MONTHLY LUNCHTIME SEMINAR SERIES

38th Session:

"LIVING WITH A SIX PERSON JURY"

Judge Lynn M. Egan
Judge Thomas M. Donnelly
Judge Diane M. Shelley

November 20, 2015

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 18 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 7,500 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

JUDGE THOMAS MORE DONNELLY

Judge Donnelly joined the bench in 2000 & serves as an Associate Judge of the Circuit Court of Cook County, assigned to the First Municipal District where he currently presides over a civil jury call. He previously presided over criminal jury trials from 2008-2009. Since becoming a judge, he has presided over hundreds of jury trials. In September 2012, he authored an opinion in a highly publicized First Amendment case involving the Occupy Chicago protests: *City of Chicago v. Alexander.* He also spearheaded the development of three court programs to assist self-represented litigants: CBA Summary Suspension Volunteer Program, the CARPLS Consumer-Collection Self-Help Desk, & the CBA Municipal Court Pro Bono Panel Program.

Judge Donnelly also chairs the Illinois Supreme Court's Judicial Education Committee, which conducts all judicial education for both trial and appellate judges in Illinois. He chaired the Advanced Judicial Academy at the University Of Illinois Law School in June 2013 and chaired the editorial board for the Illinois Judicial Benchbook for Civil Law & Procedure for four years. He also served on the Illinois Supreme Court Committee on Criminal Jury Instructions for eight years.

Before becoming a judge, he clerked for the Honorable Mary Ann McMorrow & served as an assistant public defender for thirteen years. He serves on the Illinois Judicial Ethics Committee and has chaired both the CBA Professional Responsibility Committee and the Illinois State Bar Association Standing Committee on Professional Conduct. He coauthored an online annotation of Illinois Legal Ethics for Cornell Law School and served as the Reporter for the Illinois Supreme Court Committee on Professional Responsibility (1996-2000).

Judge Donnelly has taught at Loyola Law School since 1987 & has directed the Philip H. Corboy Trial Advocacy Fellowship since 1995. He currently teaches Illinois Litigation at Loyola and has taught Illinois Tax Litigation & Procedure, Professional Responsibility, and Criminal Procedure at Loyola. He is a past recipient of the St. Robert Bellarmine Award for a distinguished young alumnus and is an honorary member of Loyola's Circle of Advocates.

Judge Donnelly has also taught trial advocacy at the University Of Chicago Law School in the Mandel Legal Aid Clinic and has lectured at Washington and Lee Law School, Marquette Law School & DePaul Law School. He has also authored numerous articles and is the recipient of the Catholic Lawyers Guild of Chicago 2014 Catholic Lawyer of the Year Award.

Judge Diane M. Shelley

Judge Diane M. Shelley was elected in 2006 from Cook County's 5th Judicial Subcircuit, and retained in 2012 after practicing law for approximately twenty-five years. Immediately prior to becoming judge, she was head of litigation at the Metropolitan Water Reclamation District; litigating and managing personal injury cases, construction contract disputes, environmental violations, and the Deep Tunnel Project. She conducted hundreds of jury trials in the First Municipal Division before being assigned to the Law Division Jury Trial Section. Judge Shelley is the Treasurer of the Illinois Judges Association and former Chair of the Illinois Judicial Council. She is a member of numerous bar associations and civic organizations. She is a member of the Special Supreme Court Advisory Committee on Justice and Mental Health Planning.

SECTION A

- *"Living with a Six Person Jury," by Judge Lynn M. Egan, November 20, 2015.*
  - **Tab 1: Jurisdictional Comparisons.**
  - **Tab 2: Civil Justice Committee Questionnaire.**
  - **Tab 3: "Jury Questions During Deliberations."**
  - **Tab 4: Jury Verdict Statistics, Administrative Office of the Illinois Courts, 2013.**

LIVING WITH A SIX PERSON JURY

by
Judge Lynn M. Egan
November 20, 2015

I. WHAT HAPPENED?

Public Act 98-1132 was signed into law by former Governor Quinn on December 19, 2014 and took effect June 1, 2015. As publicized, it reduces the number of jurors in civil cases from 12 to six. As a result, the Code of Civil Procedure now expressly states, "all jury cases shall be tried by a jury of 6." *735 ILCS 5/2-1105(a)(West 2015).*

The Act also affected the statutory provision which governs juror fees. Specifically, section 4-11001 was amended to provide that grand and petit jurors shall be paid $25 for their first day of service and $50 for every day thereafter, "or such higher amount as may be fixed by the county board." *55 ILCS 5/4-11001(West 2015).*

Additionally, the amended statute now provides that "if alternate jurors are requested, an additional fee established by the county shall be charged for each alternate juror requested." *735 ILCS 5/2-1105(b)(West 2015).*

NOTE: Although the effective date of the change was June 1, 2015, the Act expressly notes that *any party that paid for a jury of 12 prior to the effective date* may still obtain a jury of 12 upon proof of payment.

II. LEGISLATIVE CONTEXT

While the Act originated in the Senate as SB 3075, its substance is the product of House Amendments 1 & 2, which were filed on November 25, 2014. The bill was originally sponsored by Rep. Kelly Burke (D) and assigned to the House Judiciary Committee, where a hearing was held. Testimony in support of the change was obtained from the Illinois Trial Lawyers Association and passed in the House on December 2, 2014. Sen. John Mulroe (D) subsequently sponsored the Senate bill, which was assigned to the Executive Committee. Another hearing was held which again included testimony from the Illinois Trial Lawyers Association. The Senate approved House Amendments 1 & 2 on December 3, 2014.

III. WHAT DID NOT CHANGE?

Even though the number of jurors has been cut in half, the cost of demanding a six-person jury in Cook County remains the same as the prior cost for demanding a 12-person jury: $230.

CAUTION: The new statute does not specify the cost for alternate jurors. Instead, it provides that "if alternate jurors are requested, an additional fee established by the

County shall be charged for each alternate juror requested." *735 ILCS 5/2-1105(West 2015)*. Importantly, the county Clerk's office does not set this fee. Rather, the County Board determines the fee for alternate jurors. As of November 9, 2015, according to Ms. Melissa Ford, 1st Deputy General Counsel with the Cook County Clerk's Office, the County Board has not yet determined this fee so the Clerk's Office is currently approving demands for alternate jurors at no extra charge. The DuPage County Board has also not yet set this fee, but the DuPage Clerk's Office will not process demands for alternates until it does so. In Will County, the fee has been set at $250.00 for each alternate and in Lake County, the fee is $175.00 per alternate.

Additionally, the number of peremptory challenges remains unchanged. Specifically, the Code of Civil Procedure still provides as follows:

§2-1106. Peremptory challenges – Alternate jurors. (a) Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.

(b) The court may direct that 1 or 2 jurors in addition to the regular panel be impaneled to serve as alternate jurors. ***If alternate jurors are called each side shall be allowed one additional peremptory challenge, regardless of the number of alternate jurors called. The additional peremptory challenge may be used only against an alternate juror, but any unexercised peremptory challenges may be used against an alternate juror." *735 ILCS 2/2-1106(a) & (b)(West 2015)*.

NOTE: The statute governing the manner in which jurors are passed upon and accepted also remains unchanged. Thus, even though only six jurors will be selected, 705 ILCS 305/21 still provides that, "the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff. Alternate jurors shall be passed upon separately."

SMALL CLAIMS: Supreme Court Rule 285 remains unchanged, meaning parties in small claims cases can still demand a 12 person jury. The cost of such a demand also remains unchanged at $25.00.

IV. WHAT IS THE IMPACT?

Several studies suggest that any significant reduction in the number of jurors decreases diversity of the jury and impacts the deliberative process. Specifically, some authors believe that dissenting jurors are less likely to articulate their views when the jury is comprised of only six people, the ability to accurately recall evidence may decline and the overall quality of deliberations declines. The studies also suggest that the deliberation time of six person juries is shorter and that such juries are less likely to

deadlock. *See, "Does Jury Size Matter? A Review of the Literature," by Nicole L. Waters, PhD (The National Center for State Courts, August 2004) & "A Meta-Analysis of the Effects of Jury Size," by Michael J. Saks & Mollie Weighner Marti, Law & Human Behavior, Vol. 21, No. 5, 1997.*

Thus, the challenge for the bench and bar is to recognize the potential impact on the deliberative process and determine ways to protect and enhance our jury trial system so that it remains representative of our communities and beneficial to all litigants.

V. HOW DOES IT COMPARE?

There is significant variability across the country, as reflected at Tab 1, but the differences can be summarized as follows:

- Federal Court requires a minimum of 6 jurors and no more than 12.
- A majority of states define a jury as being comprised of 12 jurors, but permits the parties to stipulate to less than 12.[1]
- Five states define a jury as having six jurors, but permit the parties to demand twelve.[2]
- Two states require twelve jurors without permitting the parties to agree to fewer than this number.[3]
- Seven states, including Illinois, define a jury as six jurors and do not allow the parties to demand more.[4]

VI. CIVIL JUSTICE COMMITTEE

In order to enhance the jury trial system and adjust to six person juries, the Illinois Supreme Court Civil Justice Committee has been authorized by the Supreme Court to undertake a comprehensive project to study and analyze civil jury trials throughout the state, much like the Seventh Circuit American Jury Project that was conducted between 2005 and 2008. That project was premised on the fundamental belief that our jury trial system needs to be preserved and juror participation enhanced, and sought to identify best practices that support the system. Although the Seventh Circuit project tested numerous concepts, it also specifically examined the difference between twelve and six-person juries.

Although the Seventh Circuit project concluded that civil juries should have twelve members whenever practical, the Illinois Supreme Court Civil Justice Committee has not, and will not, take a position on this issue given the newly enacted law reducing the

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[1] *Alabama, Alaska, Califarnia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Mantana, Nebraska, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas & Vermont.*

[2] *Delaware, New Jersey, New Mexico, Wiscansin & Wyaming.*

[3] *Mississippi & New Hampshire.*

[4] *Connecticut, Florida, Illinois, Maryland, New York, Rhode Island & Washington.*

number of jurors to six.[5] Instead, the sole charge of the Illinois Civil Justice Committee is to identify ways to enhance our civil jury trial system as it currently exists. Specifically, the Committee will examine the use of preliminary jury instructions, interim statements by counsel to the jury, the appropriate number of peremptory challenges and ways to enhance jury deliberations.

The initial phase of the project will compile specific data from jurors, lawyers and judges from all civil jury trials across the state of Illinois. The Committee recently completed drafting questionnaires, which were approved by the Illinois Judicial Conference last month. A copy of the juror questionnaire is attached at Tab 2.

VII. UNANSWERED QUESTIONS

- What if suit was filed before June 1, 2015, but defendant is not served until after that date; can the defendant still demand a twelve-person jury?

- What if the judge orders use of alternates, rather than the parties – who pays the cost? How do the Clerks' Offices monitor the use of alternate jurors?

- Is it constitutional? Historically, the Seventh Amendment's guarantee of the right to a civil jury trial was thought to require twelve members. *Thompson v. Utah, 170 U.S. 343, 350 (1898).* However, in 1973, the U.S. Supreme Court held that a federal civil jury with less than twelve jurors was constitutional. *Colgrove v. Battin, 413 U.S. 419 (1973).* Since that decision, there has been extensive analysis of the effects of reducing juror numbers, leading to extensive criticism of the *Colgrove* decision. In fact, in 1978, the U.S. Supreme Court conceded the superiority of twelve-person juries, but found they were not constitutionally mandated. *Ballew v. Georgia, 435 U.S. 223, 237-238 (1978).*

VIII. PRACTICAL TIPS

- Understand the proper scope of voir dire so you can make the most of it. Although Supreme Court Rule 234 expressly cautions that "questions shall not directly or indirectly concern matters of law or instructions," the purpose of voir dire to is obtain enough information about prospective jurors' beliefs "so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed." *People v. Rinehart, 2012 IL 111719, ¶ 16-17.* Thus, although attempts to indoctrinate jurors are strictly forbidden (*Rub v. Consolidate Rail Corporation, 331 Ill.App.3d 692, 771 (1st Dist., 2002)*), questions about specific dollar amounts are permissible (*DeYoung v. Alpha Construction Company, 186 Ill.App.3d 758 (1st Dist., 1989)*), *as* are case-specific inquiries. *See, Duncan v.*

[5] *Importantly, the majority of lawyers and judges who participated in the Seventh Circuit project felt that the fairness of the trial process wos unaffected by the number of jurors imponeled.*

Peterson, 408 Ill.App.3d 911, 923 (2d Dist., 2010)("where religious affiliation is relevant to potential prejudice, subjects related to religious affiliation are proper subject of inquiry." Accord, Village of Plainfield v. Nowicki, 367 Ill.App.3d 522 (3d Dist., 2006)(verdict reversed after trial court refused to question venire in DUI case whether they drank alcohol socially or had any religious or moral opinions about alcohol consumption.); Thornhill v. Midwest Physician Center, 337 Ill.App.3d 1034, 1044-1045 (1st Dist., 2003)(questions about terminating a pregnancy because fetus had genetic defect); Grossman v. Gebarowski, 315 Ill.App.3d 213 (1st Dist., 2000)(attorney should have been allowed to ask questions about pedestrians who cross the street outside the crosswalk.).

- Do not resist the opportunity to allow jurors to ask questions of witnesses pursuant to Supreme Court Rule 243. It provides invaluable feedback before the proofs are closed!
- If the jury raises questions during deliberations, encourage the judge and opposing counsel to provide substantive answers. Such questions represent an opportunity to continue your advocacy. Just as importantly, providing substantive answers to questions during deliberations is required by law. *See, People v. Millsap, 189 Ill.2d 155, 160 (2000)("The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from the facts about which there is doubt or confusion.").* This rule applies in both criminal and civil cases (*Van Winkle v. Owens-Corning Fiberglas Corporation, 291 Ill.App.3d 165, 172 (4th Dist., 1997)).* It also applies even when the jury was properly instructed in the first instance. *Hojek v. Harkness, 314 Ill.App.3d 831, 835 (1st Dist., 2000).* Significantly, simply referring jurors back to the original instructions may actually amount to an abuse of discretion because such a response can be "in effect, no response at all." *Van Winkle, supra at 173.* Of course, it is essential that all parties, and courtroom personnel, understand the appropriate procedure when questions arise during deliberations. *See, "Jury Questions During Deliberations,"* attached at Tab 3.
- Get involved in the efforts to preserve and enhance our civil jury trial system! It has been under attack for many years and is a diminishing method of dispute resolution. According to the Administrative Office of the Illinois Courts, the total number of Law Jury cases filed throughout the state in 2013 was 248,302.[6] Yet, only 1,059 of those cases were resolved by a jury verdict. *See, Tab 4.* Significantly, Cook County accounted for the bulk of those cases. Specifically, 197,776 of the total filings were in Cook County and 710 of the 1,059 jury verdicts were in Cook County. *Id.*

[6] *2013 represents the most current comprehensive statistics available from the AOIC.*

SECTION A:
TAB 1

	STATUTE/RULE	# OF JURORS	OPTION TO INCREASE
FEDERAL	Fed. R. Civ. P. 48	At least 6, but no more than 12	Yes
ALABAMA	AL. R. Civ. P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12
ALASKA	AK. R. Civ. P. 47(f)	12 but may stipulate to less	The Rule is an option to decrease from 12
ARIZONA	AZ. R. Civ. P 48	8 but may stipulate to less, but no fewer than 3	The Rule is an option to decrease from 8.
ARKANSAS	AR. R. Civ. P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12
CALIFORNIA	Cal. Code of Civ. P. § 220	12 but may stipulate to less	The Rule is an option to decrease from 12
COLORADO	C.R.S. §13-71-103	6 but may stipulate to less but not fewer than 3	No. The Rule is an option to decrease from 6
CONNECTICUT	CT Stat. §52-2159	6	No.
DELAWARE	Del. Super. Ct. Civ. R. 38(d), 48	6 unless demand 12	Yes. Parties may demand 12.
FLORIDA	Florida Statutes §69.071	6	No.
GEORGIA	O.C.G.A. § 15-12-122	12 in Superior Court, 6 in State court but may demand 12 if damages greater than $25,000	Only for cases tried in the State court (dispossessions, misdemeanors, and traffic) over $25,000.
HAWAII	HI. R. Civ. P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12
IDAHO	ID. R. Civ. P. 48(a)	12 but may stipulate to less	The Rule is an option to decrease from 12
ILLINOIS	735 ILCS 5/2-1105(b)	6	No
INDIANA	IN. R. Civ. P. 47(a), 48	6 but may stipulate to less	No. The Rule is an option to decrease from 6.
IOWA	IA R. Civ. P. 1.915(9), 1.917(2)	8	No.
KANSAS	KSA §60-248(a)	12 but may stipulate to less	The Rule is an option to decrease from 12
KENTUCKY	KY Rev. Stat. §29A.280	12 but may stipulate to less	The Rule is an option to decrease from 12.

		but not fewer than 6	
LOUISIANA	CCP 1761	12 unless parties agree to 6	The Rule is an option to decrease from 12
MAINE	ME R. Civ. P. §1204(1):	8 or 9	No.
MARYLAND	MD. R. 2-511	6	No.
MASSACHUSETTS	MA. R. Civ. P.48	12 but may stipulate to less	The Rule is an option to decrease from 12
MICHIGAN	Revised Judicature Act of 1961, §600.1352; MI. R. Civ. P. 2.511(B)	6 but may stipulate to less	No. The Rule is an option to decrease from 6.
MINNESOTA	MN. R. Civ. P. 48	A minimum of 6 but no more than 12	Yes.
MISSISSIPPI	MS. R. Civ. P. 48	12	No option to decrease to 6.
MISSOURI	MRS §494.490	12 but may stipulate to less, but no fewer than 8	The Rule is an option to decrease from 12, but no fewer than 8.
MONTANA	MT R. Civ. P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12
NEBRASKA	Neb. Const. Art. I, sec. 6	12 or 6	The Rule is an option to decrease from 12 to 6.
NEVADA	NV R. Civ. P. 48	8 but parties may agree to 4	No. The Rule only permits an 8 or 4 person jury.
NEW HAMPSHIRE	N.H. Const. Art. 20	12	No.
NEW JERSEY	Rule 1:802(b)	6 but parties may demand 12	Yes.
NEW MEXICO	NMRA 1-038(B)	6 but parties may demand 12	Yes.
NEW YORK	N.Y. CVP LAW § 4104	6	No.
NORTH CAROLINA	N.C. GS R 48	12 but may stipulate to less	The Rule is an option to decrease from 12.
NORTH DAKOTA	N.D. R. Civ. P. 48	6 but may demand 9	Yes but only up to 9 jurors.
OHIO	OH R. Civ. P 37(B)	8 but may demand less	No. The Rule is an option to decrease from 8.
OKLAHOMA	12 Okl. St. § 556.1	12 if $10,000 or	No.

		more, 6 if less than $10,000.	
OREGON	ORCP 56	12 if $10,000 or more but may stipulate to less; 6 if less than $10,000.	The Rule is an option to decrease from 12 and there is no option to increase or decrease from 6 if less than $10,000.
PENNSYLVANIA	Pa. Const. Art. I, § 6; Pa. R. C.P. 1007.1	12 but may stipulate to less	The Rule is an option to decrease from 12.
RHODE ISLAND	RI Gen. Laws § 9-10-11.1	6	No.
SOUTH CAROLINA	SCRCP 48	12 but may stipulate to less	The Rule is an option to decrease from 12.
SOUTH DAKOTA	SD Codified Laws § 15-6-48	12 but may stipulate to less	The Rule is an option to decrease from 12.
TENNESSEE	TN. R. Civ. P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12
TEXAS	Tex. Gov't Code § 62.201	12 but may stipulate to less	The Rule is an option to decrease from 12
UTAH	Utah Code §78B-1-10(1)(e); §78B-1-10(2)	8 but may stipulate to less, 4 if damages less than $20,000	No. The Rule is an option to decrease from 8.
VERMONT	V.R.C.P. 48	12 but may stipulate to less	The Rule is an option to decrease from 12.
VIRGINIA	Code of VA §8.01-359(A)	7 but may request a "Special Jury" of 12	Yes.
WASHINGTON	RCW 3.50.135	6	No
WEST VIRGINIA	WV R. Civ. P. 48	6 but may stipulate to less	No. The Rule is an option to decrease from 6.
WISCONSIN	WI stat. § 756.06(2)(b)	6 but may demand more, not to exceed 12	Yes.
WYOMING	WY Statutes § 1-11-119	6 but may demand 12	Yes.

SECTION A:
TAB 2

#_____

Juror Questionnaire

You have just served as a juror in one of the trials involved in an important study of jury trials. To complete the study, the jurors, attorneys, and judge in this trial are being asked to complete questionnaires. It is very important to have your response. Experiences can differ, and we want to hear from every juror in order to have a thorough understanding of how the jury system is working.

Some of the questions ask for your opinions. There are no right or wrong answers to these questions. We are interested in your honest opinions and reactions. Your participation is completely voluntary, and all of your individual answers will be kept confidential. Do not write your name or other identifying information on this questionnaire.

For some of the questions, you will be asked to circle a number from 1 to 7 that best reflects your views and experiences. For example, if we ask you "How easy or difficult was it for you to travel to the courthouse?" and you found it very easy to travel to the courthouse, you would circle a 1 or 2 for this question. If you found it very difficult to travel to the courthouse, you would circle a 6 or 7. If your experience was not so extreme, you would use numbers closer to the middle of the scale. If you have no opinion, or an evenly balanced opinion, then you would circle a 4.

EXAMPLE: How easy or difficult was it for you to travel to the courthouse?

Very easy	1	2	(3)	4	5	6	7	Very difficult

THIS QUESTIONNAIRE IS DOUBLE-SIDED, SO PLEASE MAKE SURE TO COMPLETE ALL APPROPRIATE PAGES.

Thank you for your time and cooperation in completing this survey. We are very grateful for your participation in this important study.

PLEASE TURN OVER FOR PAGE 2.

PLEASE COMPLETE THIS QUESTIONNAIRE INDIVIDUALLY. DO NOT DISCUSS THE QUESTIONS OR YOUR ANSWERS WITH YOUR FELLOW JURORS. WE ARE INTERESTED IN YOUR PERSONAL OPINIONS.

Overview of the Trial

1. What was your overall level of satisfaction with the trial process?

Not at all satisfied	1	2	3	4	5	6	7	Very satisfied

2. How complex was the evidence presented at trial?

Not at all complex	1	2	3	4	5	6	7	Very complex

3. How clearly was the evidence presented in this trial?

Not at all clearly	1	2	3	4	5	6	7	Very clearly

4. How difficult or easy was it for jurors to understand the evidence in this trial?

Very easy	1	2	3	4	5	6	7	Very difficult

5. How difficult or easy was it for jurors to understand the law in this trial?

Very easy	1	2	3	4	5	6	7	Very difficult

Number of Jurors

6. How many jurors were on your jury at the end of your deliberations? ____ jurors

6A. Did all of the jurors on your jury contribute to your deliberations?

☐ Yes ☐ No

6B. If no, how many of the jurors contributed to your deliberations? ____ jurors

PLEASE PROCEED TO PAGE 3.

6C. Did any one juror dominate the deliberations of the jury?

☐ Yes ☐ No

6D. What was your opinion of the number of jurors on your jury?

☐ Too few ☐ The right number ☐ Too many

Preliminary Jury Instructions

7. Before the jury heard any evidence, did the judge give preliminary instructions to the jury that included a description of the claims and the law governing this case?

☐ Yes - GO TO 7A ☐ No - SKIP TO 8

7A. How helpful, if at all, were the instructions the judge gave you at the beginning of the trial regarding the legal issues you had to decide in this case?

Not at all helpful	1	2	3	4	5	6	7	Very helpful

7B. How was the length of the instructions the judge gave to you at the beginning of the trial regarding the legal issues you had to decide in this case?

Too short	1	2	3	4	5	6	7	Too long

7C. How was the timing of the instructions the judge gave to you at the beginning of the trial regarding the legal issues you had to decide in this case?

Given at most inappropriate time	1	2	3	4	5	6	7	Given at most appropriate time

7D. Did the judge's instructions include instructions about not using social media?

☐ Yes ☐ No

7E. Did the judge's instructions include instructions about not searching for information about the case on the internet?

☐ Yes ☐ No

PLEASE TURN OVER FOR PAGE 4.

7F. Did the judge's instructions include instructions about not talking to others about the case?

☐ Yes ☐ No

7G. If you answered yes to 7D, 7E, and/or 7F, do you agree with those instructions?

(a) Not using social media ☐ Yes ☐ No

(b) Not searching for information about the case ☐ Yes ☐ No

(c) Not talking to others about the case ☐ Yes ☐ No

IF THE JUDGE DID NOT GIVE PRELIMINARY SUBSTANTIVE INSTRUCTIONS, PLEASE ANSWER QUESTION 8.

8. Would you have liked for the judge to give instructions to you at the beginning of the trial explaining the legal issues that you had to decide in the trial?

☐ Yes ☐ No

Jury Selection Questionnaire

You may recall being asked questions in the courtroom at the beginning of this trial as part of the jury selection process. In some trials, some of these questions are asked in the form of a written questionnaire rather than being asked out loud by the judge or the attorneys in the courtroom.

9. Did the jurors in this case complete a jury selection questionnaire at the beginning of the trial?

☐ Yes – GO TO 9A ☐ No – SKIP TO 10

9A. Which of the following statements best describes the length of the jury selection questionnaire used in this trial?

☐ Too short ☐ About right ☐ Too long

9B. Many of the questions on the jury selection questionnaire are questions the judge or the attorneys usually ask out loud in the courtroom. Which of the following would you prefer?

☐ To answer some of the questions by filling out a jury selection questionnaire
☐ To have all of the questions asked out loud by the judge or attorneys

What is the reason for your preference?

_____

_____

PLEASE PROCEED TO PAGE 5.

9C. Did the judge or the attorneys tell you how the information you provided in the written questionnaire would be used?

☐ Yes ☐ No

9D. How concerned were you, if at all, about your privacy when being asked questions on the written questionnaire?

Not at all concerned	1	2	3	4	5	6	7	Extremely concerned

9E. How concerned were you, if at all, about your privacy when being asked questions by the judge or the attorneys out loud in the courtroom?

Not at all concerned	1	2	3	4	5	6	7	Extremely concerned

IF A JUROR SELECTION QUESTIONNAIRE WAS <u>NOT</u> USED IN THIS TRIAL DURING JURY SELECTION (OTHER THAN THE JUROR SUMMONS YOU RECEIVED TO APPEAR FOR JURY DUTY), PLEASE ANSWER QUESTIONS 10 AND 10A.

10. Many of the questions on a jury selection questionnaire are questions the judge or the attorneys usually ask out loud in the courtroom. Which of the following would you prefer?

☐ To answer some of the questions by filling out a jury selection questionnaire
☐ To have all of the questions asked out loud by the judge or attorneys

What is the reason for your preference?

_____

_____

10A. How concerned, if at all, were you about your privacy when being asked questions by the judge or the attorneys out loud in the courtroom?

Not at all concerned	1	2	3	4	5	6	7	Extremely concerned

PLEASE TURN OVER FOR PAGE 6.

General Questions on Trial Length

11. Were you told by the judge at the beginning of the trial how long the trial would last or when the trial would be finish?

☐ Yes ☐ No

11A. If the judge did tell you how long the trial would last or when the trial would be finished, did the trial end when anticipated?

☐ Yes ☐ No

11B. How important, if at all, was it that you knew at the beginning of the trial how long the trial would be and/or what day the trial would be finished?

Not at all important	1	2	3	4	5	6	7	Extremely important

11C. Which of the following statements <u>best</u> describes your reaction to the length of the trial?

☐ Too short ☐ About right ☐ Too long

11D. Please rate the trial on the following dimensions (circle the number on the scale that best reflects your opinion for the particular characteristic):

Efficiency of the trial (Was time wasted or used effectively?)

Not at all efficient	1	2	3	4	5	6	7	Very efficient

Organization of the trial

Not at all organized	1	2	3	4	5	6	7	Very organized

Repetitiveness/redundancy of the evidence and/or testimony

Not at all repetitive	1	2	3	4	5	6	7	Very repetitive

The amount of time each side had to present its case

Not enough time allowed	1	2	3	4	5	6	7	Too much time allowed

PLEASE PROCEED TO PAGE 7.

Juror Questions During Trial

12. In your opinion, should jurors be permitted to submit questions for witnesses?

☐ Yes ☐ No

12A. Were jurors permitted to submit questions for witnesses in this case?

☐ Yes – GO TO 12B ☐ No – SKIP TO 13

12B. In this case, did you submit any questions to be asked of the witnesses?

☐ Yes ☐ No If yes, how many?_____

12C. Did the judge answer or permit the witness to answer any of your questions?

☐ Yes ☐ No ☐ Does not apply/I didn't ask any questions

12D. If you submitted any questions to the judge, what were the primary purposes of your questions (check all that apply)?

☐ To clarify information already presented
☐ To get additional information
☐ To find out the opinion of a witness
☐ To resolve inconsistencies in the evidence
☐ Other, specify _____

12E. Which of the following statements best describes your reaction to the number of questions asked by jurors?

☐ Too many ☐ An appropriate number ☐ Not enough

12F. How did the opportunity to submit questions for witnesses during trial affect:

	Helped	Did not affect	Hurt
(a) Your understanding of the case?	☐	☐	☐
(b) The fairness of the trial process?	☐	☐	☐
(c) The efficiency of the trial process?	☐	☐	☐
(d) Your satisfaction with the trial process?	☐	☐	☐

PLEASE TURN OVER FOR PAGE 8.

IF JUROR QUESTIONS FOR WITNESSES WERE NOT ALLOWED, PLEASE ANSWER QUESTIONS 13-13B.

13. In your opinion, should jurors be permitted to submit questions for witnesses during the trial?

☐ Yes ☐ No

13A. Did you have any questions you have liked to submit to be asked of a witness during this trial?

☐ Yes ☐ No

13B. If you had been permitted to submit questions for the witnesses, how would it have affected:

	Would have helped	Would not have affected	Would have hurt
(a) Your understanding of the case?	☐	☐	☐
(b) The fairness of the trial process?	☐	☐	☐
(c) The efficiency of the trial process?	☐	☐	☐
(d) Your satisfaction with the trial process?	☐	☐	☐

Interim Statements

In some trials, attorneys are permitted to make interim statements in the course of the trial. These statements may either introduce evidence about to be presented through the testimony of witnesses or summarize the evidence that has already been presented.

14. Did the attorneys make interim statements in this trial?

☐ Yes → GO TO 14A ☐ No - SKIP TO 15

14A. How did the lawyers use the interim statements during the trial?

☐ Mostly to introduce the evidence about to be presented
☐ About the same in terms of introducing versus summarizing the evidence
☐ Mostly to summarize the evidence that had just been presented

14B. Which type of the interim statements did you find most useful?

☐ When used to introduce the evidence about to be presented
☐ When used to summarize the evidence that had just been presented
☐ Both uses of Interim Statements were equally useful
☐ Neither, I didn't find them useful at all

PLEASE PROCEED TO PAGE 9.

14C. Please rate how helpful the interim statements were on each of the following dimensions (circle the number on the scale that best reflects your opinion for each characteristic):

In your opinion, how helpful were the interim statements to you in:

	Not at all helpful						Very helpful
(a) Understanding the evidence?	1	2	3	4	5	6	7
(b) Recalling the evidence during deliberations?	1	2	3	4	5	6	7
(c) Keeping focused on the evidence?	1	2	3	4	5	6	7
(d) Making the evidence more interesting?	1	2	3	4	5	6	7

14D. Was there anything about the interim statements that you did not like?

☐ Yes ☐ No

If yes, please explain: _____

_____

14E. Did the interim statements affect your verdict?

☐ Yes ☐ No

If yes, please explain: _____

_____

IF THE ATTORNEYS DID NOT MAKE INTERIM STATEMENTS, PLEASE ANSWER QUESTIONS 15 and 15A.

15. Would you have found the use of interim statements during the trial to be helpful?

☐ Yes ☐ No ☐ Don't know

15A. Which type of the interim statements would you have found more useful during the trial?

☐ When used to introduce the evidence about to be presented
☐ When used to summarize the evidence that had just been presented
☐ I think both uses of interim statements would have been equally useful
☐ Neither, I wouldn't find them useful at all

PLEASE TURN OVER FOR PAGE 10.

Instructions on Deliberations

16. Did the judge give you any instructions or suggestions on how to select a foreperson?

☐ Yes ☐ No

16A. If yes, did you feel that you had to follow the judge's instructions about selection of a foreperson?

☐ Yes ☐ No

16B. How do you feel about the amount of guidance you received from the judge on how to select a foreperson?

Not enough	1	2	3	4	5	6	7	Too much

16C. Did the judge give you any instructions or suggestions on how to conduct your deliberations?

☐ Yes ☐ No

16D. If yes, did you feel that you had to follow the judge's instructions about conduct during your deliberations?

☐ Yes ☐ No

16E. How do you feel about the amount of guidance you received from the judge on how to conduct your deliberations?

Not enough	1	2	3	4	5	6	7	Too much

16F. What best describes how the foreperson was selected?

☐ He/she volunteered.
☐ Other jurors nominated him/her.
☐ We took a vote.
☐ The judge nominated him/her.
☐ Other, specify _____

16G. Were you the foreperson of this jury?

☐ Yes ☐ No

PLEASE PROCEED TO PAGE 11.

16H. How much influence did the foreperson have on the jury's decision?

☐ More than any other juror
☐ More than most jurors
☐ The same as other jurors
☐ Less than most jurors

16I. How satisfied were you with the way your deliberations were conducted?

Extremely dissatisfied	1	2	3	4	5	6	7	Extremely satisfied

Questions During Deliberations

17. Did your jury submit any questions to the judge during your deliberations?

☐ Yes ☐ No

17A. Did the judge answer any of the questions that you submitted during your deliberations?

☐ Yes ☐ No

17B. If the judge did not answer any of your questions, did he/she give the reason for not answering the question(s)?

☐ Yes ☐ No

17C. If the judge did answer some of your questions, how did the answers affect your understanding of the case?

☐ Helped me understand the case better
☐ Did not affect how well I understood the case
☐ Made it harder for me to understand the case

17D. If the judge did answer some of your questions, what effect did the answers have on your jury's deliberations?

☐ Were extremely helpful to the jury's decision making
☐ Were moderately helpful to the jury's decision making
☐ Were not helpful to the jury's decision making
☐ Made the jury's decision making more difficult

PLEASE TURN OVER FOR PAGE 12.

Deliberations

18A. How difficult was it for the jury to reach a verdict?

Not at all difficult	1	2	3	4	5	6	7	Very difficult

18B. How accurately was the trial evidence remembered by the jury during its deliberations?

Not at all accurately	1	2	3	4	5	6	7	Very accurately

18C. How satisfied were you with the jury deliberations?

Not at all satisfied	1	2	3	4	5	6	7	Extremely satisfied

18D. How satisfied were you with the jury verdict?

Not at all satisfied	1	2	3	4	5	6	7	Extremely satisfied

18E. How much did you rely on other jurors to remember evidence presented during the trial?

Did not rely On others	1	2	3	4	5	6	7	Relied very much on others

18F. How much did you rely on other jurors as you decided how to vote in this case?

Did not rely On others	1	2	3	4	5	6	7	Relied very much on others

18G. How thorough were the jury deliberations?

Some important matters thoroughly discussed	1	2	3	4	5	6	7	All important matters thoroughly discussed

18H. Were you the jury foreperson?

☐ Yes ☐ No

PLEASE PROCEED TO PAGE 13.

18I. How much did you participate in the jury deliberations?

Participated very little	1	2	3	4	5	6	7	Participated a great deal

18J. How many of the jury members participated more than you in the jury deliberations?

_____ members

18K. How influential would you say you were during the jury's deliberations?

Not at all persuasive	1	2	3	4	5	6	7	Very persuasive

18L. How long did the jury deliberate?

_____ hours

18M. What percentage of time was spent discussing liability?

_____ percent

18N. What percentage of time was spent discussing money awards or damages?

_____ percent

18O. How strongly did you agree with the jury's final verdict?

Did not agree at all	1	2	3	4	5	6	7	Agreed very strongly

18P. Have you served on both a 12-person jury and a jury with fewer than 12 jurors?

☐ Yes ☐ No

PLEASE TURN OVER FOR PAGE 14.

Juror Background

Please circle the number that corresponds to your answer or fill in the blank. This information is being used for statistical purposes only.

19. Did you ever sit on a jury before? ☐ Yes ☐ No

If yes, how many juries? _____

If yes, what type of juries have you served on (check all that apply)?

☐ Civil ☐ Criminal ☐ Don't Know

19A. Gender: ☐ Male ☐ Female

19B. Age: _____ years

19C. Which of the following best describes your racial/ethnic background?

☐ Asian-American
☐ Black/African-American
☐ White Hispanic/Latino
☐ Non-White Hispanic/Latino
☐ White/Caucasian
☐ Native American
☐ Other (specify): _____

19D. Are you currently employed? ☐ Yes ☐ No

19E. If you are currently employed, what is your occupation? _____

19F. What is the last year of school you completed?

☐ Less than high school
☐ High school graduate
☐ Technical school/some college
☐ Completed 2-year college
☐ Completed 4-year college
☐ Graduate School

Please use the space below for any further comments you have on the procedures used in this trial:

THANK YOU VERY MUCH FOR YOUR PARTICIPATION!

SECTION A:
TAB 3

JURY QUESTIONS DURING DELIBERATIONS

By
Judge Lynn M. Egan
May 2013

I. Applicable Statute

735 ILCS 5/2-1107. Instructing the jury.

(a) The court shall give instructions to the jury only in writing, unless the parties agree otherwise, and only as to the law of the case. The court shall in no case, after instructions are given, clarify, modify or in any manner explain them to the jury, otherwise than in writing, unless the parties agree otherwise."

This statute applies to civil *and* criminal cases. *People v. Millsap, 189 Ill.2d 155, 163 (2000); Supreme Court Rule 451(c).*

II. Trial Court Duty to Answer Questions

"The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Millsap, 189 Ill.2d 155, 160 (2000). See also, People v. Childs, 159 Ill.2d 217, 228-229 (1994); People v. McSwain, 2012 IL App (4th) 100619, ¶ 26 ("'Jurors are entitled to have their questions answered.'")*

This duty "applies fully to civil cases as well." *Van Winkle v. Owens-Corning Fiberglas Corporation, 291 Ill.App.3d 165, 172 (4th Dist., 1997). See also, Baraniak v. Kurby, 371 Ill.App.3d 310, 314 (1st Dist., 2007)("...jurors are entitled to have their inquiries answered.")*

"The duty to answer the jury's question applies even if the jury was properly instructed." *Hojek v.Harkness, 314 Ill.App.3d 831, 835 (1st Dist., 2000).*

Simply referring jurors back to the original instructions may be an abuse of discretion because such a response can be "in effect, no response at all." *Van Winkle, supra at 173.* Significantly, however, the trial court should not provide a response that amounts to an instruction on a new charge or theory after deliberations begin. *People v. Millsap, supra at 161.* Attorneys are entitled "to know the law on which the jury will be instructed so that [they] can tailor their arguments accordingly." *Id. at 163.*

III. Trial Court Discretion Not to Answer Questions

"While the jury is entitled to have its questions answered, the supreme court has not mandated that the trial court answer all questions." *Hojek v. Harkness, 314 Ill.App.3d 831, 834 (1st Dist., 2000).* Instead, the trial may properly exercise its discretion by declining to answer a jury question under "appropriate circumstances," which include the following:

- When the jury instructions are readily understandable & sufficiently explain the relevant law;
- When additional instructions would serve no useful purpose or might mislead the jury;
- When the jury's request involves a question of fact;
- When giving an answer might effectively direct the verdict

People v. Averett, 237 Ill.2d 1, 24 (2010). See also, People v. Williams, 2013 IL App (4th) 110936, ¶ 22.

IV. Proper Procedure When Answering Jury Questions

"Section 2-1107 of the Code of Civil Procedure requires that the court shall give instructions to the jury only in writing. The salutary effect of this statute should carry over to all communications with the jury." *Wolfe v. Menard, Inc., 364 Ill.App.3d 338, 359 (2d Dist., 2006)*

"All jury questions should be submitted to the court in writing. If the jury sends out an oral question, the court should advise it to reduce the question to writing. The written question or note should be transmitted from the jury to the court's bailiff. Upon receipt of the written question or note, the court should immediately notify all counsel. The court should place the substance of the note or question on the record, in counsel's presence, whether that be in person or by telephone. Or, if a party is *pro se,* the record should be made in the presence of the party. If the court, after diligent effort, is unable to secure counsel's or a party's presence, the judge should make a record of that fact. The court should make a record of its proposed answer to the jury's note or question, and give counsel or the parties the opportunity for discussion or objections. The court should answer the note or the question in writing, again transmitted by the bailiff to the jury. After the jury is discharged, the written communications should be made part of the common-law record. Rarely, if ever, should the trial judge personally enter the jury room while the jury is deliberating, even to answer administrative or housekeeping questions."*Id.*

See also, Van Winkle v. Owens-Corning Fiberglas Corp, 291 Ill.App.3d 165, 173-174 (4th Dist., 1997)

"...we note that the better practice would have been for OCF's counsel to have provided the trial court with a written draft of the specific response counsel wanted the court to give the jury, just as counsel provides a written proposed

instruction during the jury instruction conference. Supreme Court Rule 239(c) requires parties to submit proposed jury instructions in writing so that the record shows exactly the parties' respective positions on how the jury should be instructed. We should require nothing less when the jury raises a question during deliberations, requiring the court to decide how to respond to – that is, to instruct – the jury. Indeed, in the midst of jury deliberations after a vigorously contested trial, a question from the jury deserves as much – if not more – thoughtful consideration as did the original instructions."

V. Ex Parte Communications with Jurors - The Law has "Evolved"

"For many years, it was a strict rule that any *ex parte* communication whatsoever by the judge or a third person with the jury was plain error, despite that there was no improper motive or effect on the jury, regardless of the correctness of the response or instruction to the jury, or whether actual prejudice was demonstrated." *People v. Childs, 159 Ill.2d 217, 227 (1994).*

"Since those early cases, the rule has judicially evolved that a jury verdict will not be set aside where it is apparent that no injury or prejudice resulted from a communication to the jury either by the trial court or a third person outside the presence of the defendant and his counsel." *Id. at 217-218.*

People v. McLaurin, 382 Ill.App.3d 644 (1st Dist., 2008), reversed 235 Ill.2d 478 (2009)(During deliberations, the jury sent out 5 notes. Although the trial court discussed each note with the attorneys, the discussions occurred in chambers, rather than open court, defendant was not present for any of the discussions, & one of the notes was answered by the sheriff, rather than the judge.)

Appellate Court Version:

"It is well settled that [defendant] had a constitutional right to appear and be present during each critical stage of his trial. Moreover, jury deliberations are a critical stage of the trial, involve substantial rights, and a defendant has a right to be present."

"...once the jury retired to deliberate, the trial court's communications with the jurors were supposed to take place in open court. Here, the trial judge violated this rule when he permitted the sheriff to have ex parte communications with the jurors after receiving the fourth jury note..."

"It is well settled that an accused's attorney has no power to waive the defendant's right to be present...," *citing People v. Lofton, 194 Ill.2d 40, 66 (2000).*

Supreme Court Version:

"...although criminal defendants have a 'general right to be present' at every stage of the trial, 'the broad 'right to be present at trial' is not itself a substantial right under the Illinois Constitution." *Id. at 490.*

"...a defendant's right of presence is violated under Illinois law only when the defendant's absence results in the denial of an underlying substantial right, such as the right to confront witnesses." Id. at 490-491.

"Here, defendant has pointed to no substantive right that was impaired by the trial court's decision to proceed in his absence, and we find no such right was impaired." *Id. at 491.*

"...both the provision of transcripts to the jury and the formulation of a response to a claim of deadlock are within the court's discretion, as is the determination of when a supplemental instruction to the jury is appropriate." *Id. at 493.*

In addressing the claim of error related to the trial court's decision to send the bailiff into the jury room to deliver the court's message to "keep on deliberating," the Supreme Court noted, "[o]ur cases have also emphasized that the key question in determining whether an 'intrusion' into the jury room constitutes error is whether the defendant was prejudiced by the intrusion." *Id. at 497.*

"Absent any evidence or even a good-faith allegation that the bailiff actually acted improperly and did more than follow the court's simple instructions, we will not presume that a sworn officer of the court engaged in misconduct." *Id. at 498.*

VI. Standard of Review

Assessing the propriety of the trial court's response to jury questions during deliberations is a two-step process that considers the following:

- Whether the court *should* have answered the question, which is reviewed under an abuse of discretion standard; and
- If the question was answered, whether the trial court's response was correct, which is reviewed *de novo* because the correctness of the response is a question of law.

People v. Leach, 2011 IL App (1st) 090339, ¶ 16.

VII. Examples of Jury Questions

- "Were medical expenses covered by insurance?" Answer: None. **REVERSED** – failure to tender IPI Civil 3d No. 2.13 was prejudicial error. *Hojek v. Harkness, 314 Ill.App.3d 831, 839 (1st Dist., 2000).*

- "Was Dr. Adeli a resident or an attending physician at the time of plaintiff's surgery?" Answer: There is no sworn testimony on that question. **AFFIRMED** – "Refusing a request for material not in evidence does not constitute error." *Schiff v. Friberg, 331 Ill.App.3d 643, 659 (1st Dist. 2002).*

- "To find for plaintiff does it require a unanimous vote for at least one item (of 3)?" Answer: "You must be unanimous that the Defendant was negligent in one or more of the respects set out in the instructions – and the Plaintiff was injured – and the negligence of the Defendant was a proximate cause of the injuries suffered by the Plaintiff. Remember, you must consider the instructions as a whole, not picking out one instruction and disregarding others." **AFFIRMED.** *Id.*

- "For medical bills: Who paid the $50,935.48 in medical bills (plaintiff/insurance)?" Answer: Court refused IPI Civil No. 30.22 (Collateral Source) & instead sent a note which read "You have received all the evidence and instructions in this case. Please continue to deliberate until you reach a verdict." **REVERSED** – "...there was a duty to answer its questions, and the failure to do so resulted in prejudicial and reversible error, mandating a new trial." *Baraniak v. Kurby, 371 Ill.App.3d 310, 316 (1st Dist., 2007).*

- "When you say did CFC prove there was an offer by McLean, does McLean have to mean McLean as an individual?" Answer: "Yes." **AFFIRMED** – "Because CFC sought to hold McLean personally liable, and it presented no evidence that he acted as agent for an undisclosed principal, the jury could hold McLean liable only on proof that McLean as an individual offered to purchase CFC's interest in River East, LLC. We find no abuse of discretion in the court's correct response to the question." *CFC Investment, L.L.C. v. McLean, 387 Ill.App.3d 520, 532 (1st Dist., 2009).*

- In a child pornography case, jury asked for a definition of the word, "lewd" and subsequently asked for a dictionary definition of the word. Answer: The court provided two answers, including one that incorporated language from an Appellate Court decision, and another that simply stated, "The court has provided a legal definition of 'lewd.' Please rely on that instruction." **AFFIRMED** – no abuse of discretion because "the court had a duty to provide the jury with specific and accurate guidance" and it "accurately stated the law and provided the jury with well-established factors to enable it to determine whether the images were lewd." *People v. McSwain, 2012 IL App (4th) 100619, ¶ 28 & 31.*

- In a child abduction case, jury asked "Is providing a minor access to pornographic material an unlawful act in violation of a criminal statute?"

Answer: Court gave lengthy instruction defining the offense of distributing harmful material to minors, even though defendant was never charged with this offense. **REVERSED** – "By giving the instruction on distribution of harmful material to a minor, the trial court introduced a new theory not argued by the State..." *People v. Williams, 2013 IL App (4th) 110936, ¶ 27.*

- In a premises liability case, jury advised the bailiff that it had a question about verdict form B, which allowed a verdict for plaintiff but reduced the award by plaintiff's degree of comparative fault. ("They were trying to say how to do the percentage.") Without notifying the attorneys, the trial judge entered the jury room and orally instructed the jury. According to a juror, the judge was told that the jury understood the verdict form to mean that a finding of more than 50% comparative fault by plaintiff would result in no compensation. The judge allegedly responded by stating, "Exactly, you got it. You have to stop at 50%. Unfortunately, that's what we have to live with." According to the court reporter, she overheard the judge tell the jury it "cannot assess anymore than 50% negligence against plaintiff or he would get nothing." **REVERSED** – "the trial judge had an unauthorized *ex parte* communication with the jurors during their deliberations about a crucial issue in the case..." *Wolfe v. Menard, Inc., 364 Ill.App.3d 338, 350, 356 & 357 (2d Dist., 2006).*

- In asbestos litigation, jury sent out a written note which asked, "Does a conspiracy *have* to be between [OCF] and another company, or can a conspiracy be within the same company ([OCF]) with the company officers conspiring among themselves? We are confused about the meaning of 'one or more parties' in a conspiracy. Can this mean [OCF] alone, or does it have to be [OCF] and another company?" Answer: "The instructions which the court has provided contain the law applicable to these cases. Please refer to your instructions." **REVERSED** – "...because the jury's question here constituted 'an explicit question which manifested juror confusion on a substantive legal issue,' we hold that the trial court abused its discretion in its response to the jury's written question – which was, in effect, no response at all." *Van Winkle v. Owens-Corning Fiberglas Corp., 291 Ill.App.3d 165, 173 (4th Dist., 1997).*

- In medical malpractice action, jury sent out three notes, two of which the judge declined to read to the attorneys because "the questions involved the unanimous nature of jury verdicts." **AFFIRMED** – based on waiver and defendant's failure to demonstrate "substantial prejudice." However, the appellate court noted, "the preferred method is to allow counsel access to all jury inquiries, even if they reveal the temporary disposition of the jurors towards a cause at issue." *Wodziak v. Kash, 278 Ill.App.3d 901, 914 (1st Dist., 1996).*

SECTION A:
TAB 4

LAW CASE DISPOSITIONS BY CIRCUIT
CIRCUIT COURTS OF ILLINOIS
CALENDAR YEAR 2013

Circuit	Total Law Cases Disposed of			Number of Law Jury Cases Terminated By Verdict		
	Law Over $50,000	Law $50,000 Or Less	Total	Law Over $50,000	Law $50,000 Or Less	Total
1st	480	1,435	1,915	29	3	32
2nd	240	599	839	14	0	14
3rd	1,679	1,143	2,822	11	1	12
4th	216	694	910	14	3	17
5th	120	993	1,113	5	0	5
6th	335	1,923	2,258	15	0	15
7th	596	2,473	3,069	22	7	29
8th	104	417	521	4	2	6
9th	118	640	758	1	0	1
10th	399	2,129	2,528	12	1	13
11th	258	1,378	1,636	21	4	25
12th	1,083	3,745	4,828	33	2	35
13th	334	1,121	1,455	6	2	8
14th	217	1,099	1,316	8	0	8
15th	162	848	1,010	10	0	10
16th	536	2,623	3,159	14	0	14
17th	522	2,306	2,828	16	0	16
18th	1,445	4,031	5,476	25	0	25
19th	1,122	3,115	4,237	34	1	35
20th	872	2,587	3,459	11	1	12
21st	184	905	1,089	2	1	3
22nd	447	1,045	1,492	10	0	10
23rd	240	1,568	1,808	3	1	4
DOWNSTATE TOTAL	11,709	38,817	50,526	320	29	349
COOK COUNTY	23,175	174,601	197,776	438	272	710
STATE TOTAL	34,884	213,418	248,302	758	301	1,059

SECTION B

- *"Six Person Juries: Fewer Jurors, More Issues, More Control," by Judge Thomas More Donnelly, November, 2015.*
  - "Public Act 98-1132: An Unconstitutional Violation of the 'Inviolate' Right to Trial by Jury?" by Michael L. Resis & Britta Sahlstrom, IDC Defense Update, April 2015, Volume 16, No. 3 (Reprinted with permission of IDC).
  - "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge," by Professor Shari Seidman Diamond, Researching Law, Vol 21, No. 1, Winter 2010. (Reprinted with permission of Professor Diamond).
  - "Racial and Gender Composition of the Jury and Batson Issues" and "Voir Dire of Prospective Jurors in Illinois," by Marc Stahl, December 2012. (Reprinted with permission of Marc Stahl).

Six Person Juries:
Fewer Jurors, More Issues, More Control

Thomas More Donnelly

November 21, 2015

I. Preserving Your Request for Twelve
   a. Illinois Constitutional Challenge
      i. Illinois Constitution Art. I, §13: the "right to trial by jury as heretofore enjoyed"
      ii. "Public Act 98-1132: An Unconstitutional Violation of the "Inviolate" right to Trial by Jury?" IDC Defense Update, Vol. 16, No. 3 P. 1 (attached)

II. Six Person Juries Are Less Diverse
   a. "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge" Researching Law No. 21, No. 1, 1 (attached)
   b. Marc Stahl, "Racial and Gender Composition of the Jury and Batson Issues" (attached)

III. We're Only Picking Six, Judge, Can You Give Us a Little More Time for Voir Dire
   a. Marc Stahl, "Voir Dire of Prospective Jurors in Illinois" (excerpt attached)
      i. pp. 5-10 Permissible Questions
      ii. pp. 57-61 Reopening Voir Dire
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Public Act 98-1132: An Unconstitutional Violation of the "Inviolate" Right to Trial By Jury?

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Effective June 1, 2015, Public Act 98-1132 amends section 2-1105(b) of the Code of Civil Procedure (735 ILCS 5/2-1105(b)) with regard to jury demands in Illinois. Signed into law in December 2014 as Senate Bill 3075 (SB 3075) by then-Governor Quinn, the amendment provides, in part, that "[a]ll jury cases shall be tried by a jury of 6." Opponents of the lame duck session amendment maintain that the amendment is fundamentally at odds

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with the right to "Trial by Jury" as set out in Article I, Section 13 of the Bill of Rights to the 1970 Constitution of the State of Illinois, which states, "The right of trial by jury as heretofore enjoyed shall remain inviolate." The issue—which may become the center of a constitutional challenge—is whether the inviolate right "as heretofore enjoyed" includes the right to a *twelve* person jury in civil actions (unless otherwise agreed by both parties). As retired Cook County Circuit Court Judge Dennis Dohm suggests in his January 21, 2015 article published in the Chicago Daily Law Bulletin, "The Record Reflects It: Six-Person Civil Jury Law Is Unconstitutional," a close reading of the Record of Proceedings of the Sixth Illinois Constitutional Convention of 1970 ("the Record") and the 1969 Illinois Constitution Study Commission report is necessary to evaluate the constitutionality of the recent amendment.

The History of the Right of Trial by Jury in Illinois

The 2014 Senate Bill is not the first time a governing body of Illinois considered authorizing a jury of fewer than twelve: in 1970, constitutional delegates exhaustively considered whether to grant the legislature the power to decrease civil jury size. 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1427-34 (hereinafter "Record"); 4 Record at 3637-41. The framers of the 1970 Illinois Constitution voted to strike down any such amendment. 4 Record at 3641. Instead, the delegates left intact the 1870 constitutional guarantee that the "right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1870, art. II, § 5.

Unlike the 1970 constitution, the right-to-jury-trial provision of the 1870 constitution contained an additional clause—one permitting juries of less than twelve in cases before justice of the peace. *Id.* Section 5, Article II of the Bill of Rights to the 1870 Illinois Constitution, provided: "The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men, may be authorized by law." The deletion of the second clause from the 1970 constitution was prompted, in part, by the 1964 restructuring of the judiciary branch of Illinois by means of a new Judicial Article (Article VI), which superseded the judicial article of the 1870 Illinois Constitution. 3 Record at 1427. The new Judicial Article created the circuit, appellate, and supreme courts—obviating the need for justices of the peace and rendering that portion of the 1870 Constitution inapplicable. *Id.* Additionally, the delegates' decision to delete this second clause—rather than amend it to accurately reflect the newly restructured judiciary—was the product of the vigorous debate and resulting consensus of the 1970 constitutional delegates. *See* 3 Record at 1427-34; 4 Record at 3637-41.

The Record of Proceedings of the Sixth Illinois Constitutional Convention of 1970 details the discussion on the floor of the Constitutional Convention prior to the vote against authorizing the legislature to decrease the number of civil jurors. In their discussions, the 1970 constitutional delegates often refer to and consider the opinion of the Illinois Constitution Study Commission ("the Committee"), which prepared "The Illinois Constitution: An Annotated and Comparative Analysis" for the delegates. After a series of votes, the Committee recommended that the delegation adopt the first clause of the 1870 constitution and strike the second—a recommendation ultimately ratified by the delegates. *See* 3 Record at 1427.

During the first round of voting, the Committee tentatively voted to allow the General Assembly to "modify the right to trial by jury in suits between private persons for damages for death or injury to

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persons or property." on the rationale that it could alleviate some backlog in the courts. 3 Record at 1427. However, on final vote, the Committee reversed its decision and declined to recommend the authorization of any deviations from the civil jury trial as it existed. 3 Record at 1427. After the Committee vote, Justice Underwood of the Illinois Supreme Court informed the Committee that "all [the members of the court] are of the view that it would be sound policy to provide in the new constitution that the General Assembly may, if it sees fit, eliminate or restrict the right to the jury in civil cases." Because the Committee did not consider this letter prior to its vote, delegates brought the letter to the attention of the convention on the floor. *See* 3 Record at 1430.

Based on the Court's recommendation, an amendment ("the Wilson amendment") proposed adding the following language to the end of the existing Committee suggestion: "except that the General Assembly may provide in civil cases for juries of not less than six nor more than twelve and for verdicts by not less than three-fourths of the jurors." 3 Record at 1430. The amendment was proposed in consideration of the members of the court because the court's recommendation was received after the final Committee vote. *Id.* The Wilson amendment's sponsor additionally offered that the amendment would give the legislature flexibility by "vest[ing] in the legislature the authority which the legislature presently does not have to provide for juries of less than twelve but not less than six...." *Id.* Another delegate in favor of the Wilson amendment noted:

> As the constitutional provision is now, it is quite inflexible. The hands of the legislature are tied. They just don't have a chance to move in this area [of providing for juries of less than twelve or non-unanimous verdicts], and the purpose of this amendment is to give the legislature the desired flexibility.

Id. at 1432. The Wilson amendment passed by fifty-eight to twenty-three over opposition including that of Mr. A. Lennon, who would later successfully sponsor an amendment retracting the Wilson amendment and reinstating the Committee proposal. *Id.* at 1430, 1432. After passing, the Wilson amendment was "approve[d] on first reading" to be sent to Style and Drafting. *Id.* at 1432.

However, the Wilson amendment was not adopted. Instead, the Wilson amendment was itself amended by Mr. A. Lennon's proposal (the "Lennon amendment") to delete the language added by the Wilson amendment, replace the period after the word "inviolate," and return the amendment to the form originally suggested by the Committee. 4 Record at 3637. The Lennon amendment sought to remove, in part, the language that would permit the legislature to reduce the twelve-man jury system. *Id.* During his initial opposition to the Wilson amendment, Mr. Lennon stated:

> The committee discussed this and debated it long, long hours. We concluded that retaining the right of the jury, as heretofore enjoyed both in criminal and civil matters,

■ *Continued on next page*

> was the appropriate thing to do; and at least I, for one, as a member of the committee, would ask that you support the majority proposal [to retain only the constitutional provision stating '[t]he right of trial by jury as heretofore enjoyed shall remain inviolate'] and reject any tampering with or watering down of the jury system which we have heretofore enjoyed.

3 Record at 1430. After vigorous debate on the merits of both a twelve-man jury and unanimous jury verdicts, the Lennon amendment passed—reinstating the Committee proposal and, as Mr. A. Lennon intended, leaving juries intact. *See* 4 Record at 3641. When later revisiting the status of the Lennon amendment, a delegate summarized the amendment to the delegation president as follows: "So far as the constitution is concerned, the jury must be one of twelve members in criminal or civil cases unless the parties otherwise agree." 5 Record at 4241.

Constitutional Concerns

The constitutionality of the amendment appears to turn—as opponents suggest—on what specifically comprises the "inviolate" right to a trial by jury "as heretofore enjoyed." As one delegate to the 1970 Constitutional Convention explained, courts interpret "the right of trial by jury as heretofore enjoyed" as "meaning the institution of jury trial with all of its characteristics as in effect at the time the constitution was adopted...." 3 Record at 1429. Indeed, the Illinois Supreme Court has construed the provision that the "right of trial by jury as heretofore enjoyed, shall remain inviolate" to mean that "the right of trial by jury as it existed at common law, and as enjoyed at the adoption of the respective constitutions." *Reese v. Laymon*, 2 Ill. 2d 614, 618, 119 N.E.2d 271 (1954); *see also Interstate Bankers Cas. Co. v. Hernandez*, 2013 IL App (1st) 123035, ¶ 15, 3 N.E.3d 353 (quoting *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 215, 533 N.E.2d 873 (1988)) ("The Illinois Supreme Court has explained that 'it is the common law right to jury trial *as enjoyed at the time of the adoption of the 1970 constitution* to which 'heretofore enjoyed' refers") (emphasis in original). Furthermore, in 1976, the Illinois Supreme Court plainly stated that the "right to trial by jury is guaranteed by the 1970 Illinois Constitution (Ill.Const. art. I sec. 13), and this court has long determined that a jury is comprised of 12 members." *Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425, 427, 348 N.E.2d 457 (1976). Based upon a review of the Record of Proceedings of the Sixth Illinois Constitutional Convention of 1970, in conjunction with case law interpreting the constitution, it appears that the six person civil jury trial may not survive a constitutional challenge in the event courts choose to effectuate the intent of the delegates to the 1970 convention.

Shari Seidman Diamond

Achieving Diversity on the Jury:

Jury Size and the Peremptory Challenge

Emily Dolan

ABF Research Professor Shari Diamond is one of the country's leading experts on the jury system. In her research, Diamond attempts to understand the functioning of the jury by analyzing it from many different angles, drawing insights from comprehensive empirical analyses.

Readers familiar with Diamond's work will recall the groundbreaking Arizona Filming Project, where, along with collaborator Mary R. Rose, Diamond is mapping the behavior of jurors in 50 actual civil trials held in Pima County, Arizona. Diamond and Rose have published several articles on how these jurors talk about evidence, how they evaluate expert testimony, how they understand jury instructions, and how they reach their decisions, and are working on a book that will further describe and analyze their findings. In a recent article, however, Diamond shifts focus to examine also the structural and procedural factors that affect the compositions of juries. In "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge," (*Journal of Empirical Legal Studies, 2009*) Diamond and co-authors Destiny Peery, Francis J.

Dolan, and Emily Dolan, use an unusual data set of 277 civil jury trials in Cook County, Illinois to examine the effects of peremptory challenges and jury size on the diversity of juries.

"The perceived fairness of the jury system depends in part on its ability to reflect a cross-section of the community," the authors state. Indeed, the Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to trial by a jury drawn from the community within which the alleged crime took place (the Seventh Amendment also guarantees trial by jury in civil cases). In a heterogeneous nation such as the United States, in many jurisdictions a true cross-section of the community would be ethnically and/or racially diverse. Thus, the authors decided to focus on the "influence of jury selection and jury size on minority representation" on juries.

Diamond was able to draw on a rich body of new empirical evidence, thanks to a fruitful collaboration with the Hon. Francis J. Dolan, a now-retired judge in the Circuit Court of Cook County, Illinois. Over the course of six years on the bench in a high-volume civil courtroom, Judge Dolan systematically collected and digitized data on 277 trials in his call, involving both large and small juries. Thanks to Judge Dolan's innovative efforts—which he undertook initially to meet a practical managerial need rather than to develop a research project—the researchers were able to analyze the effects on jury composition of jury size and the peremptory challenge.

THE SHRINKING JURY

As they report on their research, Diamond and co-authors begin by examining the issue of jury size. The Sixth and Seventh Amendments call for "a jury" in criminal and civil trials but say nothing explicit about its size. Over the years, the matter has been debated, with defenders of the 12-person jury maintaining that the Constitution's silence on the matter meant that the Framers accepted the 12-person jury as "an implicit part of what it meant to be a jury." Though the Supreme Court confirmed this interpretation in the 1930 case of *Patton v. United States*, in 1970, in the case of *Williams v. Florida*, the Court shifted its opinion and ruled that juries consisting of six members were constitutional. Without citing any empirical evidence to support its opinion, the Court wrote, "the difference between the 12-man and six-man jury in terms of the cross-section of the community represented seems likely to be negligible." The implication of this opinion was, as Diamond and co-authors state, "according to the Court...six- and 12-member juries would not differ in representativeness or decision-making behavior."

A number of states followed

Hon. Francis J. Dolan (Ret.)

Hon. [illegible]

Destiny Peery

[illegible]

Florida's lead and reduced jury sizes, "particularly in civil cases, primarily in the interest of reducing costs," the authors note. Subsequent studies in the 1970s, though, criticized the Court's decision, citing statistical theory and evidence from simulation studies. As Diamond, et al. note, however, "neither statistical theory nor the simulation method...could directly test whether the screening process that potential jurors go through during jury selection modifies the impact of jury size on jury representativeness." A 1997 study did include a field study comparing eight- and 12-person juries, and found only a marginal difference in the representation of minorities on the juries. However, the mathematical difference between eight and twelve and six and twelve would seem to predict a greater chance of disparities between six and twelve person juries, which were not examined in the 1997 research. Thus, the researchers hoped to fill the evidence gap with their large-scale empirical study of six and twelve person juries.

THE PEREMPTORY CHALLENGE AND THE CALL FOR ITS ELIMINATION

Diamond and co-authors next turn to consider the history of the peremptory challenge—an attorney's request that a juror be removed without assigning any reason—and calls for its elimination. In the United States peremptory challenges have been used in federal criminal trials since 1790 and in civil cases since 1872. Currently, every state provides the right to peremptory challenges in both civil and criminal trials, though the number of challenges permitted varies widely. As the authors explain, during the Civil War and Reconstruction, as Congress and the Supreme Court invalidated the exclusion of blacks from jury venires, attorneys began to challenge jurors on the basis of race, in an effort to create all-white juries. The Supreme Court did not confront the issue of race-based peremptory challenges until 1965 in *Swain v. Alabama*, "ruling," the authors state, "that the Equal Protection Clause prohibited state prosecutors from racially discriminating in their use of peremptory challenges." Swain had little practical effect, however, as the standard of proof of racial discrimination it required was extremely demanding. In a subsequent case, *Batson v. Kentucky* (1986) the Court "developed a series of procedures designed to prevent the exercise of race-based peremptory challenges." Though the procedures introduced in Batson have had some success, the authors state. "*Batson* and its progeny, like *Swain*, have failed to achieve race-neutral exercise of peremptory challenges, prompting some scholars and other court observers to argue that peremptory challenges should be abolished."

Despite this criticism, the authors note that, "little empirical work has been done to assess the potential role of race in jury selection in civil cases." In the research leading to their article, the authors analyzed Judge Dolan's database, seeking to "compare how peremptory challenges were exercised on whites and minorities, as well as to control for competing and potentially confounding influences on peremptory challenges, like socioeconomic status." Judge Dolan's data allowed the researchers to analyze the effects of both jury size and the peremptory challenge on the composition of the same juries.

The analysis was guided by the following questions:

1) How does jury selection affect jury composition? Specifically, how do excuses for cause and peremptory challenges by plaintiffs and defendants affect minority representation on the civil jury?

2) Once jury selection is complete, how does jury size affect the representation of minorities on the jury? Specifically, following jury selection do six-member juries have less minority representation than 12-member juries?

3. How do jury size and peremptory challenges compare in their effects on minority representation?

THE DATA: PRACTICAL SOLUTIONS LEAD TO A RESEARCH TREASURE-TROVE

Between 2001 and 2007 now-retired judge Hon. Francis J. Dolan kept detailed records on the juries and case characteristics for the majority of the 300 trials over which he presided in his civil trial courtroom in the First Municipal District of the Circuit Court of Cook County, Illinois. Judge Dolan began collecting the data in response to the practical problems he confronted in the management of his high-volume courtroom, which averaged 550 new cases per year. In order to stay ahead of the flow of cases, maximize the efficiency of his courtroom, and better understand the characteristics of his call, Judge Dolan recorded data on the demographics of over 6,000 persons questioned during voir dire and serving on juries, on the monetary amounts awarded by jury verdicts and through arbitration, duration of trial proceedings, and many other case characteristics. All information was recorded in digital format, allowing for real-time reporting on cases, as well as database searches and statistical analysis.

Over time, Judge Dolan found the comparative data on monetary awards particularly useful in helping opposing parties, all of whom had gone through mandatory non-binding pre-trial arbitration, reach settlements. Acutely aware of his responsibilities to all persons in his courtroom, including the citizens who give their time to serve as jurors, Dolan found the jury demographics data helped him better understand the role of the community in the resolution of cases. Judge Dolan summarized some of the findings from his data in a manual, "Judicial Case Management of Civil Jury Trials: Marshaling Information on Cases, Trials and Juries with a Modest Use of Information Technology," (2008), which he hopes will be useful in encouraging fellow judges to embrace information technology and the possibilities it offers for judicial administration. The second product to come out of Dolan's trial database, after the manual, was the collaboration with Diamond, Peery and Emily Dolan.

Of the 277 cases in the database, the majority involved low-impact motor vehicle collisions "with alleged soft-tissue injuries and/or subrogation claims for property damage by insurance companies." The remainder involved "a variety of other tort claims, actions for breach of contract, and other miscellaneous claims." The case sample included 89 six-person juries and 188 12-person juries. (All cases were tried by six-person juries unless either party demanded a 12-person jury and paid additional court costs.) Lawyers for the plaintiff and the defense were each allotted a maximum of five peremptory challenges, with additional challenges permitted if an alternate juror was to be chosen or if there were multiple parties on a side. The original venire included slightly more females than males, and the mean juror age was 43.1 years. As the authors note, "the racial/ethnic composition of the venire was 63.3 percent white, 25.0 percent black, 8.1 percent Hispanic, 3.4 percent Asian or other, and 0.2 percent unknown."

As each jury was formed, the judge collected data on age, sex, race, and zip code of each prospective juror as he or she underwent questioning. Age and zip code data were obtained from the juror cards prospective jurors had filled out before arriving at court. The judge recorded sex and race based on his observations of the individuals.

Race, of course, is a contested category, the authors note, so the judge's observations were checked against statistics from the 2000 US Census. The residential pattern of Cook County, Illinois, from which the venire was drawn, is highly racially segregated. The authors "computed the percentage of blacks, Hispanics and whites in each of the 170 zip codes represented by jurors who went through jury selection in the courtroom and correlated that percentage with the percentage of individuals

from those groups residing in that zip code according to the 2000 US Census...the results indicate substantial consistency between the percentage in the courtroom, as determined by the judge's observations, and the percentage in the Census zip code data..." To estimate juror socioeconomic status, the authors obtained the median family income from the 2000 Census for the zip code where each juror lived.

The data collected from the 277 trials were so robust that the authors were able to use it to examine several aspects of jury formation. Specifically, they were able to "examine the operation of jury selection, measure directly how the exercise of peremptory challenges by plaintiffs' and defendants' attorneys affects jury composition in civil cases, and examine how the results of jury selection played out on six- and 12-member juries."

A CLOSER LOOK AT JURY SELECTION

Over the years, critics of the peremptory challenge have held that, despite safeguards, the practice allows for racial and other forms of discrimination in jury selection. Indeed, Diamond and co-authors did find systematic patterns of selection in the peremptory challenges in the trial data they examined. When the peremptory challenges were analyzed, the authors found that "plaintiffs removed fewer blacks, fewer females, and wealthier jurors...defense attorneys removed more blacks and poorer jurors." In particular they found that the defense excused 25.3 percent of available black males and 21.5 percent of available black females, but only 13.4 percent of available non-black males and 15.4 percent of non-black females.

Yet, when looked at together, the patterns of peremptory challenges of the plaintiff and defense balanced each other out. As the authors found, "overall, despite patterns of excuse that were systematically related to racial characteristics that attorneys are legally prohibited from using as a basis for peremptory challenge, the pool of available jurors remained essentially unchanged by peremptory challenge. Countervailing patterns of excuse produced the equilibrium." However, their subsequent analysis of the effect of jury size on jury composition produced very different findings.

THE EFFECTS OF JURY SIZE ON JURY COMPOSITION

If jury members were randomly selected from the venire, sampling theory would predict that smaller (six-person) juries would be less representative of the overall composition of the venire than larger (12-person) juries. But, of course, as the authors note, "jurors selected to decide a case...are *not* randomly sampled." Throughout the voir dire process they may be dismissed for cause or by peremptory challenge.

Diamond and co-authors examined the composition of each jury in the sample. They found, most strikingly, that jury size had a significant impact on the number of African Americans on a jury, with fewer African Americans on the smaller juries. As the authors state, "while 28.1 percent of the six-member juries lacked even one black juror, only 2.1 percent of the 12-member juries were entirely without black representation...more than half (58.3 percent) of the six-member juries had one or fewer black jurors, while fewer than one in five (17.8%) 12-member juries were in that category. Nor is the underrepresentation simply proportional, which would occur if juries of both sizes were equally likely to have one in six black jurors (i.e., 1 in 6, 2 in 12). Instead, 58.3 percent of six-member juries had one-sixth or fewer black jurors, while 37.7 percent of 12-member juries had one-sixth or fewer black jurors."

The authors point out that a random draw of jurors from a venire that was 25% African American, as was the population in the venire studied, would produce a 0.455 probability of obtaining two or more jurors of color on a jury of six, while the probability would be 0.842 of obtaining two or more such jurors on a jury of twelve. In the actual juries under study the

proportions were 0.417 and 0.822 respectively. This result, varying only slightly from random chance, shows that "the choices exercised by the parties during voir dire, even though systematically related to race, did not affect the probabilities of minority representation," the authors state. The authors' earlier finding that peremptory challenges on both sides tended to cancel each other out held up regardless of jury size. The authors conclude that, "these robust effects answer the question of whether we can generalize from statistical sampling theory for predictions about the effects of jury size postselection: we can."

If the peremptory challenge has only a miniscule effect on the representation of minorities on the jury, in spite of a pattern of "systematic relationships between juror race and the side excusing the juror," what effects does it actually have, and what is its actual function?

ACHIEVING IMPARTIAL AND REPRESENTATIVE JURIES

The authors argue that the peremptory challenge functions as a "safety valve" that allows the litigants to remove a juror whom the judge has not removed for cause. Judges may have a hard time evaluating a juror's response to questions; if a juror claims to be able to be fair, the judge may have to evaluate "imperfect cues"—such as hesitation. "The availability of the peremptory challenge enables a litigant to remove a juror who would not evoke an excuse for cause from a judge unless the juror explicitly 'confessed' to an inability to be fair, a safety valve that should not lightly be ignored," the authors state. Furthermore, even if peremptory challenges fail to weed out "jurors who would find it difficult to decide the case based on the evidence, those challenges still play a role in ensuring that litigants feel that they have been treated fairly." Thus, the peremptory challenge contributes to litigants' perception that the system is fair.

Further empirical research is needed to identify whether there is an optimal number of peremptory challenges. A large number of peremptory challenges "makes a race-based challenge pattern more available to an attorney who chooses that strategy," the authors note, but it also makes such a pattern more detectable. On the other hand, "retaining a limited number of peremptory challenges for litigants to exercise without having to prove juror bias to the judge can strike the balance between respecting citizen promises to be fair and providing litigants with both fairness and the appearance of fairness," the authors state. To evaluate the optimal number of peremptory challenges researchers will need to "examine challenge behavior and effects in jurisdictions with more peremptory challenges and lower percentages of minorities in the jury pool," the authors note.

In the meantime, however, the authors conclude that their research demonstrates one solution to the problem of jury representativeness. As they state, "while so much attention has been directed toward remedying peremptory challenge, a far more powerful source has been undermining the representativeness of juries...the 12-member jury produces significantly greater heterogeneity than does the six-member jury. If increasing diversity in order to better represent the population is a goal worth pursuing for the U.S. jury, the straightforward solution—the key—is a return to the 12-member jury."

Diamond, Peery, Dolan and Dolan report on this research in "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge," *Journal of Empirical Legal Studies*, Vol. 6, Issue 3, September 2009. ■

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Marc Stahl,

"Racial and Gender Composition of the Jury and Batson Issues"

VIII. Racial and Gender Composition of the Jury and Batson Issues

A. Panels must be selected in a race-neutral fashion. The Equal Protection Clause of the U.S. and Illinois Constitutions requires that the panel of jurors presented for voir dire questioning must be selected in a race-neutral fashion. In People v. Hollins,[409] the court's personnel deliberately removed or redirected members of one race from the jury pool. The Illinois Appellate Court found that a 20% disparity between the general population in the county and the jurors in the panel established a *prima facie* case of discrimination.

B. Three-step process of Batson challenges. Batson v. v. Kentucky[410] establishes a three-step process to determine whether a party used its peremptory challenges to remove prospective jurors on the basis of race. A Batson challenge must be made before the jury is sworn.[411] Trial courts must be careful to address each step in the correct order rather than collapsing the inquiry into one step.[412]

1. *Prima facie* case of purposeful discrimination. The party objecting to the use of peremptory challenges must first establish a *prima facie* case of purposeful discrimination during jury selection by demonstrating that relevant circumstances raise an inference that the opposing party exercised a peremptory challenge based upon a prospective juror's race.[413]

The mere number of people in a protected class who are peremptorily challenged will not by itself establish a *prima facie* case of discrimination.[414] However, that number is relevant because Illinois courts look to the percentages of a protected class within the venire compared to the composition of the jury selected to hear the case.[415] When a Batson objection is made

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[409] 366 Ill. App. 3d 533 852 N.E.2d 414 (3rd Dist. 2006).

[410] 476 U.S. 79 (1986).

[411] People v. Richardson, 189 Ill.2d 401, 409, 727 N.E.2d 362, 368 (2000); People v. Fair, 159 Ill.2d 51, 71, 636 N.E.2d 455, 467 (1994).

[412] People v. Davis, 233 Ill.2d 244, 248 909 N.E.2d 766, 768 (2009) ("[T]he trial court impermissibly collapsed the three-step *Batson* process. Accordingly, we remanded the cause for a full *Batson* hearing, beginning with the *prima facie* stage..."); People v. Allen, 401 Ill.App.3d 840, 850, 929 N.E.2d 583, 593 (1st Dist. 2010).

[413] Batson v. Kentucky, 476 U.S. 79, 96; People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 48 ("[T]he party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record...") (quoting People v. Davis, 233 Ill.2d 244, 262, 909 N.E.2d 766, 775 (2009)); People v. Allen, 401 Ill.App.3d 840, 849, 929 N.E.2d 583, 592 (1st Dist. 2010) ("To make it beyond stage one, defendant must produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred."); People v. Jackson, 357 Ill. App. 3d 313, 325, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419, 745 N.E.2d 13, 22 (1st Dist. 2001).

[414] People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); People v. Gutierrez, 402 Ill.App.3d 866, 891, 932 N.E.2d 139, 164 (1st Dist. 2010) ("It is settled that a *Batson prima facie* case cannot be established merely by the numbers of black venirepersons stricken by the State.") (quoting People v. Peeples, 155 Ill.2d 422, 469, 616 N.E.2d 294, 316 (1993)). But see, Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 61 ("This is not to suggest *in any way* that such a small number [two peremptory challenges against a racial minority] can never support a *prima facie* case of discrimination.").

[415] See, e.g., People v. Green, 2012 IL App (3d) 110050U, ¶ 16 ("Here, defendant made a *prima facie* showing of gender discrimination. The State used it peremptory challenges to exclude predominantly

regarding discrimination against a particular race, the unchallenged presence of jurors of that race on the seated jury tends to weaken the basis for a *prima facie* case of discrimination. But a small number of challenges may constitute a *prima facie* case even when several members of the protected class are selected to serve on the jury.[416]

In considering whether a party has established a *prima facie* case, courts consider: (1) the racial identity between the defendant and the excluded prospective jurors; (2) a systematic pattern of strikes against prospective jurors of a particular racial group; (3) a disproportionate use of peremptory challenges against prospective jurors of a particular racial group; (4) the level of a racial group's representation in the venire as compared to the jury; (5) the opposing counsel's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded prospective jurors from the racial group in question were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses.[417] In addition, "an important tool in assessing the existence of a *prima facie* case is 'comparative juror analysis,' which examines 'a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.'"[418]

In weighing these factors, the trial court should keep in mind the purpose of the first prong. The *Batson* framework is meant to address suspicions that discrimination may have infected the jury selection process and the first prong identifies which cases require further investigation because of such suspicions.[419] The U.S. Supreme Court has explained, "We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[420] Quoting this language, the Illinois Supreme Court has noted, "the threshold for making out a *prima facie* claim under *Batson* is not high."[421]

2. Race-Neutral Explanation. If the objecting party establishes a *prima facie* case, the burden shifts to the other party to articulate a race-neutral explanation for challenging the

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female jurors; only four of the impaneled jurors were female, while the venire was evenly balanced between the genders..."); People v. Gutierrez, 402 Ill.App.3d 866, 893, 932 N.E.2d 139, 165 (1st Dist. 2010).

[416] See, e.g., People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011) (*prima facie* case established when three African-American jurors were peremptorily challenged and three of four selected on the first panel were African-American).

[417] See People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001). A detailed analysis of each of these factors is contained in Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶¶ 47-78.

[418] People v. Davis, 231 Ill.2d 349, 361, 899 N.E.2d 238, 246 (2008) (quoting Boyd v. Newland, 467 F.3d 1139, 1145 (9th Cir. 2006)). See also, Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 47.

[419] Johnson v. California, 545 U.S. 162, 172 (2005).

[420] Johnson v. California, 545 U.S. 162, 170 (2005).

[421] People v. Davis, 231 Ill.2d 349, 360 899 N.E.2d 238, 245 (2008).

venirepersons in question.[422] Numerous factors have been held to be race-neutral reasons for a challenge, including a prospective juror's employment,[423] youth,[424] or failure to complete a written questionnaire.[425] Even a juror's demeanor or body language may constitute a race-neutral reason for a challenge.[426] At the second stage, the race-neutral explanation need not be "persuasive, or even plausible."[427] The only issue is whether the explanation is non-discriminatory.

3. Evaluating whether the race-neutral explanation is credible or pretextual. If the opposing party provides a race-neutral explanation, the trial judge must consider this explanation and determine whether the complaining party has established purposeful racial discrimination, including whether any purported neutral explanation is pretextual.[428]

The trial court must thoroughly examine the articulated reasons for the peremptory challenge and should not suggest race-neutral explanations. In one case, the Illinois Appellate Court observed:

> [T]he record clearly shows that the trial judge did not "closely scrutinize" the prosecutor's explanations. In fact, several times he coached the prosecutor by explaining or developing the reasons given by the prosecutor or simply articulating a "race-neutral" reason for the prosecutor, who merely agreed... The trial judge did not undertake a "sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case."[429]

The credibility of a race-neutral explanation can be evaluated based on many factors, including "the [proponent's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."[430] The trial court should consider "the offering party's consistency in applying its non-discriminatory

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[422] Harris v. Hardy, 2012 U.S.App.LEXIS 10336 (May 23, 2012); People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001).

[423] People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011).

[424] People v. Taylor, 409 Ill. App.3d 881, 902, 949 N.E.2d 124, 145 (1st Dist. 2011).

[425] People v. Brooks, 2012 IL App (4th) 110516U, ¶ 41.

[426] People v. Brooks, 2012 IL App (4th) 110516U, ¶ 35; People v. Sipp, 378 Ill.App.3d 157, 169, 883 N.E.2d 1133, 1143 (1st Dist. 2008) ("Historically, demeanor, body language, and manner have been important factors in jury selection and constitute legitimate, racially neutral reasons for exercising peremptory challenges. However, such demeanor-based explanations 'must be closely scrutinized because they are subjective and can be easily used by a prosecutor as a pretext for excluding persons on the basis of race.'") (quoting People v. Banks, 241 Ill.App.3d 966, 976, 609 N.E.2d 864, 871 (1st Dist. 1993)).

[427] Purkett v. Elem, 514 U.S. 765, 767-68 (1995). See also, Harris v. Hardy, 680 F.3d 942, 949 (7th Cir. 2012).

[428] Harris v. Hardy, 680 F.3d 942, 949 (7th Cir. 2012); People v. Jackson, 357 Ill. App. 3d 313, 325-26, 828 N.E.2d 1222 1234-35 (1st Dist. 2005); People v. Primm, 319 Ill.App.3d 411, 419-20, 745 N.E.2d 13, 22-23 (1st Dist. 2001).

[429] People v. Banks, 241 Ill.App.3d 966, 976, 609 N.E.2d 864, 871 (1st Dist. 1993) (quoting People v. Harris, 129 Ill.2d 123, 174, 544 N.E.2d 357, 380 (1989)).

[430] Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

justification."[431] "[I]f a [party's] proffered reason for striking [a prospective juror of one race] applies just as well to an otherwise-similar [juror of a different race] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."[432] "A further factor that may be considered in determining the credibility of the explanation is whether the non-discriminatory justification offered in step two results in disparate impact on prospective jurors of one race or gender."[433] "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another."[434]

C. Batson has been extended to claims of gender discrimination during jury selection. The Fourteenth Amendment to the U.S. Constitution prohibits discrimination in jury selection on the basis of gender regardless of whether the challenge involves a male or female.[435] The same three-step Batson process applies in cases of alleged gender discrimination in the exercise of peremptory challenges.[436]

D. Batson has been extended to civil cases. A private party's exercise of peremptory challenges occurs pursuant to state action administered by government officials. For this reason, "[t]he rule announced in *Batson*, that the State may not use peremptory challenges to purposefully exclude members of the venire based on their race, applies with equal force to private litigants in civil cases."[437] Thus, the same three-step Batson process applies to civil as well as criminal cases.[438]

E. Batson applies to defendants as well as the prosecution in criminal cases. The Fourteenth Amendment to the U.S. Constitution prohibits discrimination in jury selection by defendants in criminal cases. The discriminatory use of challenges by either party in a criminal case inflicts harms on the dignity of prospective jurors and the integrity of the courts. Therefore, a prosecutor has standing to raise a Batson objection on behalf of excluded jurors.[439]

F. The trial court may make a Batson objection on its own motion when a prima facie case of discrimination is "abundantly clear." A trial court may raise a Batson issue *sua sponte*.[440] The Illinois Supreme Court has observed that a trial court "suffers an injury as significant as either of the parties when discrimination takes place in jury selection...[P]erceived discrimination in jury selection reflects negatively on the integrity of the judge who presides over the proceedings."[441]

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[431] United States v. Stephens, 514 F.3d 703, 711 (7th Cir. 2008).
[432] Miller-El v. Dretke, 545 U.S. 231, 241 (2005).
[433] United States v. Stephens, 514 F.3d 703, 712 (7th Cir. 2008).
[434] Herndandez v. New York, 500 U.S. 352, 363 (1991) (brackets in original, quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).
[435] J.E.B. v. Alabama, 511 U.S. 127 (1994).
[436] People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 786, 883 (2007); People v. Green, 2012 IL App (3d) 110050U.
[437] McDonnell v. McPartlin, 192 Ill.2d 505, 526 736 N.E.2d 1074, 1087 (2000).
[438] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 35.
[439] Georgia v. McCollum, 505 U.S. 42, 59 (1992).
[440] People v. Rivera, 221 Ill. 2d 481, 852 N.E.2d 771 (2006).
[441] People v. Rivera, 221 Ill. 2d 481, 503, 852 N.E.2d 771, 784 (2006).

However, a trial court may make a Batson claim on its own motion only when a *prima facie* case of discrimination is "abundantly clear."[442] Moreover, the trial court must make an adequate record consisting of all relevant facts, findings, and articulated bases for all three stages of the Batson process.[443]

G. Preserving the record when making a Batson objection. The party making the Batson challenge must preserve the record by establishing the race or gender of all of the venire members and also establishing which prospective jurors possess which traits.[444] If a party relies upon the demeanor of a prospective juror as a race-neutral basis for a peremptory challenge, the party raising the Batson claim must put into the record any disagreement as to the description of the challenged juror's demeanor or must put into the record whether any other prospective jurors displayed the same demeanor.[445]

[442] People v. Rivera, 221 Ill. 2d 481, 515, 852 N.E.2d 771, 791 (2006).

[443] People v. Davis, 231 Ill.2d 349, 367, 899 N.E.2d 238, 249 (2008); People v. Rivera, 221 Ill. 2d 481, 515, 852 N.E.2d 771, 791 (2006).

[444] People v. Davis, 231 Ill.2d 349, 365, 899 N.E.2d 238, 247 (2008) ("[W]e are not comfortable with presuming facts not contained in the record, and defendant has made no representation before this court that the jurors [accepted by the State] are in fact nonblack."); People v. Rivera, 227 Ill.2d 1, 13, 879 N.E.2d 876, 883 (2007); People v. Abdulla, 2012 IL App (1st) 110313U, ¶¶ 52-53 ("There is nothing in the record regarding the racial identity or national origin of any of the other [unchallenged] venirepersons or jurors. As a result, we cannot assess whether there is a pattern of strikes or a disproportionate use of peremptory challenges against Arabic venirepersons."); Fleming v. Moswin, 2012 IL App (1st) 103475B, ¶ 48 ("[T]he party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party.") (quoting People v. Davis, 233 Ill.2d 244, 262, 909 N.E.2d 766, 775 (2009)).

[445] People v. Brooks, 2012 IL App (4th) 110516U, ¶ 35 ("[I]t was incumbent upon defendant to make a record that appropriately supports his contentions of discrimination, and defendant does not point to any statement in the record describing the outward appearance or body language of other venirepersons.").

Voir Dire of Prospective Jurors in Illinois

Marc B. Stahl

I. Purpose of Voir Dire of Potential Jurors

"The purposes of voir dire are to (1) enable the trial court to select jurors who are free from bias or prejudice, and (2) ensure that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges."[1] The right to examine potential jurors before exercising challenges is based in part on the constitutional right to trial by an impartial jury.[2]

In order for voir dire to be effective, parties must be allowed to ask questions that are reasonably likely to uncover biases or reasonably calculated to expose prejudice. The Illinois Appellate Court has explained:

> [L]imitation of voir dire questioning may constitute reversible error if it results in denying a party a fair opportunity to properly investigate an important area of potential bias and or prejudice among prospective jurors. And, trial courts "must exercise...[their] discretion so as not to block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory." Thus, the examination must adequately "call to the attention of the venire[persons] those important matters that might lead them to recognize or to display their disqualifying attributes."[3]

Under this standard, the critical requirement is that the questions create a reasonable assurance that prejudice would be discovered if present.[4] But a party need not demonstrate that venire members *actually* harbor prejudice against its position to justify a challenge.[5]

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[1] Village of Plainfield v. Nowicki, 367 Ill. App. 3d 522, 524, 854 N.E.2d 791, 794 (3rd Dist. 2006). See also, People v. Mabry, 398 Ill.App.3d 745, 754, 926 N.E.2d 732, 740 (1st Dist. 2010) ("The trial court should always exercise its discretion in a manner that is consistent with the goals of *voir dire* - to assure the selection of an impartial jury, free from bias or prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges."); People v. Gregg, 315 Ill.App.3d 59, 65, 732 N.E.2d 1152, 1157 (1st Dist. 2000) ("Voir dire serves the dual purpose of enabling the trial court to select jurors who are free from bias or prejudice and ensuring that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges.")

[2] See U.S. Const. amend VI; Ill. Const. Sec. 8, art. I; Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."); Rosales-Lopez v. U.S., 451 U.S. 182, 188 (1981) ("Voir dire plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored."); People v. Strain, 306 Ill.App.3d 328, 334, 714 N.E.2d 74, 79 (1st Dist. 1999) ("The sixth amendment right to an impartial jury guarantees 'an adequate voir dire designed to identify unqualified jurors and ensure the selection of an impartial jury.'"), aff'd, 194 Ill.2d 467, 742 N.E.2d 315 (2000); People v. Oliver, 265 Ill.App.3d 543, 551, 637 N.E.2d 1173, 1179 (1st Dist. 1994); People v. Thomas, 89 Ill.App.3d 592, 599, 411 N.E.2d 1076, 1082 (1st Dist. 1980).

[3] People v. Oliver, 265 Ill.App.3d 543, 548, 637 N.E.2d 1177 (1st Dist. 1994) (citations omitted) (ellipses in original) (second brackets in original) (quoting Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (1980) and U.S. v. Lewin, 467 F.2d 1132, 1138 (1972)). See also, People v. Taylor, 287 Ill.App.3d 254, 261, 678 N.E.2d 358, 363 (2nd Dist. 1997) (Voir dire must provide "sufficient information about prospective jurors' beliefs and opinions to permit the removal of those members of the venire who are unable or unwilling to be impartial.").

[4] People v. Peeples, 155 Ill.2d 422, 459, 616 N.E.2d 294, 311 (1993) ("[T]he test for evaluating the court's exercise of discretion is whether the means used to test impartiality have created a reasonable assurance that

General statements that a prospective juror could be impartial are not sufficient to assure that any latent bias has been discovered. The parties are entitled to explore whether any prejudices exist, regardless of a cursory statement that the venire member would be fair. The Illinois Appellate Court has explained:

> While the statement of a juror as to his or her ability to be fair and impartial is proper for the court to consider as evidence of the juror's state of mind, it does not alone determine a juror's eligibility. In U.S. v. Lewin, Judge Pell warned of the dangers of conducting a cursory selection process based solely upon general questions similar to those used in the present case: "We do not consider the court's obligation to let counsel, on request, get at underlying bases reflecting on bias, prejudice or other suspect factors to be discharged by general questions such as, 'Is there any reason you cannot fairly and impartially try this case?' This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess."[6]

The Illinois Appellate Court has applied this principle to specific cases. In Village of Plainfield v. Nowicki,[7] for example, the Appellate Court overturned a conviction because defense counsel was not allowed to question prospective jurors about their feelings toward alcohol consumption. The Illinois Appellate Court noted, "Questioning prospective jurors generally about whether they have any biases or prejudices that could affect their ability to be impartial does not reasonably assure that prejudice toward alcohol consumption will be disclosed. 'It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands and declare themselves biased.'"[8]

Therefore, voir dire must consist of more than vague proclamations about being fair and must constitute an honest inquiry into potential biases or opinions that could influence the decisions of prospective jurors.

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prejudice would be discovered if present."); People v. Pineda, 349 Ill.App.3d 815, 819, 812 N.E.2d 627, 632 (2nd Dist. 2004); People v. Jiminez, 284 Ill.App.3d 908, 911, 672 N.E.2d 914, 916 (1st Dist. 1996); People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996); People v. Lanter, 230 Ill.App.3d 72, 75, 595 N.E.2d 210, 213 (4th Dist. 1992).

[5] People v. Strain, 306 Ill.App.3d 328, 335, 714 N.E.2d 74, 79 (1st Dist. 1999); People v. Jiminez, 284 Ill.App.3d 908, 913, 672 N.E.2d 914, 917 (1st Dist. 1996).

[6] People v. Thomas, 89 Ill.App.3d 592, 600, 411 N.E.2d 1076, 1083 (1st Dist. 1980) (citations omitted) (quoting U.S. v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972).

[7] 367 Ill.App.3d 522, 854 N.E.2d 791 (3rd Dist. 2006).

[8] Village of Plainfield v. Nowicki, 367 Ill.App.3d 522, 524, 854 N.E.2d 791, 794 (3rd Dist. 2006) (quoting State v. Ball, 685 P.2d 1055, 1058 (Utah 1984)) (citations omitted). See also, People v. Strain, 306 Ill.App.3d 328, 336, 714 N.E.2d 74, 80 (1st Dist. 1999) ("Can you be fair to both sides here?" not sufficient to uncover specific biases.).

II. Objections to Voir Dire of Potential Jurors

A. Indoctrination or pre-educating. The Illinois Appellate Court has warned, "[V]oir dire should not be converted into a 'vehicle for pre-educating and indoctrinating prospective jurors as to a particular theory or defense...'"[9] The purpose of voir dire examination is not for the parties to argue their case. Therefore, questions that indoctrinate the jury as to specific positions of the parties are objectionable. "Broad questions are generally permissible....Specific questions tailored to the facts of the case and intended to serve as 'preliminary final argument' are generally impermissible."[10]

B. Pre-trying or hypotheticals. The purpose of voir dire examination is to impanel an impartial jury, not to ask the prospective jurors to pre-judge the case. Therefore, attorneys cannot present venire members with hypothetical fact patterns and ask them how they would vote.[11] For example, the Appellate Court found error where the prosecutor repeatedly informed jurors that they would hear two different versions of events and then asked whether this would automatically create reasonable doubt in their minds.[12] Hypotheticals that outline anticipated evidence and ask potential jurors for a decision are objectionable.

However, questions about specific pieces of evidence are not automatically prohibited.[13] Parties are allowed to ask how potentially controversial facts may affect venire members as long as such questioning does not cross the line into pre-trying the case with hypotheticals. Furthermore, the Appellate Court has stated that the parties may use hypotheticals "'to ascertain whether the jurors could intellectually comprehend' the respective theories of the case. Such an inquiry is acceptable, as long as it does not rise to the level of indoctrination or preeducation."[14]

C. Law and instructions. Illinois Supreme Court Rules 234 and 431 state that questions to prospective jurors "shall not directly or indirectly concern matters of law or instructions." The rule contains no exceptions. However, higher courts in Illinois routinely allow questions about law and

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[9] People v. Mapp, 283 Ill.App.3d 979, 986, 670 N.E.2d 852, 857 (1st Dist. 1996) (quoting People v. Kendricks, 121 Ill.App.3d 442, 449, 459 N.E.2d 1137, 1142 (1st Dist. 1984)). See also, Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 771 N.E.2d 1015, 1019 (1st Dist. 2002) (voir dire should not be used "to indoctrinate or pre-educate jurors..."); People v. James, 304 Ill.App.3d 52, 57, 710 N.E.2d 484, 489 (2nd Dist. 1999); Limer v. Casassa, 273 Ill.App.3d 300, 302, 652 N.E.2d 854, 856 (4th Dist. 1995); People v. Lanier, 230 Ill.App.3d 72, 75, 595 N.E.2d 210, 213 (4th Dist. 1992).

[10] People v. Rinehart, 2012 IL 111719, ¶ 17, 962 N.E.2d 444 (2012).

[11] Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 771 N.E.2d 1015, 1019 (1st Dist. 2002) (voir dire should not be used "to obtain a pledge as to how [prospective jurors] would decide under a given set of facts or determine which party they would favor in litigation."); Gowler v. Ferrell-Ross Co., 206 Ill.App.3d 194, 207, 563 N.E.2d 773 781 (1st Dist. 1990) (improper "to obtain a pledge [from prospective jurors] as to how they would decide under a given state of facts..."); People v. Bell, 152 Ill.App.3d 1007, 1017, 505 N.E.2d 365, 372 (3rd Dist. 1987).

[12] People v. Mapp, 283 Ill.App.3d 979, 988, 670 N.E.2d 852, 858 (1st Dist. 1996); People v. M.D., 231 Ill.App.3d 176, 197, 595 N.E.2d 702, 715 (2nd Dist. 1992).

[13] See infra, Section IV. Questions About Types of Evidence or Case-Specific Facts.

[14] People v. Taylor, 287 Ill.App.3d 254, 261, 678 N.E.2d 358, 363 (2nd Dist. 1997). See also, Gowler v. Ferrell-Ross Co., 206 Ill.App.3d 194, 208, 563 N.E.2d 773, 781 (1st Dist. 1990).

instructions. The Illinois Appellate Court has stated, "[I]nquiry may be made as to whether a juror has a disagreement with a particular rule of law which will be applied in that case..."[15]

Two legal principles seem to govern the exceptions to the general rule prohibiting such inquiries. First, the parties cannot expect prospective jurors to understand the law before they receive instructions. Attorneys may not "test the jurors understanding of the law...before they were instructed..."[16] Second, courts may allow questions about legal principles that might be controversial to some jurors. The Illinois Supreme Court has explained:

> In People v. Wright, prospective jurors were asked whether they could impose the death penalty in an appropriate capital case. A majority of this court found such voir dire unexceptionable under Rule 234....Similarly, attorneys have been allowed in dramshop actions to ask prospective jurors whether they disagreed with the dramshop statute. The thread which runs through those cases is that the jury was going to be asked to apply an extraordinarily controversial legal requirement against which many members of the community may have been prejudiced. Inquiry into the feeling or viewpoint of the venire regarding such controversial legal positions is consistent with a bona fide examination conducted so that parties can intelligently exercise their prerogatives to challenge.[17]

Thus, questions about the law or instructions have been found acceptable when (1) a potentially controversial legal rule (2) is briefly and accurately stated and (3) prospective jurors then are asked their viewpoints about the rule.[18]

D. Privilege against self-incrimination. The fifth amendment's privilege against self-incrimination applies to prospective jurors. Therefore, venire members should not be asked whether they have committed crimes.[19]

E. Irrelevant and personal opinion. While counsel may briefly explain a point before asking a question, injecting irrelevant issues or personal opinion into a trial is not allowed.[20] However, the scope of "relevant" voir dire examination can be quite broad. Parties may ask about venire

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[15] Limer v. Casassa, 273 Ill.App.3d 300, 302, 652 N.E.2d 854, 857 (4th Dist. 1995).

[16] People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

[17] People v. Stack, 112 Ill.2d 301, 312, 493 N.E.2d 339, 344 (1986) (citations omitted). See also, People v. Mapp, 283 Ill.App.3d 979, 987, 670 N.E.2d 852, 858 (1st Dist. 1996); People v. Lanter, 230 Ill.App.3d 72, 76, 595 N.E.2d 210, 213 (4th Dist. 1992).

[18] See, e.g., People v. Stack, 112 Ill.2d 301, 310, 493 N.E.2d 339, 343 (1986) (Approving the questions "Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?"); People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 860 (1st Dist. 1996) ("Given these decisions, we conclude, despite the proscription of Rule 234, that potential jurors may be given a brief and fair summary of accountability principles and then be asked if they could properly apply those principles to the evidence."); People v. Faulkner, 186 Ill.App.3d 1013, 1022, 542 N.E.2d 1190, 1195 (5th Dist. 1989) (Approving the question "Do you have any quarrel with the concept the State is not required to produce a body in this case?").

[19] People v. James, 304 Ill.App.3d 52, 58-59, 710 N.E.2d 484, 489-90 (2nd Dist. 1999).

[20] See People v. Mapp, 283 Ill.App.3d 979, 989, 670 N.E.2d 852, 859 (1st Dist. 1996).

members' personal life experiences including membership in organizations (civic, political, social, etc.), hobbies, reading interests, family, education, and professional experiences.[21]

F. No prohibition against non-leading or open-ended questions. The Illinois Supreme Court has expressly approved open-ended questions requiring a narrative answer on the part of prospective jurors.[22] Attorneys may even ask open-ended questions requiring jurors to think of reasons why somebody might act a certain way under particular circumstances, as long as the attorneys do not supply the reasons and accept the answers without argument.[23] Several trial advocacy texts, including one cited by the Illinois Appellate Court, also recommend non-leading questions during voir dire.[24] Professor Mauet has noted, "Open-ended questions let jurors answer using their natural vocabulary and manner of expression. How a juror answers, rather than what he says, is often a more reliable indicator of that juror's attitudes on critical issues."[25]

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[21] Lubet, Steven. Modern Trial Advocacy: Analysis & Practice (1993), pp. 446-47. The Illinois Supreme Court has allowed questions about childhood abuse in a case that had nothing to do with such conduct. In People v. Kurth, 34 Ill.2d 387, 390-91, 216 N.E.2d 154, 156 (1966), a juror informed the judge that she was nervous because of childhood abuse when she was locked in an attic. She stated she had a fear of confinement such that the jury room made her nervous. The Illinois Supreme Court noted, "To accept a juror who acknowledged a longstanding fear of closed places and to deny counsel the right to interrogate this juror, or even disclose her name, was under the circumstances prejudicial error." Id.

[22] People v. Buss, 187 Ill.2d 144, 195-96, 718 N.E.2d 1, 30 (1999) ("[E]ach prospective juror not excused during preliminary questioning was required to provide a narrative answer to the court's question, 'Can you explain to us here in court what your feelings are about the imposition of the death penalty?' Their responses generally gave a clear picture of their attitudes toward this law.").

[23] People v. Rinehart, 2012 IL 111719, ¶ 5 ("Q. Can you think of a reason why a victim might delay in reporting being raped or being a victim of sexual assault: A. Shame, embarrassment, fear.....Q. Can you think of some reasons why a sexual assault victim might not automatically come forward? A. Oh, I think may be fear, and think you would be a lesser person if something like that happened to you.").

[24] See, e.g., Bergman, Paul. Trial Advocacy in a Nutshell (2nd ed. 1989), pp. 319-20; Lubet, Steven. Modern Trial Advocacy: Analysis and Practice (1993), pp. 447-48; Mauet, Thomas A. Fundamentals of Trial Techniques (2nd ed. 1988), p. 38.

[25] Mauet, Thomas A. Fundamentals of Trial Techniques (2nd ed. 1988), p. 38. The Illinois Appellate Court relied upon Mauet in York v. El-Ganzouri, 353 Ill. App. 3d 1, 12-13 817 N.E.2d 1179, 1190 (1st Dist. 2004) (citing Mauet regarding voir dire) and People v. Lee, 342 Ill. App. 3d 37, 51, 795 N.E.2d 751, 762 (1st Dist. 2003).

III. Statutory Qualifications of Petit Jurors in Illinois

A. Inhabitant of the county.[26]
B. Minimum age of 18 years.[27]
C. "Free from all legal exception, of fair character, of approved integrity, of sound judgment, well informed..."[28]
D. Able to understand the English language, whether in spoken or written form or interpreted into sign language.[29]
E. Citizen of the United States of America.[30]
F. No service as a juror on the trial of a cause in any court in the county within one year previous unless the prospective juror waives the exemption.[31]
G. Not a party to a suit pending for trial in that court.[32]

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[26] 705 Ill.Comp.Stat. 305/2 (1) (2013).
[27] 705 Ill.Comp.Stat. 305/2 (2) (2013).
[28] 705 Ill.Comp.Stat. 305/2 (3) (2013).
[29] 705 Ill.Comp.Stat. 305/2 (3) (2013).
[30] 705 Ill.Comp.Stat. 305/2 (4) (2013).
[31] 705 Ill.Comp.Stat. 305/14 (2013).
[32] 705 Ill.Comp.Stat. 305/14 (2013).

VII. Re-Opening Voir Dire After the Jury Has Been Selected.

A. Voir dire may be re-opened and jurors may be challenged for cause at any time. The trial court has discretion to re-open voir dire and question jurors after a jury has been selected.[371] Further, a party can challenge a juror for cause even after the panel has been sworn.[372] However, "once a juror has been accepted and sworn, neither party has the right to peremptorily challenge that juror. Although the circuit court retains the right to dismiss a selected and sworn juror for cause, the parties no longer possess the right to exercise a peremptory challenge."[373]

B. Reasons why voir dire may be re-opened.

1. Clarifying or investigating responses from the original voir dire. "Where *voir dire*...has just been completed and it comes to the attention of the trial court that there are facts which contradict the answers given on *voir dire*, proper procedure calls for an inquiry."[374] In People v. Green,[375] three venire members indicated on their jury cards that they had been victims of crimes, but did not reply in open court when asked the question. The Appellate Court held that questioning should have been reopened for inquiry into whether the prospective jurors were in fact crime victims and whether those experiences would affect their ability to be impartial.[376]

2. Potential exposure to media coverage. When the trial court has reason to believe that sitting jurors may have read or heard trial-related publicity after the trial has commenced, the trial court should question the jurors to determine whether they were actually exposed to the media coverage and whether it will affect their ability to judge the case fairly.[377]

3. Contact with witnesses, parties, or attorneys after beginning the trial. In some cases, a sitting juror has contact with a witness, party, or attorney outside of the courtroom. Illinois law does not categorically presume prejudice when there is outside contact with jurors, but the trial court should question such jurors about their ability to remain fair and impartial.

In People v. Roberts,[378] a witness communicated with one of the jurors. The juror in question stated that she felt uncomfortable, told other jurors about what happened, and was later

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371 See, e.g., People v. Childress, 158 Ill.2d 275, 291-93, 633 N.E.2d 635, 642-43 (1994); People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996).

372 Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

373 People v. Peeples, 205 Ill. 2d 480, 520-21, 793 N.E.2d 641, 666 (2002).

374 People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996). See also, Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998) ("When information is revealed during voir dire which tends to contradict a sworn juror's answers, the trial court should allow further inquiry, and failure to do so can result in reversible error.").

375 282 Ill.App.3d 510, 668 N.E.2d 158 (1st Dist. 1996).

376 People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 16-61 (1st Dist. 1996); People v. Mitchell, 121 Ill. App. 3d 193, 196, 459 N.E.2d 351, 353 (2nd Dist. 1984) ("We conclude that the court abused its discretion in refusing to reopen *voir dire* of [the] juror..."). But see, People v. Adkins, 239 Ill.2d 1, 17-20, 940 N.E.2d 11, 21-23 (2010) (no error in removing juror for cause without follow-up questions).

377 See supra, Section VI E Media Coverage.

378 214 Ill.2d 106, 824 N.E.2d 250 (2005).

excused. The remaining eleven sitting jurors were questioned about their ability to remain fair. However, the Illinois Supreme Court found that the trial court erred by failing to question the alternate who replaced the excused juror.[379]

In other cases, the outside contact has been deemed minimal and the trial court was not required to question the jurors. The U.S. Court of Appeals explained, "[T]he extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations."[380]

The trial court is required to ensure a fair and impartial jury even if the defendant is the source of the potential extraneous bias. The Illinois Appellate Court has noted, "It makes no difference in this case that it was [the defendant] himself who initiated the contact that may have poisoned the jury. We reject the suggestion that [the defendant] may not be heard here to complain of the results of his own misconduct....At issue in his trial in this case was whether [the defendant committed the charged offense], not whether he had tried to corrupt the judicial system. A fair and impartial jury cannot be permitted to draw the conclusion that, because a defendant attempted to fix his trial, he is guilty of the offense for which he is being tried. It is conceivable that a defendant, innocent of the charge being tried, might attempt to tamper with a jury to assure a favorable verdict."[381]

If a party turns down the opportunity to question the juror about out-of-court communication with a witness, party, or attorney and presents no other evidence demonstrating that the incident caused prejudice, the party cannot later claim error.[382]

4. Jurors investigating the case, including internet searches. The trial court should question jurors if information arises that one of the jurors has used the internet or some other source to research an issue relevant to the case. In McGee v. Chicago,[383] the plaintiff testified about memory lapses or blackouts. During the trial, a juror informed the courtroom deputy that another juror had performed her own research on the internet regarding memory lapses and had brought that information into the jury room. The trial court attempted to use the deputy to identify the juror in question. When the individual would not openly admit to the deputy that

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[379] People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260-61 (2005). See also, Horn v. Union Pacific, 2012 IL App (5th) 110558U, ¶¶ 16, 22 (failure to question juror about a conversation with the spouse of an attorney).

[380] Wisehart v. Davis, 408 F.3d 321, 326 (7th Cir. 2005). The Wisehart decision required inquiry when one of the jurors received information that the defendant had taken a polygraph examination. See also, People v. Ward, 371 Ill. App. 3d 382, 862 N.E.2d 1102 (1st Dist. 2007) (After defendant allegedly communicated with one of the jurors, the trial court questioned that juror but did not question any of the other jurors. The defense did not request that the other jurors be questioned. No error in failing to question the rest of the jurors.)

[381] People v. Ward, 371 Ill.App. 3d 382, 406, 862 N.E.2d 1102, 1127 (1st Dist. 2007) (quoting U.S. v. Forrest, 620 F.2d 446, 458 (5th Cir. 1980)).

[382] Horn v. Union Pacific, 2012 IL App (5th) 110558U, ¶¶ 16, 22; People v. Turner, 143 Ill. App.3d 417, 426 493 N.E.2d 38, 43 (1st Dist. 1986).

[383] 2012 IL App (1st) 111084.

she had done internet research, the trial court instructed the jurors not to consider outside sources of information and to base their decision on the evidence presented in the courtroom.[384] The Illinois Appellate Court concluded that the trial court erred and that *voir dire* was required:

> The circuit court abused its discretion in denying defendants' request to *voir dire* the jurors. Once it became apparent that extraneous information on memory lapse had reached the jury, the circuit court's well-intentioned concern not to embarrass any juror was misplaced. The circuit court should have sustained defendants' request to *voir dire* the juror in chambers. At a minimum, the circuit court should have determined what was brought into the jury room, what it contained, and who had read it. The court could then determine whether the extraneous information was prejudicial.[385]

Thus, the trial court should re-open voir dire examination when it receives credible information that extraneous or unauthorized information has reached the jury, whether by juror use of the internet or some other source.

5. Observing a defendant or co-defendant in custody in a criminal case (including defendants or co-defendants in jail jump suits or handcuffs). If jurors are accidentally exposed to a defendant or a co-defendant while he or she is shackled or in a jail jump suit, defense counsel should be given the opportunity to question "the juror who saw the defendant to determine what the juror saw, if any other jurors were informed, and if it would affect that juror's ability to be fair and impartial."[386]

6. Potential misuse of trial exhibits. When a party alleges that jurors have misused or mishandled an exhibit in a way that could cause prejudice, the trial court should consider questioning the jurors about the matter.[387]

7. Juror comments or behavior indicating an opinion before hearing all the evidence and argument. Jurors should be questioned if they appear to have formed an opinion before hearing all of the evidence and argument. In People v. Peterson, a juror "approached [defense counsel] in the hall and stated that she 'was praying that the defendants will plead guilty' so she could go home."[388] The juror had stated during pre-trial voir dire examination that she could be fair. But the Appellate Court ruled that further questioning was necessary following the comment because it could have meant that the juror had already made up her mind. "[T]he remark itself vitiates any previous conclusion made as to impartiality on voir dire, and, without

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[384] McGee v. Chicago, 2012 IL App (1st) 111084, ¶ 29.

[385] McGee v. Chicago, 2012 IL App (1st) 111084, ¶ 33.

[386] People v. Romero, 384 Ill.App.3d 125, 135, 892 N.E.2d 1122, 1131 (1st Dist. 2008). See also, People v. Stevenson, 2012 IL App (1st) 111511U, ¶ 23.

[387] See, e.g., People v. Williams, 384 Ill. App.3d 327, 336, 892 N.E.2d 620, 628 (4th Dist. 2008) ("[O]nce defense counsel raised the possibility that one of the jurors was copying the statement, the court should put on the record what transpired, review the jurors' notes, and possibly *voir dire* the jury on the issue.").

[388] People v. Peterson, 15 Ill.App.3d 110, 303 N.E.2d 514-15 (5th Dist. 1973).

further inquiry, there was no way for the trial court to make a sound judgment on her present state of mind."[389]

In People v. Nelson,[390] the foreperson wrote a note during deliberations informing the judge that one of the jurors said in the middle of the proceedings (before evidence had been completed and before argument) that he had already made up his mind and then refused to deliberate at the conclusion of the trial. The trial court thoroughly questioned the juror about whether he or she had a "preconceived notion" how to resolve the case and whether the juror was able to "weigh the facts and circumstances and address the issue of the case from the evidence."[391]

In People v. Runge,[392] a juror complained of another juror saying "yes, yeah" when one party appeared to be doing well and threw his notes against the wall when the judge overruled an objection and allowed the other side to ask a question. The Illinois Supreme Court approved the trial court's decision to allow the juror to remain after asking the following questions:

> I observed you in the jury box. Are you having difficulty with the case of some kind? What's happening?[393]
>
> Did you formulate any opinions about this case at all?[394]
>
> I told you earlier, at the beginning of the case, the defendant is presumed to be innocent of the charge against him?...You still understand that?...Do you have any problem being able to follow that rule of law basically?[395]
>
> Do you have any opinions as to whether or not the defendant's guilty or innocent of the charge against him at the present time?[396]
>
> Is there anything about what's happened with the trial so far that would in any way prevent you from giving either side in this case a fair trial?[397]

As the proceedings continued, a juror notified the trial court of potentially improper comments from the previously-questioned juror. The Illinois Supreme Court approved the trial court's decision to replace the juror after asking the following questions:

> I just wanted to ask you, are you having a rough time with this case at all?...What about, basically, if you can tell me?[398]

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[389] People v. Peterson, 15 Ill.App.3d 110, 111, 303 N.E.2d 514, 515 (5th Dist. 1973). See also, U.S. v. Resko, 3 F.3d 684, 690 (3rd Cir. 1993).
[390] 235 Ill.2d 386, 922, N.E.2d 1056 (2009).
[391] People v. Nelson, 235 Ill.2d 386, 438-39, 922 N.E.2d 1056, 11085-86 (2009).
[392] People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009).
[393] People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).
[394] People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).
[395] People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).
[396] People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).
[397] People v. Runge, 234 Ill.2d 68, 112, 917 N.E.2d 940, 965 (2009).

> Have you talked about anything, any of these issues,...with any of the other jurors or anything like that?[399]

In People v. Garza,[400] the Illinois Appellate Court approved the trial court's decision to replace a juror after asking the following questions:

> One of the important things about jurors is that they approach their duties with the mind-set of they don't know anything about the case. And they wait for the evidence, they follow the law, and in that way they decide the case. Do you understand what I'm saying so far?[401]
>
> The important part of a jury is that they don't walk into the trial thinking, before they hear anything, whether they want someone on one side or the other to win or lose. Do you understand that?[402]
>
> Certainly jurors talk about jury service and why they're here. Every judge tells jurors not to talk about the case, but there's probably a few things about jury service that aren't about the case specifically, and my guess is jurors talk about those. Is it possible that the jury commission saw you talking with other jurors about jury service in some way?...What was the other thing you were talking about?[403]

8. Sleeping jurors. In People v. Jones,[404] the trial court noted that a juror appeared to have been half asleep through most of the trial. Under those circumstances, the Illinois Appellate Court held that the trial court must, on its own motion, make further inquiry to ensure that the defendant receives a fair trial.[405]

The Illinois Appellate Court noted that "a juror who is inattentive for a substantial portion of a trial has been found to be unqualified to serve on the jury."[406] However, a juror is not automatically disqualified and voir dire might not be required because of a momentary lapse in attention. In People v. Gonzalez,[407] the trial court notified the parties that a juror "may have fallen asleep" early in the proceedings. Neither party asked to question the juror and neither party raised the issue again until the appeal. The Illinois Appellate Court held that the trial court was not obligated to voir dire the juror when neither party requested such relief and when the record contained no indication that the juror may have fallen asleep at any other time during the trial.[408]

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[398] People v. Runge, 234 Ill.2d 68, 117, 917 N.E.2d 940, 968 (2009).
[399] People v. Runge, 234 Ill.2d 68, 117, 917 N.E.2d 940, 968 (2009).
[400] 2012 IL App (2d) 110787U.
[401] People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.
[402] People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.
[403] People v. Garza, 2012 IL App (2d) 110787U, ¶ 4.
[404] 369 Ill.App.3d 452, 861 N.E.2d 276 (1st Dist. 2006).
[405] People v. Jones, 369 Ill.App.3d 452, 456, 861 N.E.2d 276, 279-80 (1st Dist. 2006).
[406] People v. Jones, 369 Ill.App.3d 452, 455, 861 N.E.2d 276, 279 (1st Dist. 2006).
[407] 388 Ill.App.3d 566, 577, 900 N.E.2d 1165, 1174 (1st Dist. 2008).
[408] People v. Gonzalez, 388 Ill.App.3d 566, 578, 900 N.E.2d 1165, 1175 (1st Dist. 2008).

IX. Procedures for Voir Dire of Potential Jurors

A. Attorneys directly questioning prospective jurors. Prior to May 1, 1997, voir dire examination in civil and criminal cases was governed by Illinois Supreme Court Rule 234. After that date, rule 234 was amended for civil cases and rule 431 was adopted for criminal cases. Rule 431 modified rule 234 in the following ways (additions are underlined, deletions have a line through them):

> (a) The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching their qualification to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate ~~, or~~ and ~~may~~ shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court ~~may~~ shall acquaint prospective jurors with the general duties and responsibilities of jurors.[446]

Rule 234 was amended with virtually identical language, except for substituting "the nature and extent of the damages" for "the nature of the charges."[447]

Among the changes, the new rule replaced "***may*** permit...direct inquiry" with "***shall*** permit...direct inquiry." A conflict has developed over whether this language is mandatory or whether a trial court could deny a request for attorney-conducted voir dire.[448] The rule contains the language "as the court deems proper," which undoubtedly gives the trial court the right to sustain objections and limit improper voir dire questioning. But the "as the court deems proper" language is immediately followed by the phrase "for a reasonable period of time." This would seem to indicate that some period for direct inquiry is mandated. Further, interpreting the new rule as maintaining the old discretionary standard would make the change from "may" to "shall" completely meaningless.[449]

In People v. Garstecki,[450] the Illinois Supreme Court discussed Rule 431. Although the trial court first questioned the prospective jurors, the attorneys were then allowed to ask questions of every prospective juror requested. For this reason, the Illinois Supreme Court stated that it was not ruling

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[446] Ill.S.Ct.R. 431(a).

[447] Ill.S.Ct.R. 234.

[448] Compare People v. Allen, 313 Ill.App.3d 842, 847, 730 N.E.2d 1216, 1221 (2nd Dist. 2000) (presumption in favor of attorney-conducted voir dire) and Grossman v. Gebaroski, 315 Ill.App.3d 213, 221, 732 N.E.2d 1100, 1106 (1st Dist. 2000) (attorney-conducted voir dire mandatory).

[449] Since the adoption of the rule, Appellate Court decisions have referred to attorney-conducted voir dire as an accepted procedure. See, e.g., People v. Brooks, 2012 IL App (4th) 110516U, ¶ 7 ("The State and defense counsel were then permitted to follow up with individual questions as necessary."); Thornhill v. Midwest Physician Center, 337 Ill. App. 3d 1034, 1045, 787 N.E.2d 247, 257 (1st Dist. 2003) ("When questioning of prospective jurors is turned over to counsel, it has been held that it is properly within the scope of questioning to expose any hidden bias or prejudice of a prospective juror."); Rub v. Consolidated Rail Corporation, 331 Ill. App. 3d 692, 696, 705, 771 N.E.2d 1015, 1019, 1026 (1st Dist. 2002).

[450] 234 Ill.2d 430, 917 N.E.2d 465 (2009).

on the issue of whether Rule 431 is mandatory: "Following its own voir dire, the court then allowed defendant's attorney to pick out any prospective jurors that he wished to question further.... Because the trial court complied with the rule's mandatory obligation, we are not presented with the question of whether the rule is mandatory or directory."[451]

While not expressly ruling on the issue, the Illinois Supreme Court discussed the rule:

> [T]he change from "may" to "shall" must have had some significance. That significance was to change the rule from a permissive one to a mandatory one. Under the previous version of the rule, which stated that the court "may" allow attorney participation as the court deems proper, the trial court had complete discretion whether to allow attorneys to participate in *voir dire*...[W]hat the rule clearly mandates is that the trial court consider: (1) the length of examination by the court; (2) the complexity of the case; and (3) the nature of the charges; and then determine, based on those factors, whatever direct questioning by the attorneys could be appropriate. Trial courts may no longer simply dispense with attorney questioning whenever they want. We agree...that the "the trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorneys." We are not prepared to say, however, that it is impossible to conceive of a case in which the court could determine, based on the nature of the charge, the complexity of the case, and the length of the court's examination, that no attorney questioning would be necessary.[452]

Thus, there might be some circumstances in which direct inquiry would not be required.

In People v. Gonzalez,[453] the trial court prohibited direct questioning of prospective jurors. The defendant complained that the trial court used leading questions that influenced a juror's responses and then prohibited direct inquiry by the attorney to follow up on the matter. The Illinois Appellate Court reversed the conviction: "[D]efense counsel voiced concern that leading questions from the court affected the juror's answers to questions on that issue. In a close case, the prospect of a biased jury could easily affect the outcome. Accordingly, the error threatened to tip the scales of justice against the defendant..."[454]

B. Back-striking. "Back-striking is the process wherein a party may strike a venireperson from an already accepted panel, where that panel has been broken by opposing counsel and re-tendered."[455] When one party tenders a panel to the other party, the other party accepts the panel without change, and then the first party exercises a peremptory challenge to excuse one of the panel members, no back-striking has occurred.[456] The trial court has discretion to prohibit "back-

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[451] People v. Garstecki, 234 Ill.2d 430, 444-45, 917 N.E.2d 465, 474 (2009).

[452] People v. Garstecki, 234 Ill.2d 430, 443-44, 917 N.E.2d 465, 473-74 (2009) (citations omitted).

[453] 2011 IL App (2d) 100380.

[454] People v. Gonzalez, 2011 IL App (2d) 100380, ¶ 27, 962 N.E.2d 23 (2nd Dist. 2011).

[455] Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

[456] Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998).

striking" of venire members during the jury selection process if the policy is announced before jury selection begins.[457]

In some cases, additional information is learned after one party has exercised its peremptory challenges and before the entire panel has been selected. Even if the trial court has prohibited back-striking, a party must object to the back-striking prohibition and must attempt to exercise a peremptory challenge as a back-strike in order to preserve an objection for appellate review. In People v. Dixon,[458] the defendant accepted a panel of prospective jurors. After accepting the panel, the State informed the defendant that a juror had been dishonest in denying prior arrests. The trial court rejected the defendant's motion to strike the juror for cause. The defense did not attempt to exercise a peremptory challenge based on the trial court's prohibition against back-striking. The Appellate Court ruled that the error was not preserved because the defense failed to object to the back-striking prohibition and failed to request a peremptory challenge after learning the new information.[459]

C. Burden of proof when challenging jurors. The burden of showing that a prospective juror possesses a disqualifying characteristic or state of mind is on the party making the challenge.[460]

D. Court reporter required during voir dire examination of prospective jurors in criminal cases. Illinois Supreme Court Rule 608(a)(9) states that in non-death penalty criminal cases, "court reporting personnel...shall take the record of the proceedings regarding the selection of the jury..."[461] The language is mandatory.[462]

Higher courts in Illinois have given different answers to the question of whether an attorney may waive a court reporter during jury selection in a criminal case. Waiving a court reporter during voir dire is not *per se* ineffective assistance of counsel,[463] but such a waiver can constitute ineffectiveness under the facts of the case. In People v. Houston,[464] defense counsel waived the court reporter during jury selection in an armed robbery case. After the trial, the defendant wrote to the judge to complain about the racial composition of the jury. The lack of a record precluded analysis under Batson. The Illinois Supreme Court found defense counsel's performance to be deficient: "[C]ounsel's waiver of the court reporter in the case at bar falls below an objective standard of reasonableness. We can conceive of no possible strategic advantage that might have been gained by waiving the court reporter for *voir dire*."[465]

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457 People v. Moss, 108 Ill. 2d 270, 275-76, 483 N.E.2d 1252, 1255-56 (1985).

458 382 Ill.App.3d 233, 887 N.E.2d 577 (1st Dist. 2008).

459 People v. Dixon, 382 Ill.App.3d 233, 241-42, 887 N.E.2d 577, 585 (1st Dist. 2008).

460 People v. Peeples, 155 Ill.2d 422, 463, 616 N.E.2d 294, 313 (1993); Roach v. Springfield Clinic, 1992 Ill.LEXIS 204 *45 (1992).

461 Ill.S.Ct.R. 608(a)(9) (2012).

462 People v. Houston, 226 Ill.2d 135, 152-53, 874 N.E.2d 23, 34 (2007).

463 People v. Houston, 226 Ill.2d 135, 144, 874 N.E.2d 23, 29 (2007) ("[A] waiver of the court reporter for *voir dire* is not *per se* ineffective assistance of counsel..."); People v. Ash, 346 Ill. App. 3d 809, 813, 805 N.E.2d 649, 652 (4th Dist. 2004).

464 226 Ill.2d 135, 874 N.E.2d 23 (2007).

465 People v. Houston, 226 Ill.2d 135, 148, 874 N.E.2d 23, 32 (2007).

The Houston Court did not grant a new trial, but instead fashioned a different remedy. If the jury selection is not recorded and if a *Batson* claim is raised, the trial court must attempt to reconstruct the record of the jury selection. The Illinois Supreme Court explained:

> We hold that where, as in the unusual case before us, a defendant attempts to raise in the trial court a *Batson* claim of discrimination in jury selection, and claim may not be pursued because trial counsel waived the presence of the court reporter for *voir dire*, in violation of our *Rule 608(a)(9)*, resulting in the absence of a *voir dire* record, the appropriate course, in the first instance, is to remand to the circuit court for an attempt to reconstruct the record of the proceedings regarding the selection of the jury.[466]

On remand, the trial court created a bystander's report with several exhibits, including the written jury questionnaires, driver's license photographs of the prospective jurors, and notes identifying which jurors were excused by the trial court, the State, and the defense.[467]

Before Houston, Illinois courts had ruled that appellate review is not possible without a transcript or a bystander's report, but would not necessarily remand the case for a bystanders report.[468] In civil cases, higher courts have continued the practice of refusing to review claims of error during voir dire if a transcript or a bystanders report is not included in the record.[469]

Houston found counsel's performance deficient for waiving the court reporter. But after Houston, at least one Appellate Court panel has stated that counsel still may waive a court reporter during jury selection. The Illinois Appellate Court has stated, "There is nothing in rule 608(a)(9), however, that prohibits the parties from waiving the presence of the court reporter during voir dire. Allowing the parties to do so does not deprive a defendant of due process. Any claim of error in voir dire may be established through the use of a bystander's report or an agreed statement of facts."[470]

Whatever the cause (including a court reporter losing notes or counsel waiving a reporter), the lack of a transcript of voir dire is not plain error and a conviction will not be overturned without an allegation of some irregularity in jury selection.[471]

E. Defendant's ~~presence during~~ voir dire. A defendant in a criminal case has a right to be present during jury selection, but a ~~defendant~~ can waive that right.[472] The defendant need not

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[466] People v. Houston, 226 Ill.2d 135, 152-53, 874 N.E.2d 23, 34 (2007).

[467] People v. Houston, 229 Ill.2d 1, 6, 890 N.E.2d 424, 427-28 (2008).

[468] See, e.g., People v. Toft, 355 Ill. App. 3d 1102; 824 N.E.2d 309 (3rd Dist. 2005) (no review possible and conviction affirmed when defendant failed to provide a transcript or a by-stander's report regarding voir dire of prospective jurors).

[469] See, e.g., White v. Northeast Illinois Regional Commuter Railroad Corp., 1-09-1867, 2011 Ill. App. Unpub. LEXIS 636 (1st Dist. April 15, 2011).

[470] People v. Reed, 376 Ill.App.3d 121, 125, 875 N.E.2d 167, 171 (1st Dist. 2007).

[471] People v. Sims, 403 Ill.App.3d 9, 16-17, 931 N.E.2d 1220, 1228 (1st Dist. 2010) (Transcript of jury selection missing "through no fault of defendant due to the court reporter's lost notes....It is not enough to say that as a result of the missing records we do not know whether any error occurred..."); People v. Russell, 385 Ill.App.3d 468, 473, 895 N.E.2d 1131, 1137 (3rd Dist. 2008).

cross-examined the State's witnesses, and made a closing argument. The defendant did not raise any constitutional issues, so the Court did not consider whether jury selection without the defendant and without an attorney violates the Right to Counsel Clause or whether the Due Process Clause requires an attorney or the defendant's presence in order to subject the State's case to a meaningful adversarial test.[481] The Illinois Supreme Court held that section 115-4.1(a) of the Illinois Code of Criminal Procedure does not apply to in-custody defendants and that jury selection could proceed without an attorney when the defendant refused to enter the courtroom (when the defendant "essentially boycotts his or her own trial.").[482]

F. Duty to tell the truth. Voir dire literally means "To speak the truth."[483] Jurors are sworn to tell the truth before voir dire examination. In order to evaluate jurors, attorneys must receive truthful information. Therefore, jurors should be excused for cause if they give incorrect information during pre-examination surveys or oral examination.[484]

"When information is revealed during voir dire which tends to contradict a sworn juror's answers, the trial court should allow further inquiry, and failure to do so can result in reversible error."[485] If a party does not learn of a juror's false statement until after the trial is complete, the party must establish that the juror answered falsely during voir dire examination and that prejudice resulted in order to receive a new trial.[486] However, this two-part test cannot be applied using inadmissible evidence. Generally, post-trial statements by jurors about the mental process involved in reaching a verdict are not admissible.[487]

The juror need not admit to prejudice. When significant information is omitted or misstated during voir dire, Illinois courts have found prejudice based on the circumstances despite juror claims of

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[481] People v. Eppinger, 2013 IL 114121, ¶ 20.

[482] People v. Eppinger, 2013 IL 114121, ¶¶ 38-41.

[483] Black's Law Dictionary 1575 (6th ed. 1990).

[484] People v. Szudy, 262 Ill.App.3d 695, 709, 635 N.E.2d 801, 810 (1st Dist. 1994).

[485] Strawder v. Chicago, 294 Ill.App.3d 399, 402, 690 N.E.2d 640, 643 (1st Dist. 1998). See also, People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 16-61 (1st Dist. 1996) (when three venire members had indicated on their jury cards that they had been victims of crimes but did not reply in open court when asked orally, questioning should have been reopened). But see, People v. Adkins, 239 Ill.2d 1, 17-20, 940 N.E.2d 11, 21-23 (2010) (no error in removing juror for cause without follow-up questions).

[486] People v. Nitz, 219 Ill. 2d 400, 422-223, 848 N.E.2d 982, 996 (2006); People v. Kantu, 196 Ill. 2d 105, 124-27, 752 N.E.2d 380, 391-93 (2001) (jury foreperson in a capital case did not reveal that he had gone to law school with the Cook County State's Attorney, juror wrote a congratulatory note to the Cook County State's Attorney after the trial which contained language indicating a personal relationship, case remanded for a post-trial hearing during which the trial court found that the juror and the Cook County State's Attorney had seen each other only twice since graduating from law school, the trial court found that the juror's state of mind allowed him to give to the defendant a fair and impartial trial); People v. Monroe, 2011 IL App (5th) 90616U (defendant entitled to evidentiary hearing when postconviction petition alleged that one of the jurors lied during voir dire when he denied knowing the defendant because the prospective juror was carrying on a sexual relationship with the defendant's girlfriend and "voted to convict the defendant with the hope that [the girlfriend] would want him [the juror] more if the defendant was sent to prison."); People v. Ollinger, 176 Ill.2d 326, 353, 680 N.E.2d 321, 335 (1997); People v. Dixon, 409 Ill.App.3d 915, 917, 948 N.E.2d 786, 787-88 (1st Dist. 2011) (no prejudice from failure to disclose 20-year-old arrests).

[487] People v. Nitz, 219 Ill. 2d 400, 848 N.E.2d 982 (2006).

fairness. In People v. Potts,[488] a juror failed to disclose that her daughter had been murdered and that she was acquainted with witnesses that were named on the witness list. At a post-trial motion, the juror testified that she did not know the witnesses' names and did not realize she knew the witnesses until the trial was underway. Further, the case did not involve a charge of murder and the witness testified that she was not prejudiced or influenced by her knowledge of any witness or her experience with her daughter's murder. Still, the Illinois Appellate Court reversed the conviction based on the juror's omissions during voir dire questioning.

G. Exhibits allowed during voir dire examination, trial court discretion. The Illinois Appellate Court has upheld a trial court's decision to allow prospective jurors to see a disabled plaintiff during voir dire because it allowed the parties to test for prejudice.[489] The Illinois Appellate Court has also ruled that trial courts have discretion to allow or refuse the showing of "day-in-the-life" videos during voir dire examination of prospective jurors.[490]

H. Individual or in camera voir dire. The trial court has discretion to conduct individual voir dire out of the presence of the other venire members, but is not required to do so.[491] However, individual *voir dire* might be required when jurors express fears about their personal safety such that the defendant might not receive a trial by an impartial jury.[492]

I. Number of peremptory challenges, discretion to grant additional peremptory challenges, and peremptory challenges when selecting alternate jurors. In criminal cases involving one defendant, Illinois Supreme Court Rule 434(d) grants parties fourteen peremptory challenges in capital cases, seven peremptory challenges in non-capital felony cases, and five peremptory challenges in all other cases. When multiple defendants are being tried before the same jury, each defendant is allowed eight peremptory challenges in capital cases, five in non-capital felony cases, and three in all other cases. The State is allowed the same number of peremptory challenges as all of the defendants.[493] In addition, trial courts have the discretion to grant additional peremptory

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[488] 224 Ill.App.3d 938, 947, 586 N.E.2d 1376, 1382-83 (2nd Dist. 1992).

[489] Roberts v. Sisters of Saint Francis Health Services, Inc., 198 Ill.App.3d 891, 900-01, 556 N.E.2d 662, 668-69 (1990).

[490] Folely v. Fletcher, 361 Ill. App. 3d 39, 50-51, 836 N.E.2d 667, 677 (1st Dist. 2005) (trial court refused the video).

[491] People v. Neal, 111 Ill.2d 180, 197-98, 489 N.E.2d 845, 852 (1985).

[492] U.S. v. Blitch, 622 F.3d 658, 665 (7th Cir. 2010) ("In light of the revelation that the whole venire had been exposed to the discussions of fear for personal safety, the defendants were concerned that they would not receive a fair trial from persons who might have prejudged the case or were motivated by fear or preconception. They immediately requested a new pool or, at the least, individual questioning of the prospective jurors. They received neither. It is certainly true that not all allegations of juror bias or misconduct require individualized voir dire. We also recognize that 'courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial . . . . [A]ny such investigation is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident.' Nonetheless, we find the procedure in this case insufficient under the circumstances. The first important circumstance is, as we have already emphasized, the widespread nature of the discussions among the jurors. Unlike cases where a judge decides against individual voir dire of the entire panel at the risk of conjuring up new fears among previously unexposed jurors, individual questioning here did not run the same risk of planting a new concern in anyone's mind since all the venire members were part of the discussion.") (citations omitted).

[493] Ill.S.Ct.R. 434(d) (2012).

challenges.[494] Such a request might occur if the trial court rejects a party's request for a challenge for cause and the party must exercise a peremptory challenge to remove the prospective juror.

Supreme Court Rule 434(e) states that, "Each party shall have one additional peremptory challenge for each alternate juror."[495] On its face, the rule gives an *additional* challenge for use when alternate jurors are being selected and does not prevent carrying over peremptory challenges that were not used when selecting the first twelve jurors. Some courts interpret the rule in this manner.[496] In practice, many Illinois trial courts prohibit the parties from carrying over any peremptory challenges for selection of alternate jurors. Under this interpretation of the rule, parties are allowed only one peremptory challenge per alternate juror.

J. Public trial – voir dire may be closed to the public in limited circumstances. "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial."[497] But a trial court must consider whether alternatives are available to protect the interests of the litigants and the prospective jurors without closing the courtroom.

In Press-Enterprise Co. v. Superior Court,[498] three days of voir dire were open to the public, but six weeks of the jury selection process were closed and media requests for the transcripts were denied. The U.S. Supreme Court ruled that the procedure was illegal. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire."[499]

The U.S. Supreme Court suggested a procedure to balance the interests of a public trial and juror privacy:

> The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public

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[494] People v. Eldefonso, 2011 IL App (1st) 101121U ¶ 42 ("[H]ad defense counsel used a peremptory challenge against [the prospective juror] and later exhausted all of the defendant's peremptory challenges, she could have requested, if necessary, additional peremptory challenges – a request that the trial court could have granted at its discretion."); People v. Bowens, 407 Ill.App.3d 1094, 1100, 943 N.E.2d 1249, 1257 (4th Dist. 2011) ("Had defendant used a peremptory challenge [after unsuccessfully challenging a prospective juror for cause] and later exhausted all of his peremptory challenges, he could have requested – if necessary – additional peremptory challenges, a request the trial court could have granted at its discretion."); People v. Fort, 248 Ill.App.3d 301, 311, 618 N.E.2d 445, 453 (1st Dist. 1993) ("A decision to grant...a request for additional peremptory challenges rests within the sound discretion of the trial court.")

[495] Ill.S.Ct.R. 434(e) (2012).

[496] See, e.g., People v. Pate, 2012 IL App (5th) 110130U, ¶ 82 ("When the panel of 12 was complete, the defendant had one peremptory challenge remaining, which carried over for the selection of alternates.").

[497] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 551, 581 n.18 (1980). While this case did not directly concern jury selection, the U.S. Supreme Court cited Richmond Newspapers in a later case dealing with the issue of closed voir dire. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 n.10 (1984).

[498] 464 U.S. 501 (1984).

[499] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984). See also, People v. Kelly, 397 Ill.App.3d 232, 259, 921 N.E.2d 333, 358 (1st Dist. 2009) ("The questioning and selection of jurors has historically been open to the public.").

> domain....[A trial judge] should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.[500]

The trial court may close the courtroom during pre-trial hearings on questions to be presented to prospective jurors. In People v. Kelly,[501] the trial court conducted closed hearings regarding questionnaires for potential jurors and sealed the transcripts until after the trial. The trial court considered alternatives including (1) redacting transcripts, (2) using pseudonyms for the jurors' names, (3) questioning potential jurors during voir dire concerning pretrial publicity, or (4) changing the venue of the trial. But the trial court rejected each of these alternatives as ineffective or unworkable in the particular case.[502] The Illinois Appellate Court affirmed the decision to close the hearings and seal the transcripts. "Making the questions public to the very pool from which the jurors are about to [be] drawn would completely undermine their function, of eliciting honest and unrehearsed responses from potential jurors."[503]

K. Replacing sitting jurors with alternates. Section 115-4(g) of the Illinois Code of Criminal Procedure and Supreme Court Rule 434(e) provide for mandatory replacement of a juror who dies or is discharged before submission of a case to the jury.[504] The replacement of a discharged juror after deliberations begin is not directly addressed by these provisions.

In People v. Roberts,[505] the Illinois Supreme Court ruled that a trial court may replace a juror with an alternate after deliberations have begun, but the trial court must "review carefully the matter and take significant precautions to avoid prejudice before allowing substitution."[506] In determining whether a defendant was prejudiced by substituting a juror after deliberations have begun, reviewing courts consider the totality of the circumstances including: (1) whether the alternate juror and the remaining original jurors were exposed to outside prejudicial influences about the

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[500] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-12 (1984).

[501] 397 Ill.App.3d 232, 921 N.E.2d 333 (1st Dist. 2009).

[502] People v. Kelly, 397 Ill.App.3d 232, 241, 921 N.E.2d 333, 343 (1st Dist. 2009).

[503] People v. Kelly, 397 Ill.App.3d 232, 260, 921 N.E.2d 333, 358 (1st Dist. 2009).

[504] Ill.S.Ct.Rule 434(e) (2012); 725 Ill.Comp.Stat. 5/115-4(g) (2012).

[505] 214 Ill. 2d 106, 824 N.E.2d 250 (2005).

[506] People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

case: (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.[507] The Illinois Supreme Court also expressed concern about guarding the privacy and secrecy of a jury's deliberations. Thus, trial courts must be careful to avoid inquiring as to jurors' specific views on the case.[508]

Illinois courts have applied a stringent test to ensure that a juror's position during deliberations does not influence the trial court's decision whether to remove the juror: "[I]f the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."[509] In People v. Gallano,[510] juror notes revealed the identity of a lone holdout juror who would not sign a guilty verdict. The State performed a background check on the holdout juror and discovered that he had not honestly disclosed his criminal background. The trial court dismissed the dishonest juror and the defendant was convicted. The Illinois Appellate Court reversed the conviction because the impetus for the State's background check was the juror's status as the lone holdout.[511]

L. Trial courts must not discourage candid and open responses by prospective jurors. When a prospective juror states that he or she cannot be fair, a trial court may ask follow-up questions to be sure that the prospective juror understands the issue and is genuinely unable to be impartial. But the trial court must be careful not to discourage or intimidate the prospective juror or other venire members from giving candid responses when questioned about potential bias.

In People v. Brown,[512] a prospective juror stated that he or she could not be fair in a drug case due to personal experiences with family members addicted to drugs and "drug problems" on the west side of Chicago. The trial court asked several pointed questions, but the prospective juror consistently denied the ability to be fair because of the nature of the charges. The judge then ordered the prospective juror to return to court the next day to observe the trial.[513]

The defendant waived the issue before the trial court. The Illinois Appellate Court found that the trial court's conduct did not constitute plain error and would not reverse the conviction without some showing that the selected jury was biased.[514] However, the Appellate Court cautioned, "It is

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[507] People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

[508] People v. Roberts, 214 Ill.2d 106, 124, 824 N.E.2d 250, 260 (2005).

[509] People v. Nelson, 235 Ill.2d 386, 445, 922 N.E.2d 1056, 1088 (2009).

[510] 354 Ill.App.3d 941, 821 N.E.12 1214 (1st Dist. 2004).

[511] People v. Gallano, 354 Ill.App.3d 941, 953, 821 N.E.2d 1214, 1224-25 (1st Dist. 2004).

[512] 388 Ill.App.3d 1, 903 N.E.2d 863 (1st Dist. 2009).

[513] People v. Brown, 388 Ill.App.3d 1, 2-3, 903 N.E.2d 863, 864 (1st Dist. 2009).

[514] People v. Brown, 388 Ill.App.3d 1, 8, 903 N.E.2d 863, 869 (1st Dist. 2009). The Illinois Appellate Court compared the situation to U.S. v. Rowe, 106 F.3d 1226 (5th Cir. 1997), in which the conviction was reversed because the trial court ordered a venire member to return for jury service in each of the next three months. The Illinois Appellate Court stated, "[W]e have no disagreement with the Rowe decision...First and foremost, the error in Rowe was preserved. The trial judge was given the opportunity by a defense objection to strike the venire panel and continue with the jury selection with an untainted group of prospective jurors." Id. See also, People v. Morales, 2012 IL App (1st) 101911, ¶ 58-59, 966 N.E.2d 481,

precisely that 'frank' exchange between the prospective juror and the questioner that is the primary objective of voir dire. Anything that might reduce that frank exchange should be avoided."[515] The Appellate Court also questioned the trial court's authority to order an excused venire member to return to court the next day.[516]

As an alternative, a trial court might consider asking a potentially dishonest prospective juror attempting to avoid jury service to remain for an appropriate sanction after the remainder of the prospective jurors are no longer present.

M. Preserving issues for appeal and failure to challenge. When objecting to a voir dire limitation, the party must preserve the error by informing the trial court of the proposed questions at the time when the error can be addressed.[517]

The failure to challenge a juror for cause or by peremptory challenge waives any objection to that juror.[518] Further, a court's failure to remove a prospective juror for cause is grounds for reversal only if the party exercised all of its peremptory challenges and an objectionable juror was allowed to sit on the jury.[519] Even if a party eventually exhausts all peremptory challenges, the issue is waived if the party had any remaining peremptory challenges at the time the challenged juror was accepted.[520]

Despite the rule that a party must exhaust all peremptory challenges to preserve error, higher courts sometimes consider a trial court's denial of a challenge for cause when the party still had remaining peremptory challenges.[521] In particular, a defendant does not waive a challenge for cause by holding back peremptory challenges in a high publicity case. The Illinois Appellate Court has explained:

> The State initially argues defendant has waived any objections he might have regarding jury impanelment, as he failed to exhaust all of his peremptory challenges. Case law certainly suggests that failure to use all allotted peremptory challenges precludes any complaint on appeal. Also, such failure by defense counsel to exercise those challenges "tends to belie a claim of unfair prejudice." However, because of the amount of publicity in this case and the number of venire[members] apparently influenced by it, defendant had special need to

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495 (1st Dist. 2012) (threat to send prospective juror to a different court building to spend a month on a medical malpractice case not plain error and issue waived by failure to object).

[515] People v. Brown, 388 Ill.App.3d 1, 5, 903 N.E.2d 863, 867 (1st Dist. 2009). See also, People v. Morales, 2012 IL App (1st) 101911, ¶¶ 11, 58-59.

[516] People v. Brown, 388 Ill.App.3d 1, 5, 903 N.E.2d 863, 866 (1st Dist. 2009).

[517] York v. El-Ganzouri, 353 Ill. App. 3d 1, 12, 817 N.E.2d 1179, 1189 (1st Dist. 2004).

[518] People v. Metcalfe, 202 Ill. 2d 544, 551-52, 782 N.E.2d 263, 269 (2002); People v. Collins, 106 Ill.2d 237, 271, 478 N.E.2d 267, 282 (1985); People v. Rudeen, 2011 IL App (2d) 100613U ¶ 26 ("[D]efendant accepted [the prospective] juror, even though she could have excluded her via peremptory challenge. Defendant thus forfeited any objection..."); People v. Redmond, 357 Ill. App. 3d 256, 258, 828 N.E.2d 1206, 1209 (1st Dist. 2005).

[519] People v. Redmond, 357 Ill. App. 3d 256, 258, 828 N.E.2d 1206, 1209 (1st Dist. 2005).

[520] People v. Bowens, 407 Ill.App.3d 1094, 1099-1100, 943 N.E.2d 1249, 1257-58 (4th Dist. 2011).

[521] See, e.g., Leischner v. Advance Stores Company, 2011 Ill.App.Unpub. LEXIS 271 (4th Dist. 2011); People v. Hines, 165 Ill.App. 3d 289, 297, 518 N.E.2d 1362, 1367 (4th Dist. 1988).

preserve his peremptory challenges. We conclude we should not hold defendant to have waived error in the denial of his challenges for cause for failing to exercise all of his peremptory challenges.[522]

N. Effective assistance of counsel and failure to challenge. Illinois courts have ruled that "defense counsel's conduct during voir dire, including the decision whether to exercise a peremptory challenge, involves matters of trial strategy that generally are immune from claims of ineffective assistance of counsel."[523] Even if a prospective juror states that he or she cannot be fair, counsel may choose to keep that individual to serve on the jury.[524] Illinois courts also "decline to impose a duty upon a trial court to *sua sponte* excuse a juror for cause in the absence of a defendant's challenge for cause or exercise of a peremptory challenge."[525] However, "a trial court certainly has the discretion to remove a juror *sua sponte* for cause..."[526]

O. Harmless error. Typically, voir dire restrictions make difficult issues on appeal because the trial court is granted wide discretion in this area.[527] However, some decisions have refused to apply the harmless error rule. The Illinois Appellate Court has explained, "Even if evidence of defendant's guilt was sufficient, issues involving the right to a fair trial by a panel of impartial jurors cannot be disposed of by the harmless error rule."[528]

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[522] People v. Hines, 165 Ill.App. 3d 289, 297, 518 N.E.2d 1362, 1367 (4th Dist. 1988) (citations omitted, quoting People v. Sanchez, 115 Ill. 2d 238, 265, 503 N.E.2d 277, 286 (1986).

[523] People v. Lopez, 371 Ill. App.3d 920, 933, 864 N.E.2d 726, 736 (1st Dist. 2007). See also, People v. Manning, 241 Ill.2d 319, 333, 948 N.E.2d 542, 550 (2011) ("[C]ounsel's actions during jury selection are generally considered a matter of trial strategy. Accordingly, counsel's strategic choices are virtually unchallengeable."); People v. Banks, 237 Ill.2d 154, 215-16 934 N.E.2d 435, 469 (2010) ("The law is equally clear that defense counsel's conduct during *voir dire* involves matters of trial strategy that generally are not subject to scrutiny under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)."); People v. Jones, 2012 IL App. (2nd) 110346, ¶ 71 ("In general, counsel's actions during jury selection are considered a matter of trial strategy, and counsel's strategic choices are virtually unchallengeable. Attorneys consider many factors in making their decisions about which jurors to challenge and which jurors to accept, and reviewing courts should hesitate to second-guess counsel's strategic decisions, even where those decisions seem questionable.") (citations omitted).

[524] See, e.g., People v. Manning, 241 Ill.2d 319, 323, 948 N.E.2d 542, 545 (2011) (defense counsel not ineffective despite responses: "Q You cannot? A. No. I said it's not going to change. I cannot be fair with the case. Q. You can be fair, or you cannot? A. No, I cannot be fair."); People v. Metcalfe, 202 Ill. 2d 544, 782 N.E.2d 263 (2002).

[525] People v. Metcalfe, 202 Ill. 2d 544, 555, 782 N.E.2d 263, 271 (2002).

[526] People v. Metcalfe, 202 Ill. 2d 544, 556, 782 N.E.2d 263, 272 (2002).

[527] People v. Peeples, 155 Ill.2d 422, 458-59, 616 N.E.2d 294, 313 (1993).

[528] People v. Green, 282 Ill.App.3d 510, 514, 668 N.E.2d 158, 160 (1st Dist. 1996) (quoting People v. Mitchell, 121 Ill. App. 3d 193, 196, 459 N.E.2d 351, 353-54 (2nd Dist. 1984)).

"LIVING WITH A SIX PERSON JURY"

Judge Lynn M. Egan

Judge Thomas M. Donnelly

Judge Diane M. Shelley

November 20, 2015

WHAT CHANGED?

The law reduces the number of jurors in civil cases from 12 to 6. The Code of Civil Procedure now expressly states, "all jury cases shall be tried by a jury of 6." *735 ILCS 5/2-1105(a)(West 2015).*

It also changed the statute that governs juror fees so that jurors are paid $25 for the first day of service & $50 for every day thereafter "or such higher amount as may be fixed by the county board." *55 ILCS 5/4-11001(West 2015).*

Although the new statute doesn't specify the cost for alternate jurors, it contemplates an additional fee for each alternate requested. This fee will be set by the county board. Varies by County.

WHEN DID THIS HAPPEN?

November 25, 2014: House Amendments 1 & 2 to SB 3075 are filed & assigned to the House Judiciary Committee. Hearing held.

December 2, 2014: Bill passes in the House & Sen. John Mulroe sponsors the Senate bill, which is assigned to the Executive Committee. Hearing held.

December 3, 2014: Senate approves House Amendments 1 & 2.

December 19, 2014: Former Governor Quinn signs Public Act 98-1132 into law. Effective date: June 1, 2015.

WHAT DID NOT CHANGE?

The cost of a jury demand. In Cook County, the cost remains $230.

The number of peremptory challenges & alternates remains the same under 735 ILCS 2/2-1106(a) & (b)(West 2015).

The manner in which jurors are passed upon & accepted also remains unchanged -- panels of four, commencing with the plaintiff. Alternate jurors passed upon separately. *705 ILCS 305/21(West 2015)*.

Supreme Court Rule 285. Parties in small claims cases can still demand a 12 person jury. Cost remains $25.00.

HOW DOES ILLINOIS COMPARE?

Federal court requires a minimum of 6 jurors & no more than 12.

A majority of states define a jury as being 12 jurors, but permit parties to stipulate to less.

Five states define a jury as six jurors, but permit parties to demand twelve.

Two states require twelve jurors & do not permit parties to agree to fewer than this number.

Seven states, including IL, define a jury as six jurors & do not allow parties to demand more.

WHAT IS THE IMPACT?

Some studies suggest that significant reduction in the number of jurors:

1) Decreases diversity of the jury;

2) Negatively impacts the deliberative process by making dissenting jurors less likely to articulate their views, diminishes the ability to accurately recall evidence & reduces the overall quality of deliberations;

3) Reduces the deliberation time;

4) Results in juries that are less likely to deadlock.

UNANSWERED QUESTIONS

1) What if suit was filed before June 1, 2015, but defendant was not served until after that date - can the defendant still demand a twelve-person jury?

2) What if the judge, rather than the parties, orders alternates? Who pays the cost? How do the county clerks' offices monitor the use of alternate jurors?

3) Is it constitutional? *See*, *Colgrove v. Battin*, *413 U.S. 419 (1973)* & *Ballew v. Georgia*, *435 U.S. 223 (1978)*.

WHAT TO DO?

The Illinois Supreme Court tasked the Civil Justice Committee with undertaking a comprehensive project to study/analyze civil jury trials throughout the entire state.

The Civil Justice Committee has not, & will not, express a preference for a six or twelve person jury. Instead, it will identify ways to enhance our civil jury trial system as it currently exists.

It will begin by examining the use of preliminary jury instructions, interim statements by counsel to the jury, number of peremptory challenges & ways to enhance jury deliberations.

CIVIL JUSTICE COMMITTEE

The Committee has developed questionnaires that will be used in civil jury trials across the state.

Separate questionnaires will be completed by the judges, lawyers & jurors.

After the data is compiled & analyzed, the Committee will make specific recommendations to the Supreme Court.

JUROR QUESTIONS

1) Did all of the jurors on your jury contribute to your deliberations? If no, how many contributed?

2) Did any one juror dominate the deliberations? How much influence did the foreperson have on the jury's decision?

3) What was your opinion of the number of jurors on your jury?

4) How accurately was the evidence remembered by the jury during deliberations?

5) How much did you rely on other jurors to remember the evidence?

JUROR QUESTIONS

6) How thorough were the deliberations?

7) How satisfied were you with the deliberations?

8) How much did you participate in the deliberations? How many participated more than you?

9) What percentage of time was spent discussing liability? Money awards or damages?

10) Questions about jurors' racial/ethnic & educational background, as well as gender & employment status.

PRACTICAL TIPS

Make the most of voir dire.

Utilize S.Ct.Rule 243, which permits jurors to ask questions of witnesses.

Provide substantive answers to questions that arise during deliberations - but know the proper procedures.

Get involved in efforts to preserve & enhance our civil jury trial system - it is vanishing! In 2013, there were 248,302 Law Jury cases filed in the state, but only 1,059 of those cases generated jury verdicts.