear, its meaning is not subject to modification." *Appeal of Northern New England Tele. Operations, LLC,* 165 N.H. 267, 272, 75 A.3d 1102 (2013).

[4] Pursuant to RSA 500–A:12–a, III, after the trial court has completed its examination of the prospective jurors, "counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." Although the plaintiff asserts that this provision "reiterates that the legislature intended counsel to examine the jury panel as a group," the plain meaning of the provision refutes her assertion. This provision affords counsel the right to examine "any of the prospective jurors." RSA 500–A:12–a, III. "Any" is defined as "one indifferently out of more than two: one or some indiscriminately of whatever kind." *Webster's Third New International Dictionary* 97 (unabridged ed. 2002). It does not, in any context, mean "all," or, as here, the entire panel. Consequently, the procedure employed by the trial court did not violate the statute.

We note, however, that pursuant to RSA 500–A:12–a, IV, the trial court retains the discretion to prescribe "[t]he scope of the examination conducted by counsel," as well as "the form and subject matter of voir dire questions," based upon "any unique or complex elements, legal or factual, in the case." Accordingly, although questioning of the panel as a whole is not required, it is likewise not prohibited, and, in certain instances, it may be the more prudent course.

[5] **[6]** **[7]** **[8]** ***255** The plaintiff contends that the trial court's procedure "deprived [her] of both constitutional protections and the ability to meaningfully prepare her case." The trial court, however, was never afforded the opportunity to consider these arguments. "[P]arties [generally] may not have judicial review of matters not raised in the forum of trial." *Thompson v. D'Errico,* 163 N.H. 20, 22, 35 A.3d 584 (2011). It is the plaintiff's burden, as the appealing party, to demonstrate that she specifically raised the arguments articulated in her brief before the trial court. *Id.* To satisfy this preservation requirement, issues which could not have been presented to the trial court prior to its decision must be presented to it in a motion for reconsideration. ****737** *N.H. Dep't of Corrections v. Butland,* 147 N.H. 676, 679, 797 A.2d 860 (2002). Because the plaintiff failed to do so, we need not address these issues.

[9] The plaintiff also argues that the trial court erred in preventing counsel from addressing the jury panel prior to individual questioning. Again, we conclude that the plaintiff failed to properly preserve this issue for our review.

The plaintiff asserts that this issue was raised in her motion to reconsider. We disagree. The plaintiff's motion to reconsider is devoid of any reference to a ruling by the trial court precluding her from addressing the jury panel. Indeed, she concedes in her brief that she "did not learn of the change in the trial court's procedure [from that described at the final pre-trial conference] until the jury was drawn." Accordingly, she could not have included it in her motion for reconsideration, which was filed prior to the jury draw. Nor did she object when she learned of the change or file a motion to reconsider after the trial court established the new *voir dire* procedure. Consequently, because the record does not support the assertion that this issue was raised in the trial court, we decline to address it. *See State v. Noucas,* 165 N.H. 146, 152, 70 A.3d 476 (2013); *Butland,* 147 N.H. at 679, 797 A.2d 860.

Although the plaintiff has not provided us with a record of the jury *voir dire*, the defendant does not contest her assertion that she was not permitted to address the jury panel, stating in his brief that the trial court "essentially short-circuited the process ... by eliminating the panel presentation." *See* RSA 500–A:12–a, II ("Counsel for each party shall be allowed a reasonable amount of time to address the panel of prospective jurors for the purpose of explaining such party's claims, defenses, and concerns in sufficient detail to prompt jury reflection, probing, and subsequent disclosure of information, opinion, bias, or prejudices which might prevent a juror from attaining the requisite degree of neutrality required."); *McCarthy v. Wheeler,* 152 N.H. 643, 645, 886 A.2d 972 (2005) ("The use of the word 'shall' is generally regarded as a command ... [and] is significant as indicating the intent that the statute is mandatory."). Accordingly, we take ***256** this opportunity to remind trial judges to comply with the requirements established by the legislature when conducting jury *voir dire.*

Affirmed.

LYNN and BASSETT, JJ., concurred; CONBOY, J., concurred specially.

CONBOY, J., concurring specially.
In interpreting RSA 500–A:12–a (2010), we have stated that the statute does not preclude the trial court from allowing counsel to question the jury panel as a whole. I write separately to express my belief that doing so is, as a practical matter, the most effective way to achieve the legislature's purpose of assuring juror neutrality. The legislature has made clear that, prior to questioning jurors, counsel "shall be allowed a reasonable amount of time *to address the panel* ... for the purpose of explaining such party's claims, defenses, and concerns in sufficient detail to prompt jury reflection, probing, and subsequent disclosure of information, opinion, bias, or prejudices." RSA 500–A:12, II (emphasis added). In my opinion, the effectiveness of subsequent questioning of the jury panel as a whole—open *voir dire*—simply cannot be duplicated by individual *voir dire* at the bench. Further, given the time constraints that generally characterize jury selection, it is unlikely that counsel would be able to explore with each juror, privately at the bench, the questions that would otherwise be asked of the entire panel. In my judgment, open *voir dire* better accomplishes the legislature's stated purpose of allowing counsel "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case." RSA 500–A:12–a, III.

All Citations

166 N.H. 252, 93 A.3d 734

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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g.*, *In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3.*[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal.*[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Paula J. Frederick, Atlanta, GA ■ T. Maxfield Bahner, Chattanooga, TN ■ Barbara S. Gillers, New York, NY ■ Amanda Jones, Chicago, IL ■ Donald R. Lundberg, Indianapolis, IN ■ Myles V. Lynk, Tempe, AZ ■ J. Charles Mokriski, Boston, MA ■ Ellen A. Pansky, South Pasadena, CA ■ Jennifer A. Paradise, New York, NY ■ Richard H. Underwood, Lexington, KY

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