26th Annual Litigation Institute and Retreat

Cosponsored by the Litigation Section

Friday, March 1, 2019
1 p.m.–5:30 p.m.

Saturday, March 2, 2019
8:30 a.m.–12:15 p.m.

7.75 General CLE credits
INSTITUTE PLANNERS

Chair: Dennis Rawlinson, Miller Nash Graham & Dunn LLP, Portland
Leslie Johnson, Samuels Yoelin Kantor LLP, Portland
Thomas Johnson, Perkins Coie LLP, Portland
Jeanne Loftis, Bullivant Houser Bailey PC, Portland
Kimberly Stuart, Washington County Counsel, Hillsboro

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P.O. Box 231935
Tigard, OR 97281-1935
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Breakfast

CICAYDA eDiscovery

PERKINS coie
COUNSEL TO GREAT COMPANIES

Lunch

Bullivant Houser Bailey PC
Attorneys at Law

KJH Keating Jones Hughes, P.C.
ATTORNEYS AT LAW

Breaks

ghr
GARRETT HEMANN ROBERTSON P.C.

Stoll Berne

Reception

ANDERSEN MORSE & LINTHORST ATTORNEYS AT LAW

Dumas Law Group, LLC

bullard law

JOHNSON JOHNSON LUCAS & MIDDLETON

After-Dinner Wine Reception

MILLER NASH
GRAHAM & DUNN LLP
ATTORNEYS AT LAW
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   — Kelly Zusman, U.S. Attorney’s Office, Portland, Oregon

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   — The Honorable Stacie Beckerman, Magistrate Judge, U.S. District Court, District of Oregon, Portland, Oregon
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   — Stephen English, Perkins Coie LLP, Portland, Oregon
   — David Markowitz, Markowitz Herbold PC, Portland, Oregon
   — Charese Rohny, Charese Rohny Law Office LLC, Portland, Oregon
SCHEDULE

Friday, March 1, 2019

10:30 Registration

11:00 New Lawyer Workshop—Crafting Legal Writing
Learn strategies for crafting your own refreshing brand of legal writing for any season. Hear about tips and practical tools to efficiently and effectively persuade your judicial audience at trial and beyond.
The Honorable Virginia Linder, Senior Justice, Salem

12:15 Workshop Adjourns

Noon Lunch Buffet

1:00 Advanced Written Persuasive Advocacy—What You Write Is as Important as What You Say
Moderator: The Honorable Mary Mertens James, Marion County Circuit Court, Salem
The Honorable Erin Lagesen, Oregon Court of Appeals, Salem
The Honorable Virginia Linder, Senior Justice, Salem
Kelly Zusman, U.S. Attorney’s Office, Portland

2:15 From the Bench: Lessons Learned from Handling Jury Issues in High-Profile Cases
The Honorable Anna Brown, U.S. District Court, District of Oregon, Portland
The Honorable Gloria Navarro, Chief U.S. District Judge for the District of Nevada, Las Vegas
The Honorable Julie Frantz, Multnomah County Circuit Court, Portland

3:30 Break

3:45 Rancho Rajneesh—Legal Battles in Wild Country’s “Utopia”
Moderator: Robert Weaver, Garvey Schubert Barer, Portland
The Honorable Edward Leavy, US Court of Appeals, Portland
William Gary, Harrang Long Gary Rudnick PC, Eugene

4:45 Murder, Mayhem, and Massacre: Oregon’s Most Historic and Sensational Trials
Kerry Tymchuk, Oregon Historical Society, Portland

5:30 Adjourn to Hosted Reception

6:30 Dinner and Presentation of the 22nd Owen M. Panner Professional Award to the Honorable Anna Brown, U.S. District Court, District of Oregon, Portland

Saturday, March 2, 2019

7:45 Late Registration and Breakfast Buffet

8:30 From Ordinary to Extraordinary: What Makes a Great Trial Lawyer
The Honorable Michael Mosman, Chief U.S. District Judge for the District of Oregon, Portland

8:45 A Litigation Profile: Sharing Observations and Experiences from the Bench and Bar
The Honorable Michael Mosman, Chief U.S. District Judge for the District of Oregon, Portland
Craig Wessel, Portland Business Journal, Portland
9:15  **Inside Edition: What Attorneys Can Learn from Post-Trial Juror Interviews**  
Moderator: The Honorable Michael Mosman, *Chief U.S. District Judge for the District of Oregon, Portland*  
The Honorable Stephen Bushong, *Presiding Judge, Multnomah County Circuit Court, Portland*  
The Honorable Karin Immergut, *Multnomah County Circuit Court, Portland*  
The Honorable Susie Norby, *Clackamas County Circuit Court, Oregon City*  

10:30  **Break**  

10:45  **Persuading the Jury: What Works and Doesn’t Work**  
Moderator: The Honorable Stacie Beckerman, *Magistrate Judge, U.S. District Court, District of Oregon, Portland*  
William Barton, *Barton Law Firm PC, Newport*  
Stephen English, *Perkins Coie LLP, Portland*  
David Markowitz, *Markowitz Herbold PC, Portland*  
Charese Rohny, *Charese Rohny Law Office LLC, Portland*  

12:00  **The Exceptional Trial Lawyer Demystified: Final Thoughts from the Chief**  
The Honorable Michael Mosman, *Chief U.S. District Judge for the District of Oregon, Portland*  

12:15  **Adjourn**
FACULTY

William Barton, Barton Law Firm PC, Newport. Mr. Barton’s national practice focuses on medical negligence, institutional sexual abuse, and insurance bad faith. Since 1972, he has tried over 500 jury trials to verdict, and he has over 40 million-dollar-plus verdicts and settlements. He also serves as a state trial judge pro tem. Mr. Barton is a Fellow of the International Academy of Trial Lawyers, the American College of Trial Lawyers, the International Society of Barristers, and the American Board of Trial Advocates, and he is past president of the Oregon Trial Lawyers Association and Western Trial Lawyers Association. He is the author of Recovering for Psychological Injuries, 3rd Edition. Mr. Barton has been a guest instructor for Harvard Law School’s Trial Advocacy Workshop and has lectured on trial advocacy over 450 times in 35 states and 5 countries. He is also the “Camp Commandant” of Barton’s Advocacy Boot Camp, now in its 14th year. Mr. Barton has received the Oregon Trial Lawyers Association “Distinguished Trial Lawyer Award.” In 2013 the Oregon State Bar Litigation Section recognized Mr. Barton with its Professionalism Award, and in 2015 he was presented with the Oregon State Bar’s highest honor, the Award of Merit.

The Honorable Stacie Beckerman, Magistrate Judge, U.S. District Court, District of Oregon, Portland. Judge Beckerman was appointed to serve as U.S. Magistrate Judge in January 2015. Prior to joining the bench, she was an Assistant U.S. Attorney for the District of Oregon, prosecuting violent, white-collar, and environmental crimes. She has also served as an Assistant Attorney General at the Oregon Department of Justice, Appellate Division, and as an adjunct professor at Lewis and Clark Law School. Prior to government service, Judge Beckerman was a litigator for many years, focusing on securities class actions, shareholder derivative actions, insurance defense, and pro bono civil rights cases. Judge Beckerman is chair of the Ninth Circuit Pro Se Litigation Committee, vice chair of the Ninth Circuit Magistrate Judge Executive Board, the coordinator of the U.S. District Court Pro Bono Panel, a board member of the U.S. District Court of Oregon Historical Society, a member of the District of Oregon Corrections Working Group, a board member of Oregon Women Judges, an advisory board member of the Campaign for Equal Justice, and past president of Queen’s Bench (the Multnomah County Chapter of Oregon Women Lawyers).

The Honorable Anna Brown, U.S. District Court, District of Oregon, Portland. Judge Brown was appointed United States District Judge for the District of Oregon by President William Jefferson Clinton, and her appointment was confirmed by the United States Senate on October 15, 1999. She assumed “Senior Status” as a United States District Judge on July 27, 2017. In her years as a trial judge, Judge Brown worked in the full range of general-jurisdiction, state, and federal trial court proceedings, as well as presiding over numerous complex civil and criminal jury trials. She presided pretrial and at two complex, multi-defendant criminal jury trials arising from the 2016 occupation of the Malheur National Wildlife Refuge in southeastern Oregon. Judge Brown shares her extensive trial court expertise with new and experienced lawyers through frequent state and federal continuing legal education programs and as an instructor and mentor for new lawyers and trial judges.

The Honorable Stephen Bushong, Presiding Judge, Multnomah County Circuit Court, Portland. Judge Bushong has been a Circuit Court Judge in Multnomah County since 2008. He was named Chief Civil Judge in 2013 and Presiding Judge in 2018. He worked for the Oregon Department of Justice from 1994 until he was appointed to the bench. At DOJ, he served as an Assistant Attorney General, Attorney-in-Charge of the Special Litigation Unit, and Chief Trial Counsel of the department’s Trial Division. Judge Bushong serves on the Oregon Law Commission. He has served on the Oregon State Bar Uniform Civil Jury Instruction Committee, the OSB Litigation Section Executive Committee, and the OSB Government Law Section Executive Committee, and he is past chair of Multnomah Bar Association Professionalism Committee. He authored chapters in the OSB publications on Civil Pleading and Practice (2012) and Oregon Constitutional Law (2013) and regularly submits articles on “Recent Significant Oregon Cases” featured in the OSB Litigation Section’s Litigation Journal.
Stephen English, Perkins Coie LLP, Portland. Mr. English has more than 40 years of jury and nonjury trial experience representing both plaintiffs and defendants. He has successfully tried over 100 cases to verdict. His trial experience includes business disputes, commercial torts, environmental claims, trade secrets, securities, breach of contract, directors’ and officers’ liability, policyholder disputes, product liability claims, and institutional liability. He has served as national, regional, and Oregon counsel for international businesses and manufacturers. He has broad experience in high-stakes cases and in sensitive, high-risk matters for both individuals and corporate clients, large and small. Mr. English has also on occasion agreed to be a “mediator of last resort” in particularly difficult and contentious disputes. Mr. English is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers and a member of the American Bar Association, Multnomah Bar Association, the Federal Bar Association, the Oregon Association of Defense Counsel, the Defense Research Institute, and the Association of Defense Trial Attorneys. He is past president of the American Board of Trial Advocates Oregon Chapter, past member of the National Judicial College National Board of Trustees, and past chair of the Oregon State Bar Litigation Section.

The Honorable Julie Frantz, Multnomah County Circuit Court, Portland. Judge Frantz served on the Multnomah County Circuit Court from 1994 through 2017. She presided over civil and criminal trials and in the position of Chief Criminal Judge, and she currently is engaged as a mediator and Special Master in federal court. Judge Frantz served as the first woman president of the Oregon State Bar in 1992–1993 and as president of the National Association of Women Judges in 2014–2015. She is the recipient of numerous awards including the Multnomah Bar Association Award of Merit, the Fred Stickel Public Service Award, Lewis and Clark Law School Distinguished Alumni Award, and the Oregon Women Lawyers Justice Betty Roberts Award. Judge Frantz has decades of active engagement in local and state bar activities and innovative judicial, youth mock trial and mentorship programs.

William Gary, Harrang Long Gary Rudnick PC, Eugene. Mr. Gary is board chair of Harrang Long Gary Rudnick P.C. His practice focuses on complex litigation and appellate law. From 1980 to 1989, he served first as Oregon’s Solicitor General and then as the Deputy Attorney General under Attorney General Dave Frohnmayer. He has argued hundreds of cases in the Oregon Supreme Court, Oregon Court of Appeals, federal appellate courts, and the United States Supreme Court. Together with Attorney General Frohnmayer, he was primarily responsible for advising and representing the State of Oregon with respect to the wide array of disputes and legal issues that arose out of the Rajneesh commune that located on the Big Muddy Ranch in Central Oregon. In particular, he was lead counsel for the State of Oregon in the case of State v. City of Rajneeshpuram, in which the United States District Court for the District of Oregon ruled that the incorporation of a legal commune as a municipality violated the Establishment Clause.

Hannah Horsley, U.S. Attorney’s Office, District of Oregon, Portland. Ms. Horsley is an Assistant United States Attorney who prosecutes violent crimes and civil rights crimes, with an emphasis on human trafficking. She has tried multiple jury trials and handled dozens of white-collar criminal cases, as well as civil habeas cases and appeals. Ms. Horsley leads the Oregon Foreign-Born Human Trafficking Task Force, a multidisciplinary group working to combat labor and sex trafficking of foreign-born victims. She also oversees federal civil rights enforcement in Oregon and supervise the investigation and prosecution of federal criminal civil rights matters in Portland. Ms. Horsley is a member of the Federal Bar Association Oregon Chapter, Oregon Women Lawyers, the Ninth Circuit Jury Trial Improvements Committee, and the Oregon Coalition Against Hate Crimes. She is admitted to practice in California and the District of Columbia, as well as before the United States Supreme Court.
The Honorable Karin Immergut, Multnomah County Circuit Court, Portland. Judge Immergut was appointed by Governor Ted Kulongoski and has served on the trial court bench since September 2009. She handles a wide variety of criminal and civil cases and has presided over more than 250 criminal and civil trials and hundreds of civil motions. She has also supervised Multnomah County’s drug diversion court. Judge Immergut previously served for six years as United States Attorney for the District of Oregon, after having been nominated by President George W. Bush and confirmed by the United States Senate. As U.S. Attorney, Judge Immergut supervised a staff of over 100 employees, including attorneys and support staff, in three different offices. In addition, throughout most of her term as U.S. Attorney, Judge Immergut served on, and then chaired, the Attorney General’s Advisory Committee, which advises the U.S. Attorney General about national policy matters.

The Honorable Mary Mertens James, Marion County Circuit Court, Salem. Judge James was appointed to the bench in 2003 by Governor Ted Kulongoski and presides over criminal and civil bench and jury trials and pretrial hearings. Her case load includes complex commercial, construction defect, civil enforcement, constitutional challenges to Oregon laws, family law and probate, and criminal cases from misdemeanor to death penalty charges. She is also a mediation/settlement judge. With community partners, Judge James started Marion County’s mental health treatment court, and she served as the presiding judge for a decade. Judge James is past chair of the Bench-Bar Commission on Professionalism and the Oregon State Bar Civil Rights Section, Uniform Civil Jury Instruction Committee, and Judicial Administration Committee. She is past president of the Willamette Valley Inn of Court and was Oregon’s first director on the national American Inns of Court Board. Judge James is a member of the statewide Judicial Conduct and Judicial Leadership and Education Committees, Oregon Woman Lawyers, Opportunities for Law in Oregon (OLIO), the Oregon Gay and Lesbian Law Association, and the Campaign for Equal Justice board. She teaches Judicial Ethics at the New Judges School and is a frequent presenter on trial practice, professionalism and ethics in the courtroom, overcoming bias, and treatment courts. Judge James has mentored law students for more than 25 years and teaches trial practice and pretrial civil litigation as adjunct faculty at Willamette University College of Law. The Law School honored Judge James in 2013, creating an award in her name for excellence in mentoring law students.

The Honorable Erin Lagesen, Oregon Court of Appeals, Salem. Judge Lagesen was appointed by Governor John Kitzhaber and began service on November 12, 2013. Before joining the Court of Appeals, Judge Lagesen practiced law in the appellate division of the Oregon Department of Justice, handling a wide range of civil, criminal, and administrative appeals in the Oregon Court of Appeals, the Oregon Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Prior to that, she was a litigator in private practice. Judge Lagesen serves on the Oregon State Bar Constitutional Law Section Executive Committee and is past chair of that section.

The Honorable Edward Leavy, US Court of Appeals, Portland. Judge Leavy was appointed to the United States Court of Appeals for the Ninth Circuit in 1987 by President Ronald Reagan. In 2001, Judge Leavy was appointed by Justice William Rehnquist as Judge of the Foreign Intelligence Surveillance Act Court of Review, and he served as Presiding Judge from 2005 to 2008. Judge Leavy assumed senior status on the Ninth Circuit in 1997. He continues participating in the Ninth Circuit’s case load and also has served as mediator in several complex federal mediations, including ongoing mediation matters involving the Confederated Tribes, the Yakima Nation, the Department of Justice, and the Federal Energy Regulatory Commission and California utilities. In 2015, Judge Leavy was selected to receive the prestigious Edward J. Devitt Distinguished Service to Justice Award, considered to be the federal judiciary’s highest honor. The Devitt Award is presented by the Dwight D. Opperman Foundation and recipients are chosen annually by a committee of federal judges, including a member of the United States Supreme Court.
The Honorable Virginia Linder, Senior Justice, Salem. Justice Linder began her legal career in 1980 as an Assistant Attorney General in the Oregon Department of Justice Appellate Division. From 1983 through 1986, she held various midlevel management and lead lawyer roles. In 1986, she was appointed to the position of Oregon Solicitor General, where she was responsible for the work of as many as 33 appellate lawyers on between 3,000 and 4,000 appeals a year in both state and federal courts. In 1997, she was appointed to the Oregon Court of Appeals. After almost 10 years as a judge on that court, she successfully ran for the Oregon Supreme Court, where she served from 2007 until her retirement at the end of 2015. As a senior justice, she works part-time as a judge, principally participating in appellate cases for both of Oregon’s appellate courts.

David Markowitz, Markowitz Herbold PC, Portland. Mr. Markowitz is the cofounder of the Markowitz Herbold law firm. He has received numerous awards and recognition for his outstanding trial work and efforts in mentoring and educating attorneys at all levels. He is a Fellow and former Oregon State Chair of the American College of Trial Lawyers, a Fellow of the International Academy of Trial Lawyers, and a member of the American Board of Trial Advocates. Mr. Markowitz frequently acts as a mediator and arbitrator to resolve commercial disputes, served as a pro tem judge in Multnomah County, and is an expert on attorney fees.

The Honorable Michael Mosman, Chief U.S. District Judge for the District of Oregon, Portland. Chief Judge Mosman was nominated by President George W. Bush. He was confirmed by the Senate on September 25, 2003, and received his federal commission the following day. He became Chief Judge on February 1, 2016. Chief Judge Mosman is also serving a 2013–2020 term on the United States Foreign Intelligence Surveillance Court. Prior to taking the bench, Chief Judge Mosman served as the U.S. Attorney for the District of Oregon and before that was in private practice in Portland.

The Honorable Gloria Navarro, Chief U.S. District Judge for the District of Nevada, Las Vegas. Chief Judge Navarro was nominated by President Barack Obama on December 24, 2009, confirmed by a unanimous vote of the U.S. Senate on May 5, 2010, and took the oath as a United States District Judge on May 25, 2010. On January 1, 2014, Chief Judge Navarro became Chief Judge of the United States District Court for the District of Nevada. Chief Judge Navarro is a member of the Ninth Circuit IT Committee, and she was recently appointed by Chief Justice John Roberts to sit on the national JCUS IT Committee. Prior to taking the bench, Chief Judge Navarro was the Chief Deputy District Attorney for Clark County, Nevada, in the Civil Division, and before that she was a Clark County Deputy Special Public Defender, exclusively representing indigent clients charged with murder and facing the death penalty. During that time, she was named Pro Bono Public Lawyer of the Year by the State Bar of Nevada Access to Justice Committee after she received the Louis Wiener Pro Bono Service Award for her pro bono representation of a non-English speaking victim of domestic violence. Chief Judge Navarro has authored several articles, including “Cultural Factors and the Voluntariness of Statements” and “Criminal Defense and the Consequences of Immigration Law.” Chief Judge Navarro has also been a speaker for the Criminal Justice Act Panel Attorneys on the topic of “How to Effectively Represent Non-English Speaking Clients and/or Clients with a Different Cultural Background.”

The Honorable Susie Norby, Clackamas County Circuit Court, Oregon City. In 2006, Judge Norby became the first female judge to win a contested judicial election in Clackamas County and the third female judge in the history of Clackamas County’s bench. She was reelected in 2012 and 2018. She presides over a wide spectrum of trials and hearings in all disciplines of law. Judge Norby oversees all adoptions in Clackamas County and chairs the Clackamas County Arbitration Board. She is specially appointed as one of three judges handling probate and guardianship cases. Judge Norby also had the honor of acting as an appointed pro tem judge on the Oregon Court of Appeals with three separate panels. She has had two written opinions published with the appeals court. Prior to taking the bench, Judge Norby practiced civil law for just over ten years in the Office of Clackamas County Counsel and spent nearly five years as a criminal prosecutor with the Clackamas County District Attorney’s Office. Judge Norby was recently appointed to the Bar and Bench Commission on Professionalism, and she is a member of the Council on Court Procedures.
FACULTY (Continued)

Charese Rohny, Charese Rohny Law Office LLC, Portland. Ms. Rohny practices in the areas of employment discrimination and civil rights. She is a member of the National Employment Lawyers Association, the American Association for Justice, Oregon Women Lawyers, the Oregon Trial Lawyers Association, the Multnomah Bar Association, and the Oregon State Bar Labor and Employment Law and Civil Rights sections. She is admitted to practice in Oregon and California.

Kerry Tymchuk, Oregon Historical Society, Portland. Mr. Tymchuk became the Permanent Executive Director of the Oregon Historical Society in October 2007 after a brief term as the Interim Executive Director. He has served on the museum's board since 2007. Mr. Tymchuk is an inactive member of the Oregon State Bar.

Robert Weaver, Garvey Schubert Barer, Portland. Mr. Weaver handles "bet the company" cases in federal and state courts. He has a particular focus on complex business and tax litigation and white-collar criminal defense, often assisting companies and individuals embroiled in major government investigations and performing internal corporate investigations on their behalf. He has successfully defended cases involving federal antitrust laws, securities violations, environmental crimes, health care fraud, tax violations, banking fraud, civil and criminal false claims cases, and Foreign Corrupt Practices Act prosecutions. He has also successfully defended a number of high-profile cases on behalf of political figures and professional athletes. Before entering private practice, Mr. Weaver served as Assistant U.S. Attorney for the District of Oregon from 1979 to 1987, and for most of that time he was chief of that office's Criminal Division.

Craig Wessel, Portland Business Journal, Portland. Mr. Wessel is President and Publisher of the Portland Business Journal. He has been involved in the newspaper and magazine publishing industry for nearly 35 years. He began his publishing career with American City Business Journals as Director of Development and was involved in the launch of more than 18 regional business newspapers across the country. He has worked as an independent publishing consultant and executive for a wide array of magazines and newspapers nationwide.

Kelly Zusman, U.S. Attorney’s Office, Portland. Ms. Zusman is the Appellate Chief for the United States Attorney’s Office in the District of Oregon. She teaches a variety of subjects for the National Advocacy Center, Justice Television Network, University of Oregon School of Law, Northwestern School of Law, and a number of USAOs and Main Justice components throughout the United States. In 2018, she taught a seminar on appellate advocacy for law students in Dhaka, Bangladesh. Her courses include appellate advocacy, evidence, legal writing and editing, criminal discovery, Fourth Amendment, and trial advocacy. She has written numerous articles and authored handbooks on appellate advocacy, privilege law, and criminal discovery. In 2013 and 2018, Ms. Zusman received U.S. Department of Justice national awards for outstanding appellate advocacy, and she was twice selected to serve as a Ninth Circuit Lawyer Representative.
Pre-Writing

A. Identify applicable procedural or format rules that bear on content: Rules of Civil Procedure; Rules of Appellate Procedure; Uniform Trial Court Rules; Local Rules; and court style manuals.

B. Identify substantive legal standards, if any, that govern the content of factual narratives: Oregon Rule of Civil Procedure 21; Federal Rule of Civil Procedure 12; Oregon Rule of Civil Procedure 47; Federal Rule of Civil Procedure 56; and standards of review from case law and statutes. Identify facts, and the evidentiary support for those facts, in view of applicable standards.

C. Identify issues presented - think about where the issues come from - your own strategy choice, the arguments raised by the opposing party, or the specific rulings made by a prior tribunal. When in a responsive posture -- either responding to an opponent's argument or challenging a prior tribunal's ruling on appeal--take care to address arguments raised or rulings made.

D. Identify (and research) key points of law pertaining to those issues.

E. Identify audience: one judge or a panel of judges; subject matter generalists or experts; or judicial staff.

F. Outline or otherwise map out a pathway through your brief, building the bones of your case before attempting express it in a fully-developed prose.

Writing

A. Treat your outline or map like a worksheet; go to a different section if one section is proving challenging to write.

B. On longer pieces of writing, revise while writing -- but not too much! Start the day by giving what's been written a trim and then move on to new drafting.
C. Discard writing that is not working. Write a new outline to the extent needed and start over.

**Post-Writing**

A. Review content to determine whether the final product contains the necessary pieces that you identified pre-argument. In cases of responsive writing, review the writing to which you are responding to ensure that your writing adequately engages with that writing, and does not primarily set up and knock down arguments that have not been made.

B. Edit or, better yet, have someone else edit and proofread. Ask that person to explain to you the person's understanding of the points that you have made, and for their assessment of tone.

C. Seek feedback from the non-legal staff persons that assist you in processing your work; inquire about their understanding of what you've written, and their impression of its tone.

**General**

A. Learn to edit. This means learning to communicate to someone else the gaps and weaknesses in a piece of writing without re-doing it yourself. This will help you to avoid similar gaps and weaknesses in your own writing and also help you work productively as part of a team of writers.

B. Read widely.

C. Think carefully about tone. How would the people you care about most react to your choice of tone in a particular matter?
Resources


Chapter 1B

Advanced Written Persuasive Advocacy—Zusman’s Top 10 Tips

Kelly Zusman
U.S. Attorney’s Office
Portland, Oregon
Advanced Written Persuasive Advocacy — Zusman’s Top 10 Tips

I’m already a pretty good writer. I’ve been doing this for a long time. How can I possibly improve now?

1. Focus on the writing itself, not just the substance. What drives you crazy in others’ writing? Don’t do that. What do you like about others’ writing? Do that.
   a. Ross Guberman dissects good legal writing and explains why some legal briefs are particularly well-written. He has written two very helpful articles:
      i. https://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer-2018/what-judges-read.pdf Reading this article, I learned that a lot of judges dislike the phrase “pursuant to.” So I’ve stopped using it.
      ii. https://www.legalwritingpro.com/pdf/john-roberts.pdf This article inspired me to use semi-colons and, more importantly, it reminded me to find the interesting angle to my case, and introduce my issue through that lens. A lot of legal briefs are dull when they really don’t have to be.

   a. If you always run, play tennis, golf, etc. with others who are as skilled, or less skilled than you, improvement is unlikely. You need to run with people who are faster, better, smarter than you – these people will inspire you to be better.

3. Edit others. Volunteer and then really dig into the work. For example, does the first sentence accurately summarize the paragraph? If you were to read only the first sentence of each paragraph, would you get the gist? Does the last sentence of each paragraph complete the thought?
   a. A good argument needs a good structure. CREARC works really well.
      i. Conclusion – Rule – Explanation – Analysis – Rebuttal – Conclusion
4. Look for clutter. Long sentences and long paragraphs often are too long because they include too many unnecessary words or clauses.

5. Find a really good editor. Skip the easy grader. Go for the one who may bruise your ego but who will take the time to examine your work closely and give you good, meaningful feedback. Buy that person coffee. A lot of coffee.

   a. [https://www.newyorker.com/magazine/2011/10/03/personal-best](https://www.newyorker.com/magazine/2011/10/03/personal-best) I found this article by Dr. Atul Gawande inspiring. He’s a brilliant, well-established surgeon. More than 20 years into his tenure, he felt as though he had plateaued in his work, so he sought out a fellow well-regarded surgeon and asked him to observe and “coach” his surgery skills. He found the process incredibly helpful because it improved his skills and gave him insights he might never have achieved otherwise.

6. Use pictures, diagrams, maps, etc. to explain facts. Images are more credible than words and images make your brief more interesting. Judges love them.

   a. A bank robbery demand note. We could describe the note, or we could simply show the court exactly what the bank teller saw the day she was robbed.
b. A defendant charged with unlawful gun possession claimed that he simply fired his gun in the air. The crime scene, however, looked a lot like a shootout; 18 shell casings from three different types of guns were recovered from a tavern parking lot.
c. A former mortgage broker charged with fraud in relation to 15 different properties. The misrepresentations fell into three categories: falsehoods about the borrowers’ income, falsehoods about the borrowers’ assets, and lies about the properties’ intended use. We summarized the scheme and inserted this helpful chart:

<table>
<thead>
<tr>
<th>Count Number</th>
<th>Borrower Name</th>
<th>Property Address</th>
<th>Occupancy Listed</th>
<th>Employer Listed</th>
<th>Monthly Income</th>
<th>Rental Income</th>
<th>Assets Listed</th>
<th>Liabilities Not Listed</th>
<th>Real Estate Not Listed</th>
<th>Interstate Wire</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Brandon Barnet</td>
<td>6825 SW 153rd Ave</td>
<td>Primary Residence</td>
<td>DZ Investment Group</td>
<td>$19,500</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>From CA to OR</td>
</tr>
<tr>
<td>5</td>
<td>Brandon Barnet</td>
<td>14140 SW Stuckney Drive</td>
<td>Primary Residence</td>
<td>DZ Investment Group</td>
<td>$19,500</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>From CA to OR</td>
</tr>
<tr>
<td>6</td>
<td>Jacob Shoop</td>
<td>17080 SW Vincent Ct</td>
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d. This case involved a hidden bathroom camera used to photograph children as they emerged from a shower. The images show how investigators discovered the camera (the cable leading under the wall cover), and demonstrate just how well-hidden it was (which helped prove intent).
7. Use case law effectively. What does that mean?

   a. Prioritize: Supreme Court & precedential intermediate courts.

   b. Lead with the principle applicable to your case.

      i. For example, your reader probably does not need to know that Ernesto Miranda was arrested for murder. The crime is irrelevant to the principle that suspects must be advised of their rights prior to custodial interrogation.
c. Avoid block quotes. No one reads them. Digest the information in the quote, and then explain to your court how and why it has a bearing on your case. Judge Kozinski described block quotes as “lazy.”

d. Use parentheticals to explain an unclear or indirect citation, but do not tuck critical holdings into parentheticals. They could get skipped.

e. Footnotes are for information that is optional reading; if you don’t mind if your reader skips them, O.K.


9. Pick a clean, easy to read seraph-font. I like Garamond. The Seventh Circuit and many of my colleagues prefer Century Schoolbook. I think it looks too large in 14 pt, which is what the Ninth Circuit requires.

10. Use “go-bys” with caution:
Chapter 1C

Brief Writing

THE HONORABLE DONALD C. ASHMANSKAS (DECEASED)
U.S. Magistrate Judge, District of Oregon
Portland, Oregon
1. **Concede Nothing**

Judges are impressed by tough lawyers. Make your opponent fight for every inch of ground, no matter how indefensible your position. If your opponent says today is Monday, move to strike for lack of personal knowledge. If you are persistent, you’ll eventually wear the other side down.

2. **Use the Shotgun Approach**

Make as many arguments as possible, no matter how weak. When in doubt, most judges just tote up the points, e.g., “plaintiff has ten arguments in her favor, defendant only one, so plaintiff must have the stronger case.”

3. **Phrase Every Argument in the Alternative**

If the complaint accuses your client of violating NEPA by not preparing an environmental impact statement, you should simultaneously argue that your client: (1) fully complied with all NEPA requirements for this project; (2) fully complied with NEPA for a prior project, and this is just a continuation of that project; (3) was not required to comply with NEPA; (4) complied with NEPA in spirit; (5) plaintiff lacks standing to contest your failure to comply with NEPA; or (6) . . .

4. **Don’t Give Away the Surprise Ending**

Briefs are like mystery novels—you don’t want to ruin the suspense by revealing the surprise ending too early. Use the first 34 pages of your brief to lay out the most complicated legal puzzle imaginable. Only after you have completely befuddled the other side (and the judge as well) should you play your ace in the hole. “In any event, this is all academic because [fill in the blank].” The judge will be awed by your legal tour de force.

5. **Use All 35 Pages**

One of the most embarrassing things you can do as a lawyer is to file a 15-page brief when the local rules allow up to 35 pages. Your little brief looks wimpy sitting on the table next to your opponent’s power brief with its 49 attached exhibits all housed in deluxe imitation wood-grain binders. You might as well attach a note saying: “Sorry, but my client has a very weak case and I can’t think of any other arguments to make on her behalf.” If you run out of things to say, just repeat the same arguments over again. No one will notice.

6. **Always Attach Exhibits**

Exhibits lend an air of authority to a brief. It is no longer just a lawyer making an argument; now you have documentary proof of your client’s position. If you don’t have any exhibits, invent some. It really doesn’t matter what you use because, if they are fat enough and contain lots of technical-sounding fine print and rows of numbers, no one will read them anyhow.

7. **Ignore Controlling Authority**

A lot of lawyers assume they have an ethical duty to cite controlling authority contrary to the position advocated by their client; that is nonsense. By definition, if the judge doesn’t follow a case, then it is not controlling. If it is not controlling, then you have no ethical obligation to cite the case. Seems simple enough to me.

8. **Use String Citations**

Anyone can cite the latest Ninth Circuit authority. What really impresses the judge is citing a long list of pre–World War II cases from district courts in Louisiana and Mississippi that your law clerk cribbed from an old ALR article.
9. **Cite Corpus Juris Secundum**

   Can’t find a case on point? Just cite CJS. It is comprehensive, authoritative, and those Latin titles get the judge every time. It always worked for Perry Mason. In a pinch, the Harvard Law Review will suffice.

10. **Don’t Shepardize**

   Shepardizing is expensive. If you cite a few dozen cases in a brief (or for you string-citers, perhaps a few hundred cases), that adds up to a lot of pocket change, not to mention the time involved. Don’t waste your money—the odds are that the key cases you cited are still good law. If they aren’t, you’re cooked and there is nothing you can do about it anyhow, so why throw good money after bad?

11. **Cite Out-of-Circuit Authority**

   I don’t know why people think the Ninth Circuit is so special—it’s just one of thirteen circuits. If Ninth Circuit case law doesn’t favor your client, then cite a circuit that is more hospitable. Timid attorneys may want to put a little “but cf XYZ (9th Cir. 1993)” at the end of the string citation to avoid possible ethical problems. Alternatively, point out that the Ninth Circuit’s position has not been followed by other circuits and urge the trial judge to overrule the Ninth Circuit.

   **EXAMPLE:** “The circuits (with the sole exception of the Ninth Circuit) are unanimous in holding that the Civil Rights Act of 1991 is not retroactive. The Ninth Circuit’s position is clearly an aberration and should not be followed.”

12. **Attack Your Opponent**

   Your opponent is a sleazebag who should not be believed, and that is reason enough to rule against him. So be sure you attack your opponent in the brief, call him names, and impugn his motives.

13. **Whine**

   Few federal judges are young enough to still have small children at home, but all it takes is a pair of whining lawyers to bring back those nostalgic memories of two six-year-olds squabbling. “Judge, his brief is one page too long.” “Judge, he pretended to be negotiating with me while he was secretly preparing a complaint.” It will make the judge feel twenty years younger.

14. **Omit No Defense**

   Defenses were put on this earth for only one purpose—to be used by defense attorneys. There’s no sense letting them go to waste.

   **EXAMPLE:** A prisoner filed a civil rights action alleging that female clerical employees at a local jail had been viewing strip searches of male inmates through a peep window. The defendants promptly moved to dismiss the inmate’s claim on grounds of qualified immunity, *i.e.*, they didn’t know that such conduct was wrong. Some attorneys might have trouble asserting that defense with a straight face—but that’s what junior associates are for.

15. **Don’t Read Cases You Cite**

   You’re thumbing through the Federal Digest and you find the perfect headnote—you couldn’t have written a better holding if you’d tried. Should you read the case just to be sure it really stands for that proposition? Of course not! Why spoil perfection? A lot of bad things can happen when you go beyond the headnote and read the actual case. You might discover the court was applying Washington law instead of Oregon law or that there were some distinguishing circumstances. Ignorance is bliss.
16. **Employ See Creatively**

This is one of the most useful signals in brief writing. For instance, you can cite a terribly complicated case to support an obscure procedural point (which the case does *not* stand for). No one who reads the case can “see” in it what you could—but is he going to admit that? Of course not, because he doesn’t want to admit he is not smart enough to see the brilliant point you are making. This strategy works particularly well with law clerks who graduated from big name law schools but are haunted by subconscious feelings of inadequacy.

17. **Argue Issues Not Before the Court**

This strategy works for both briefs and oral arguments. If the issue before the court is not your strongest, don’t fight a losing battle. Change the subject and argue some other issue where you have a chance of prevailing. For instance, if the issue is change of venue, argue the merits of the case, e.g., there is no point transferring this case because defendant can’t win in any court.

18. **A Little Latin Goes a Long Way**

1. Because plaintiff has not shown he suffered measurable injury, his claim must be denied.

2. *De minimis non curat lex. Damnun absque injuria. Cadit quaestio.*

Which paragraph sounds more authoritative? The second one, of course. *Vel caeco apparat.* (It would be apparent even to a blind man.) Would you rather tell the jury that your client was “caught between a rock and a hard place,” or “*a fronte praecipitium a tergo lupi*” (“a precipice in front, wolves behind”)? If the defendant calls your client a “lying cur,” just smile and say: “*Proprium humani ingenii est odisse quem laesperis.*” (It is human nature to hate a person whom you have injured.) Everyone will assume that if you’re smart enough to use all these Latin phrases, the rest of your arguments must be of similar caliber. *Experto credite.*

If you don’t know any Latin, ask your local bookstore to order copies of Eugene Ehrlich’s *Amo, Amas, Amat and More: How to Use Latin to Your Own Advantage and to the Astonishment of Others* (Harper & Row 1985); Richard A. Branyon’s *Latin Phrases & Quotations* (Hippocrene Books 1994); and Henry Beard’s *Latin for All Occasions* (Random House 1990) and *Latin for Even More Occasions* (Random House 1991).

19. **Don’t Search for Recent Decisions**

The job of a law clerk can be tedious. One of the few pleasures they get is to uncover a recent decision that neither party cited. Why deprive them of that pleasure by reading slip opinions or doing a Westlaw search?

20. **Let Your Opponent Do Your Research**

Don’t have time to research the theories of your case? No problem. Include the whole kitchen sink in your complaint, and let the other side sort it out in its motion to dismiss. Or maybe the judge’s law clerk can figure out which theories are viable.

21. **Always Get the Last Word**

If your opponent files a reply brief, then you must file a supplemental response. If she files a surreply brief, then you immediately file another supplemental response. Following oral argument, send the judge a letter responding to your opponent’s points. A letter is more effective than a brief because the judge won’t realize it is a brief in disguise until after he has begun to read it. The better letters start by discussing some innocuous procedural matter and then digressing to merits almost as an afterthought, or so the reader should believe.
22. Assume the Judge Knows Everything About Your Case

You’ve been working on this case for months. You know the facts and the relevant law, and so should the judge. After all, if she wasn’t so smart, she wouldn’t be a judge. So, when writing a brief, just dive right into your arguments without any introduction or background. Don’t bother including a capsule summary of your argument at the beginning—the judge will figure it out eventually.

Conversely, you should assume the judge knows nothing about basic legal principles. A classic example is a major law firm that devoted ten pages of a brief to explaining the concept of stare decisis to a veteran trial judge. Unfortunately, the “controlling” case was construing California law, and the judge was applying Oregon law. Oh well, *non omnia possumus omnes*. (No one can be an expert in all things.)

23. File Your Brief Late

The best time to file a brief is Friday afternoon at 4:30 for an oral argument on Monday. That’s particularly effective when the judge’s law clerk has already finished her memo and now has to stay all weekend to revise it. You are assured of getting the last word. You should also mail a copy to your opponent on Friday afternoon. With some luck, he won’t receive it until oral argument is over.

24. Cite Unavailable Materials

When citing unpublished district court opinions or similar materials, never attach a copy to your brief. If the judge can’t read the case you’ve cited, he’ll have to take your word on its contents. That also applies to obscure 19th-century treatises or $600/year industry newsletters.

25. Move to Strike

Federal judges love motions to strike. Don’t like something in your opponent’s complaint? Move to strike the offending words. If your opponent files affidavits opposing your summary judgment motion, move to strike the entire affidavits or particular sentences in them. If you prevail on the motion to strike, you win the case since your summary judgment motion is now unopposed.

Don’t make the mistake of thinking a motion to strike is unnecessary because the judge knows the rules of evidence and is perfectly capable of ignoring irrelevant statements, hearsay, or argument. The judge will be grateful for an opportunity to rule on another motion. Nowadays, federal judges have so little on their calendars they look forward to all the extra work they can get.

A novel spinoff is to file a motion to strike your opponent’s affidavits on grounds the facts stated therein were wrong—and thus there are no disputed material facts and you are entitled to summary judgment as a matter of law.

26. Don’t Proofread Your Brief

Some attorneys waste valuable time proofreading a brief in the mistaken belief that typographical or collating errors reflect badly on the quality of their legal research. Wrong, wrong, wrong! Experienced attorneys know these errors actually make a brief more effective. Why? Because if the pages are out of order, the law clerk can’t just whiz through the brief—she has to stop and sort the pages. Smart lawyers not only collate the pages out of sequence, but also make sure the pages are not numbered. Now the law clerk must read each page carefully to ensure one idea follows the next. What more could you ask?

**Another Tip:** If you omit key words, paragraphs, or sentences, the law clerk must try to decipher what you meant to say—and he may come up with a better argument than the one you had in mind. You also get to file an amended brief with the corrections, which the law clerk must read carefully to determine what changes you made.
27. Don’t Identify the Changes in Amended Documents
   When filing an amended document (e.g., complaint, brief), do not attach a cover letter listing the changes. That way the reader must carefully compare the two documents, one line at a time, to determine what changes you have made. Sure, that's rude, but at least you know the law clerk will carefully read your brief.

28. Put the Wrong Case Number in the Caption of Your Brief
   If the case number is wrong, the brief may be sent to the wrong judge or incorrectly docketed. That holds true for any filing. A surefire way to maximize confusion.

29. The End of the World Is Near
   No brief is complete without a description of the parade of horrors that will result if your opponent prevails. This is not just a motion to extend discovery. The future of the universe is at stake.

30. Always Request Expedited Consideration
   If you file a plain-vanilla motion, it will ordinarily not be heard for another five weeks. Smart lawyers always request “expedited consideration.” Most of the time, it really is an emergency because you waited until the last minute to file the motion. Even if it isn’t a true emergency, you should still act like it is. You don’t want the judge to get the idea that your motion isn’t very important. See “The End of the World Is Near,” supra.
## Chapter 2A

**From the Bench: Lessons Learned from Handling Jury Issues in High-Profile Cases**

*The Honorable Anna Brown*
U.S. District Court, District of Oregon
Portland, Oregon

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Chapter 2A—From the Bench: Lessons Learned from Handling Jury Issues in High-Profile Cases

Tips for Trial Lawyers re What Matters Most to Jurors

Anna J. Brown
United States Senior District Judge

I. Bases for These Tips

A. 40+ years of interacting with jurors serving in civil and criminal trials in Oregon’s state and federal courts, including 3 years as a courtroom law clerk in Multnomah County Circuit Court, 12 years as a civil trial lawyer, and 27 years as a judge presiding at jury trials; and Service as member and chair of the Oregon Criminal Uniform Jury Instructions Committee, Oregon Civil Uniform Jury Instructions Committee, Ninth Circuit Jury Instructions Committee, and Ninth Circuit Jury Trial Improvement Committee.

II. What Matters Most to Jurors Before They Serve

A. Prospective jurors need a clear and efficient process to determine:

• whether and, if so, when they must first report to a courthouse;

• if seated for a trial, how long they will be empaneled, the days and hours of required service, and what compensation or reimbursement may be available, including for travel and/or lodging; and

• what restrictions they must observe re electronic devices at the courthouse and limiting other access to “outside” information generally.

The Court’s public website has important information for jurors, including about the electronic process – eJuror – by which they can interact with the Court about their potential service, even before appearing at the courthouse.

B. Tips: Although trial counsel may have little to do with communication between the Court, its jury staff and potential jurors in advance of jurors first reporting for service, please note:

• When the nature of the case and/or its anticipated length requires a larger-than-normal panel, trial counsel must work with the trial
judge and jury staff to make necessary adjustments in advance of trial. For a “typical” civil case, staff aims to summons 25 potential jurors, whereas 33-36 are summoned for a typical criminal case. High profile cases or ones involving long-term service, however, definitely require calling extra jurors. In such cases, case-specific questionnaires sent to prospective jurors before they report to the courthouse may be useful to facilitate efficient consideration of a juror’s request to be excused (for hardship or otherwise), counsels’ advance consideration of excuses for cause, or even advance communication to prospective jurors to avoid their exposure to case-specific issues (especially online).

* Every juror must be paid $40 for each day the juror is required to appear at the courthouse (even for the initial process of responding in person to a summons and determining whether the juror may be excused). The Judicial Conference of the United States expects courts to minimize such costs by not requiring “too many” jurors to report and participate in person in a jury selection process. Thus, only a typical number of jurors will usually be summonsed for a typical case, and, in turn, counsel should take steps in atypical cases to avoid being caught short on day of trial.

* Trial counsel should be familiar with our Court’s Juror Management Plan which is available on the Court’s public website under the “Jurors” tab. Among other things, the Plan authorizes the Jury Administrator to excuse prospective jurors on certain grounds, whereas the trial judge will resolve all other requests to be excused, usually in the presence of counsel and the litigants.

### III. What Matters Most to Jurors During Jury Selection

A. Prospective jurors need a clear “job description” of the general duties they must accept and a summary of the types of the issues the trial jurors will be asked to resolve so that each juror can make meaningful disclosure about qualifying and disqualifying information. They also need a safe and respectful process to disclose and discuss sensitive information.

B. Tips:
Work with opposing counsel to submit in advance of the Final Pretrial Conference your joint suggestions of case-specific voir-dire topics for the trial judge to cover with prospective jurors. Although our trial judges are all very experienced and can cover typical voir dire subjects with little preparation, they likely do not know what unique or sensitive issues may arise during your trial that warrant review with prospective jurors;

No later than the Final Pretrial Conference, become familiar with the process your trial judge will use during voir dire, including whether you will be permitted to address potential jurors directly. If possible, observe your trial judge conduct voir dire in another case. In particular, request the trial judge to address sensitive subjects so that you don’t have to do so.

Don’t expect to try your case during voir dire or ask jurors to opine on its specific issues. Instead, respectfully focus on issues that will reflect on a juror’s qualifications to serve.

First impressions matter, and jurors will remember them! Prospective jurors will be observing you, your team, and your client (even when jurors are seated behind you) beginning with the very first time they see you in the courtroom. They will be distracted by unusual dress, and they will notice throughout the trial if you are not courteous to them, witnesses, opposing parties and counsel, court staff and, yes, even to the judge.

IV. What Matters Most to Jurors at the Beginning and During Trial

A. Jurors need to know:

- When and for what purposes they may use electronic devices and access any media while they serve;

- When alternate jurors will be identified (e.g., by random drawing just before deliberations to encourage all jurors to pay equal attention or by seat number established at the beginning of trial);
• Whether they will be permitted to ask questions while the evidence is being received;

• Whether they will be permitted to discuss the evidence before deliberations;

• What issues they will be required to resolve (e.g., what specific elements must be proved, to what standard, and by whom) so they understand the potential importance of items of evidence as the evidence is received;

• How they will be permitted to take notes, and, in particular, whether there is a permissible way to do so electronically;

• Whether they will be “sequestered” in any way during trial (e.g., will they travel independently to and from the courthouse, will they be free to speak with family and work colleagues about their service, will they encounter any security risks because of their service);

• What “evidence” they may access during deliberations and its format (e.g., the JERS system allows jurors to review and search exhibits in an electronic format); and

• That their time will be respected, time estimates will be honored, and proceedings will convene and adjourn on time. Put another way, neither the Court nor counsel will “waste” their time being unprepared, repeat material unnecessarily, or present irrelevant evidence, including exhibits.

B. Tips:

• Counsel should settle with the Court at the Final Pretrial Conference a form of verdict. A well-structured and straight-forward verdict form provides a method to organize the presentation of evidence, assists the jury in sorting through multiple issues and parties in a logical way, and presents clear findings for appellate review.

• Similarly, basic “elements” jury instructions should be settled before trial and given before opening statements. An "elements" instruction should state concisely and in plain language what must be proved, by whom, and to what legal standard. An "elements"
instruction will guide the jury in understanding the evidence and deciding how to complete the verdict form, that is, whether a party has established a claim or defense on which it has the burden of proof.

Existing model jury instructions may already define the substantive elements at issue and, thus, are a de facto starting point for writing an "elements" instructions. Model instructions, however, are written by committees, and, therefore, they are not binding as correct statements of the law unless and until an appellate court approves their substance. See Dang v. Cross, 422 F.3d 800, 804 –805 (9th Cir. 2005) (noting the "[u]se of a model jury instruction does not preclude a finding of error" and citing United States v. Warren, 984 F.2d 325, 328 (9th Cir. 1993)). Nonetheless, lawyers who want a trial judge to give an instruction that differs from an existing and ordinarily-used model instruction should have a sound, analytical reason why and how the instruction should be modified.

- Counsel’s presentation of evidence should track the verdict form and jury instructions. Put another way, in opening statements, closing arguments and while presenting evidence, tell a story with a point that tracks the verdict form and instructions; use clear transitions and timeline graphics, but avoid confusing the court and jury with fact-stacking recitations without a point.

- Know how to ask non-leading questions on direct (and how to turn a leading question into a nonleading question, if an objection is sustained).

- Endeavor to be a trustworthy and helpful voice in the courtroom. When issues become confused, the jury (and the trial judge) expect trial counsel will accurately and efficiently clarify the situation. In other words, no one in the courtroom (whether judge or jury) should come to doubt or question the accuracy, candor, and completeness of what counsel says (or chooses not to say).

- Be prepared; long pauses between questions can suggest counsel isn’t prepared or doesn’t know what’s next. Again, jurors expect counsel to be ready to proceed and not to waste their time.
• Be sure to thank jurors for their time and attention during opening statements and closing arguments.

• Be aware jurors often “bond” with the trial judge, especially if she provides them treats every day! Jurors will notice when counsel do not follow the Court’s rulings or directions.

V. What Matters Most to Jurors During Deliberations

A. Jurors want “to do justice,” and they usually equate the process of returning a verdict as its equivalent. Expect jurors to try very hard to follow the Court’s instructions to apply the law (whether they agree with it or not) to the facts they find from the evidence. Jurors become frustrated, however, when the issues or legal standards aren’t clearly defined, or when the evidence is confused and difficult to sort. Sometimes they send out questions. It is important that such questions are answered without delay and, of course, with sufficient clarity to be helpful within applicable legal standards.

B. Tips:

• Work with the Courtroom Deputy to confirm that only received exhibits are assembled to go to the jury room and that electronic evidence has already been formatted to be compatible with the JERS system;

• Stay in close contact with court staff during deliberations in case you are needed to return to work on a question and, in any event, when the jury has a verdict; and

• Before a verdict is received and the jury discharged, be prepared to raise any questions about potential inconsistencies or other issues with how the jury completed the verdict form

VI. What Matters to Jurors After They Are Discharged

A. Some jurors want to get out of the courthouse as quickly as possible after they have been discharged; others would like a chance to talk with the judge and/or counsel and the parties about the case before they leave. Some what to talk with the media or others (including counsel) after they leave. Some seek affirmation they have done the right
thing.

B. Tips:

- Clarify with the trial judge before the jurors are discharged what type of interaction with jurors may be permitted and what instruction will be given to the jurors about what they may discuss after they have been discharged.

- If available, juror feedback can be invaluable to your client (and to you).

VII. Conclusion: What Matters Most to Jurors is Respect!
Practice Tips for Effective Jury Instructions

Hon. Anna J. Brown United
States Senior District Judge
District of Oregon

Despite the best efforts of court and counsel, the task of formulating legally correct and accurately understood jury instructions often takes a backseat to other trial demands and defaults to the end of trial when the jury is waiting and the judge and counsel are least able to give instructions the thoughtful consideration they deserve. We can do better! I've been a trial judge for 18 years, tried dozens of civil cases as a lawyer, served on and chaired the Oregon State Bar Civil and Criminal Jury Instruction Committees, and served on and chaired the Ninth Circuit Jury Instructions Committee. From this perspective, I offer these observations and suggestions to help achieve effective jury instructions before the end of the case.

1. **Begin at the end — with a verdict form.**

   Early in the case, even when drafting a complaint or an answer, think about what fact questions the jury must resolve at the end of the case. The formulation of such questions depends on the legal standards the jury will have to follow. Correctly identifying the elements of any claim or defense at the beginning of the case provides the roadmap for discovery, dispositive motion practice, the pretrial order, and, of course, the key instructions the jury will follow in deciding the case. Ultimately, a well-structured and straightforward verdict form provides a method to organize the presentation of evidence, assists the jury in sorting through multiple issues and parties in a logical way, and presents clear findings for appellate review. In any event, early discussion of instructions focuses the court and counsel and maximizes their capacity to anticipate problems before they arise, to avoid or correct errors, and to ease pressures at the end of the trial. Ultimately, the trial process should be more meaningful for jurors who receive some substantive instructions concerning the issues to be resolved and the legal standards the jurors must apply before they hear the evidence.

2. **Use model instructions to develop "elements" instructions.**

   An "elements" instruction should state concisely and in plain language what must be proved, by whom, and to what legal standard. In other words, an "elements" instruction guides the jury in deciding how to complete the verdict form, that is, whether a plaintiff has established a claim for relief or whether a defendant has proven an affirmative defense. Existing model jury instructions may already define the substantive elements at issue and, thus, are the de facto starting point for writing an "elements" instructions. Indeed, LR 51.1(b) of the District of Oregon Local Rules for Civil Practice provides: "In diversity cases, the Oregon State Bar Uniform Civil Jury Instructions should be used. In other cases, and unless otherwise directed by the Court, the Ninth Circuit Model Jury Instructions should be used." When local model instructions do not suffice, other resources, such as the Northern District of California's Model Patent Jury Instructions, can be very helpful. Because model instructions are written by committees, however, they are not binding as correct statements of the law unless and until an
appellate court approves their substance. See Dang v. Cross, 422 F.3d 800, 804–805 (9th Cir. 2005) (noting the "[u]se of a model jury instruction does not preclude a finding of error" and citing United States v. Warren, 984 F.2d 325, 328 (9th Cir. 1993)). Nonetheless, lawyers who want a trial judge to give an instruction that differs from an existing and ordinarily-used model instruction should have a sound, analytical reason why and how the instruction should be modified.

3. When model instructions don't suffice, consider these tips to write your own.

   a. Cover the theories of the case with a correct statement of applicable law.

      As the Ninth Circuit has noted, "a party is entitled to an instruction to help it prove its theory of the case, if the instruction is 'supported by law and has foundation in the evidence.'" United States v. Heredia, 483 F.3d 913, 922 (9th Cir. 2007) (quoting Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002)).

   b. Avoid argumentative or cumulative language.

      LR 51.1(d)(4) provides "Each instruction must be brief, impartial, understandable, and free from argument. The principle stated in one instruction must not be repeated in any other instruction." Indeed, a "court is not required to accept a proposed instruction which is manifestly intended to influence the jury towards accepting the evidence of the defendant as against that of the prosecution." United States v. Sarno, 73 F.3d 1470, 1485 (9th Cir. 1995) (quoting United States v. Hall, 552 F.2d 273, 275 (9th Cir. 1977)).

   c. Avoid permissive-inference instructions.

      The Ninth Circuit discourages permissive-inference instructions. For example, when considering a jury instruction about inferring an intent to distribute drugs from evidence about the quantity of drugs a defendant possessed, the Ninth Circuit cautioned that "[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" United States v. Beltran–Garcia, 179 F.3d 1200, 1206 (9th Cir. 1999) (citations omitted), cert. denied, 528 U.S. 1097 (2000). See also United States v. Rubio–Villareal, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (Ninth Circuit disapproved of instructing the jury that knowledge of the presence of drugs in a vehicle may be inferred from the defendant being the driver). Instead, a model instruction on circumstantial evidence generally eliminates the need to explain the same legal principle in terms of inferences and leaves to argument of counsel the inferences a jury might draw from the evidence.

   d. Confer with opposing counsel.

      When proposing to change a model jury instruction, confer with opposing counsel and attempt to agree on language that works better. A judge is more likely to alter model language if the parties agree and the judge does not see any fundamental error in law. In any event, give the judge your proposal formatted to show how the proposal differs from the
model instruction, along with a succinct statement explaining why your version is better.

e. Clarity is the goal.

Whenever possible, use plain language, active voice, present tense, and concise and declarative statements while avoiding "legalese," compound concepts, and negative statements about what the law does not permit. Using plain language also avoids unnecessary definitions. Jury instructions need not define common terms that are readily understandable by the jury. See, e.g., United States v. Dixon, 201 F.3d 1223, 1231 (9th Cir. 2000) (holding that “the court did not err by failing to define ‘commercial advantage’ and ‘private financial gain’ because these are common terms, whose meanings are within the comprehension of the average juror”); United States v. Young, 458 F.3d 998, 1010 (9th Cir. 2006); and Zhang v. American Gem Seafoods, Inc. 339 F.3d 1020, 1029 -1030 (9th Cir. 2003)(In Title VII claim, term "motivating factor" may not require definition because of its common usage).


In October 2006, the Ninth Circuit Jury Trial Improvement Committee issued its "Second Report: Recommendations and Suggested Best Practices" for "improving courtroom procedures that will result in better jury trials and improved experiences for our jurors." In addition to recommending the obvious (to "permit" juror note-taking, to encourage attorneys to use technology for the presentation of trial exhibits in order to improve juror comprehension, and to provide individual juror trial books in appropriate cases), the Committee's advice includes the following:

a. Provide all jurors with substantive preliminary and final jury instructions in written form.

b. Inform jurors at the beginning of trial that alternate juror(s) will be randomly selected after closing arguments and instructions.

c. Permit written questions from jurors during civil trials.

d. Permit juror discussion of evidence as civil trials progress.

Although all of these suggestions may not be appropriate or even welcomed in every case, they are worth consideration in advance of every trial.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, 3:16-cr-00051-BR

v.

AMMON BUNDY, JON RITZHEIMER, REDACTED JURY MANAGEMENT
JOSEPH O’SHAUGHNESSY, RYAN ORDER AND PROTECTIVE
PAYNE, RYAN BUNDY, BRIAN ORDER (#978)
CAVALIER, SHAWNA COX, PETER
SANTILLI, JASON PATRICK,
DUANE LEO EHMER, DYLAN
ANDERSON, SEAN ANDERSON,
DAVID LEE FRY, JEFF WAYNE
BANTA, SANDRA LYNN ANDERSON,
KENNETH MEDENBACH, BLAINE
COOPER, WESLEY KJAR, COREY
LEQUIEU, NEIL WAMPLER, JASON
CHARLES BLOMGREN, DARRYL
WILLIAM THORN, GEOFFREY
STANEK, TRAVIS COX, ERIC LEE
FLORES, and JAKE RYAN,

Defendants.

1 - REDACTED JURY MANAGEMENT ORDER AND PROTECTIVE ORDER (#978)
BROWN, Judge.

This matter comes before the Court sua sponte on jury-management issues related to the trial set to begin on September 7, 2016. As of the date of this Order, Defendants Ammon Bundy, Joseph O’Shaughnessy, Ryan Bundy, Shawna Cox, Peter Santilli, David Lee Fry, Jeff Wayne Banta, Kenneth Medenbach, and Neil Wampler will go to trial with voir dire starting on September 7, 2016.

I. Juror Anonymity and Protective Order

The empaneling of an anonymous jury "is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its factfinding function." United States v. Shryock, 342 F.3d 948, 971 (9th Cir. 2003). The Court "may empanel an anonymous jury 'where (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused.'" Id. (quoting United States v. DeLuca, 137 F.3d 24, 31 (1st Cir. 1998))(emphasis added). Among the factors that may warrant protecting juror information from public disclosure is "extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation"
and harassment.’” Shryock, 342 F.3d at 971.

The record in this case reflects there has been extensive publicity and commentary in traditional and social media of the 41-day “occupation” events that give rise to the charges on which Defendants will be tried beginning September 7, 2016, and of the proceedings in this matter. Such publicity and commentary reflect strong opposing views concerning Defendants’ alleged conduct and the reasons Defendants may assert for protesting governmental action as well as the methods they may have chosen for doing so. See Order (#389) and Order (#884) Denying Motion for Change of Venue. The Court also notes there have been several occasions during the pendency of this case when
(1) pro-Defendant demonstrators have congregated at the public entrance in front of the Courthouse where the trial will take place, often on days when court was in session on this matter and
(2) telephone, email, social media, and U.S. Mail messages have been received by the Court protesting Defendants’ prosecution and at times threatening presiding judicial officers and those involved in the court process.¹

Based on 24 years of experience as a trial judge, this Court finds if jurors’ names and personally-identifiable information are publicly disclosed, there is an unacceptable, continuous, and

¹The Court does not have any information that suggests these communications have been directed by any Defendant or are otherwise attributable to any Defendant.

3 - REDACTED JURY MANAGEMENT ORDER AND PROTECTIVE ORDER (#978)
significant risk that jurors will be contacted or otherwise exposed to external information and influences about the case notwithstanding the Court’s ongoing efforts to restrict their exposure only to admissible evidence, the parties’ arguments to the jury, and the Court’s controlling instructions of law.

The Court, therefore, concludes it is necessary to enter a Protective Order in this case requiring partial juror anonymity to protect jurors from the possibility of contact by any media or members of the public. Based on Shryock the Court finds good cause to prohibit the public disclosure of the jurors’ names and personally-identifiable information. The Court also concludes it is equally important to Defendants’ fundamental rights to permit the parties, their counsel, and their paralegals and/or investigators to have access to the identities of the prospective jurors and the ultimate trial jurors subject to this Protective Order prohibiting disclosure of such information beyond the parties and their litigation teams (i.e., the parties, counsel, licensed investigators, and paralegals). ²

The Court, therefore, enters this Protective Order absolutely prohibiting the parties and members of their litigation teams from disclosing outside of such litigation teams the names and personally-identifying information of potential jurors.

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²The Court notes the defendant-specific factors from Shryock do not apply in this case and, therefore, do not form the basis of the need for juror anonymity.
jurors and trial jurors. This Protective Order is in effect immediately and will remain in effect until further order of the Court. Although individual jurors may choose after trial to comment on the case publicly and, therefore, to forfeit their anonymity, the parties, nevertheless, remain prohibited from publicly disclosing the identity of any juror until further order of the Court. Any person who violates this Protective Order is subject to sanctions, including for contempt.

II. Procedure for Review of Juror Questionnaires and In-Person Voir Dire

With the agreement of the parties the Court began the process of distributing Juror Questionnaires to the remaining pool of approximately 450 potential jurors on July 13, 2016, together with instructions to complete and to return their Questionnaires no later than August 5, 2016.

Early in the week of August 8, 2016, the Court will make available to the parties the completed Juror Questionnaires for the purpose of the parties’ advance review and conferral regarding whether any potential jurors should be excused “for cause” from further participation in the jury-selection process. The Court directs the parties to hand-deliver to the Court a joint status report no later than Noon, August 18, 2016, in which the parties identify (1) the potential jurors the parties agree should be excused for cause and (2) the potential jurors that either the government or at least one Defendant believes should
be excused for cause but at least one other party objects to excusing, together with a concise explanation of the parties’ positions as to each disputed challenge.

On the first day of the Pretrial Conference on August 22, 2016, the Court will consider the parties’ recommendations and challenges regarding the potential jurors to excuse for cause based only on their Questionnaire responses. After the Court rules on the parties’ requests to excuse certain prospective jurors for cause and pursuant to the parties’ agreement, the Jury Administrator will randomly order the remaining jurors in the sequence they will be called to participate in live, in-court voir dire beginning on September 7, 2016, and, if seated, the order in which they will serve as trial jurors or alternate jurors.\(^3\) In addition, at this stage of the Pretrial Conference the Court will discuss with the parties and, if sufficient information is then available, settle the number and distribution of peremptory challenges.

As soon thereafter as practical, the Court will provide the parties with a list of prospective jurors in the sequential order in which they will be seated for in-court voir dire. During the live voir dire process beginning September 7, 2016, the Court will ask questions of the prospective jurors with input from the

\(^3\) The Court and the parties have agreed if an alternate juror must be seated as a trial juror, such alternate will be selected by lot from the available alternate jurors.
parties. The Court will address jurors by the number that corresponds to the sequential order in which they are seated for in-court voir dire. No one will address or identify any prospective juror by name, and, for the reasons already stated, the Court directs the parties to refer to prospective jurors during in-court voir dire by their juror seat number and not to disclose the name of any juror or prospective juror during court proceedings.

As the parties have agreed, the Court intends to seat 12 trial jurors and 8 alternate jurors. As a result, voir dire will continue day-to-day until enough jurors are passed for cause to allow the seating of 20 jurors after peremptory challenges have been exercised.

On September 7, 2016, the Court will call 30 prospective jurors for in-court voir dire. On each subsequent day the Court intends to call 30 prospective jurors for each of two separate in-court voir dire sessions in the morning and in the afternoon. The Court directs the parties to provide the Clerk (no later than Noon on the day before a specific group of prospective jurors is scheduled for voir dire) a single, joint document with the juror-specific questions that the parties request the Court to ask during in-court voir dire (e.g., questions for prospective jurors on the first day of voir dire are due no later than Noon on September 6, 2016, and questions for jurors on the second day of
voir dire are due by Noon on September 7, 2016).

III. Partial Jury Sequestration

The decision to sequester a jury is within the discretion of the trial court. *United States v. Dufur*, 648 F.2d 512, 513 (9th Cir. 1980). See also *United States v. Cabaccang*, No. 97-00095, 2010 WL 3000196, at *14 (D. Guam July 28, 2010). Partial jury sequestration implicates many of the same concerns as juror anonymity, and, therefore, the court considers the same factors when determining whether to partially sequester the jury. See *DeLuca*, 137 F.3d at 31 n.4 (partial sequestration and juror anonymity implicate essentially similar constitutional concerns.

For the reasons already specified, this Court concludes it is necessary to require a partial sequestration of the 12 trial jurors and 8 alternate jurors [REDACTED]. As noted, there have been periodic gatherings of nonparties interested in the case outside of the public entrance to the Courthouse through which jurors would normally enter and leave. Although these demonstrations to date have been without incident, they, nonetheless, present the potential to influence jurors with information external to the trial and to impair jurors’ ability to be impartial and to decide the case solely on the evidence presented in court and on the Court’s instructions as to the law. Moreover, because some threats have been made against judicial
Accordingly, on this record the Court concludes a partial sequestration of the jury is necessary as specified herein to protect jurors from external influences that could impair their ability to be impartial and to ensure jurors’ security throughout their service.

IT IS SO ORDERED.

DATED this 3rd day of August, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge
June 1, 2016

Re: Instructions re Enclosed Summons Documents for Jury Duty on a Complex Criminal Jury Trial beginning 9/7/16

Dear Prospective Juror:

The United States District Court for the District of Oregon hereby summonses you as a potential juror for a complex criminal jury trial beginning 9/7/16 at the Mark O. Hatfield United States Courthouse in Portland, Oregon. Your name was drawn by random selection from among those persons already preliminarily qualified to serve as a juror in this District.

The process of jury selection in this case includes two phases for you to provide information before you may be required to appear at the Hatfield Courthouse when in-person, jury-selection proceedings begin on 9/7/16. This mailing begins the first phase of collecting that information.

Enclosed are the following:

1. The Summons for your jury service;
2. An excuse form for you to complete if you seek to be “permanently excused for the entire term of service”;
3. The Court’s Federal Juror Information Letter which provides answers to general questions you may have about the Court’s summons to you to serve as a juror; and
4. A postage-paid, return envelope.

Please do all of the following within 5 days of your receipt of this summons:

1. Complete the Jury Information Form. This form is the lower, detachable part of the Summons. You may either complete it in writing, detach it, and mail it back to the Court in the enclosed postage-paid, return envelope or you may provide the same information online through the Court’s eJuror system at https://ord.uscourts.gov as explained in the enclosed Federal
Chapter 2A—From the Bench: Lessons Learned from Handling Jury Issues in High-Profile Cases

Juror Information Letter. If you need assistance in completing this form, you may have someone help you do so, but please state the reasons why it was necessary for you to have such help. You may do so either on the back of the detached Jury Information Form if you complete it in writing or when prompted for this information in eJuror if you provide the information online.

2. **If your service on this case would cause an undue hardship or extreme inconvenience, you may request deferment or excuse from service in writing.** Please see the section of the Federal Juror Information Letter captioned “Can I Request a Deferment or Excuse?” Any such request must be in writing either by email at pjury@ord.uscourts.gov or written out and mailed back with your completed Jury Information Form in the enclosed envelope. In considering whether to seek a deferment or excuse because the length of service for this case would cause an undue hardship or extreme inconvenience, the Court provides the following information:

In-person jury selection for this case will begin at the Hatfield Courthouse on 9/7/16, and will continue day-to-day until a sufficient number of jurors are seated. It is expected the trial itself will begin in the week of 9/12/16, but it is too early to tell how long the trial will take. At present, a reasonable estimate is that jurors may be required to serve up to three or more months from when the trial begins.

Please note that trial proceedings will be in session only four (4) days each week until the case is concluded so that the jurors who are seated on the case will have one day each week when they are not required to attend trial. Court also will not be in session on federal holidays such as Columbus Day (Monday, 10/10/16) or Veterans’ Day (Friday, 11/11/16). When those holidays occur, the trial will be in session and jurors will be required to attend the remaining four days of the weeks of 10/10 and 11/7. Should the trial continue through other holidays, the Court will recess on a schedule still to be determined but long enough to allow all persons associated with the trial sufficient time (including travel time) to observe such holidays.

As noted, if you believe the potential length of jury service required for this case would cause an undue hardship or extreme inconvenience if you are seated as a juror, you may seek a deferment of or excuse from jury service on this case. To make that request, please write out the reasons explaining the circumstances showing undue hardship or extreme inconvenience as explained above. The Court will decide each such request on an individual basis.
Once you provide all of the requested information for this phase of jury selection, you will receive further instructions from the Court as to whether you have been excused from jury duty on this case or whether you are still required to participate in the second phase of collecting information about your qualifications to serve and to participate in the in-court jury selection process beginning 9/7/16.

Our Constitution guarantees the right to trial by jury, and that right is fundamental to our system of justice. Jury service, therefore, is both an opportunity and an obligation of every American. Thank you for providing the information required for this initial phase of jury selection in this case.

If you have any questions, please contact the Jury Administration at 503-326-8100.

Very truly yours,

Anna J. Brown
United States District Judge
July 13, 2016

Re: Instructions to Provide Additional Information re Prospective Jury Duty for 9/7/16 Criminal Jury Trial

Dear Prospective Juror:

Thank you for responding to the Summons sent to you as a potential juror for a complex, criminal jury trial beginning 9/7/16 at the Mark O. Hatfield United States Courthouse in Portland, Oregon. As noted in my letter that came with your Summons, the jury-selection process in this case began with your response to the Summons. You remain among the number of randomly-drawn citizens who comprise the potential jury pool for this trial.

This letter gives you instructions for the next steps of the jury-selection process before you may be required to appear at the Courthouse on 9/7/16 where in-person, jury-selection proceedings will begin. These next steps include completing a Juror Questionnaire either online or in writing and signing and returning the enclosed Preliminary Jury Instructions and Juror’s Oath.

Please promptly do the following:

1. Read the enclosed Preliminary Jury Instructions and Juror’s Oath and sign and return that document in the enclosed postage-paid return envelope no later than August 5, 2016. A copy of that document is also enclosed for you to keep and for your reference as you complete the Juror Questionnaire.

2. Decide whether to complete the Juror Questionnaire online or by writing out your responses on a printed version. If you wish to complete the Questionnaire online, please refer to the instructions for doing so on the enclosed form. If you prefer to complete the Questionnaire in writing, please call (503) 326-8100 to request that a printed Questionnaire and postage-paid return envelope be mailed to you. No later than August 5, 2016, you must complete the Questionnaire online or return your completed Questionnaire by mail.
Please understand your truthful completion of the Juror Questionnaire is required so that the Court may gather necessary information from each prospective juror to satisfy its duty to provide a fair and impartial jury for the parties. The questions therein are not intended to pry into personal matters, but they are designed to assist the Court in seating a fair and impartial jury.

Rather than require you to come to the Courthouse to answer such questions in public, however, I’ve determined it is sufficient for all prospective jurors to complete the Questionnaire either online or in writing as explained above. Although the Questionnaire is lengthy, completing it before you may be required to appear at the Courthouse ensures your time is used more efficiently during the last step of the jury-selection process at the Courthouse and reduces the amount of information about you discussed in public.

Although that last step in the jury-selection process will take place in a courtroom and, therefore, is public, your name and identifying information will not be made public and will be disclosed only to the parties in this case pursuant to a court order protecting that information. This common practice in many federal cases ensures the privacy rights of jurors are respected and protects the jurors from possible outside influences.

As described in the enclosed jury instructions, you must not investigate or research this case in any way or seek out or view any coverage of this matter in the news media or on the internet. Do not discuss this case with other people in person, by telephone, or on the internet/social media. It is essential that you comply with these instructions while you are a potential juror because the parties’ right to a fair trial by an impartial jury depends on your compliance. From this point forward, if you come into contact with any outside information about this case, you must disregard the information and you must note how you came into contact with the information in order to report that contact to the Court at a later date.

Thank you very much for your dutiful participation during this process. The Court could not fulfill the Constitution’s guarantee of a fair and impartial trial by jury without it. You will receive further instructions after the Court considers your responses to this phase of the jury-selection process. If you have any questions, please call (503) 326-8100.

Thank you,

Judge Anna J. Brown
United States District Judge
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

v.

AMMON BUNDY, ET AL.

PARTICIPANT NUMBER: _______
1. Age: ____

2. Gender: _____________

3. In what city, state, and country were you born and raised?

   Born: ____________________ Raised: ________________

   (a) If you were born outside the United States, are you a naturalized citizen?

       [ ] Yes [ ] No

       Please explain: __________________________________________

       ________________________________________________________

   (b) Did you, your parents, spouse, or significant other (if applicable) immigrate to the United States?

       [ ] Yes [ ] No

       If “yes,” please indicate who immigrated to the United States, and when:

       Please do not list the person’s name

       ________________________________________________________

       ________________________________________________________

     2 - JUROR QUESTIONNAIRE
4. In which city or town do you currently live?

(a) How long have you lived at your present address?

(b) Who lives with you? 
*Do not list the individuals’ names. Only indicate their relationship to you (e.g., spouse, daughter, stepson, etc.) and their ages.*

(c) Which of the following best describes your residence?

[ ] Rental House  [ ] Own home
[ ] Rental apartment  [ ] Own mobile home
[ ] Own condominium  [ ] Other: ____________________

5. What is your race and/or ethnic background and that of your spouse, domestic partner, or roommate (if applicable):

Yours: ______________________________________________________

Spouse/Partner/Roommate(s): ____________________________________

6. What is your marital status (check all that apply):

[ ] Single  [ ] Living with significant other
[ ] Divorced/Separated  [ ] Single, living with roommate(s)
[ ] Married _____ years  [ ] Widowed
7. Do you have any children, step-children, or grandchildren?

[ ] Yes    [ ] No

If “yes,” please indicate the following in the same manner as the example provided:
Please do not list the person’s name

<table>
<thead>
<tr>
<th>Type of Family Member</th>
<th>Age</th>
<th>Occupation or Education Level</th>
<th>Does this person live with you?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stepchild</td>
<td>14</td>
<td>9th Grade</td>
<td>Yes</td>
</tr>
</tbody>
</table>

4 - JUROR QUESTIONNAIRE
8. What is the highest level of education that you have completed?

______________________________________________________

(a) Please list your major areas of study or area of concentration, and any degrees, certificates, licences, etc., that you have received.

______________________________________________________

______________________________________________________

______________________________________________________

9. Employment Status: Are you currently (check all that apply):

Employed: [ ] Full-time [ ] Part-time
[ ] Have more than one job

Unemployed: [ ] Laid off [ ] Looking for work
[ ] Not looking for work

Other: [ ] Homemaker [ ] Retired
[ ] Disabled

Student: [ ] Full-time [ ] Part-time

Studying: _________________________________
10. What is your current or most recent occupation?  
   Please do not name the employer  

   ___________________________________________________________
   ___________________________________________________________

   (a) Are you self-employed?  
      ________________________________________________________

   (b) If self-employed, what type of business is it?  
      ________________________________________________________

   (c) Do you work for others?  If yes, what type of business or work do you do?  
      ________________________________________________________

11. If you are married or living with one or more adults, what is that person’s employment status and what type of work does he or she do (if not working now, please indicate any recent prior work)?  Please do not name the employer.  

   ___________________________________________________________
   ___________________________________________________________
   ___________________________________________________________
12. Have you or a close family member (parent, sibling, or child) ever served in the military, including the reserves, National Guard or ROTC, or worked for the military in a civilian capacity?

[ ] Yes  [ ] No  [ ] Don’t know

(a) If you served in the military or National Guard, please answer the following:

1. Date(s) of Service: _____________________________

2. Date of Discharge: _____________________________

3. Type of Discharge: _____________________________

4. Branch and Highest Rank: _______________________

5. Did you ever serve in a combat zone?

[ ] Yes  [ ] No

If yes, where and when? ___________________________

6. Were you involved in the Military justice system (e.g., JAG Corps, court martial, military police)

[ ] Yes  [ ] No

If yes, please explain: ___________________________

_________________________________________________

_________________________________________________
Question 12 (continued)

(b) If a close family member ever served in the military or worked for the military in a civilian capacity, please answer the following in the same manner as the example provided:

Please do not list the person’s name

<table>
<thead>
<tr>
<th>Family Member</th>
<th>Dates of Service</th>
<th>Branch</th>
</tr>
</thead>
</table>

Have any of your close family members served in a combat zone? If yes, please identify who, when, and where.

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________
13. Have you, or anyone close to you (close family member or close friend), ever had any education or training in the following areas? (Check all that apply)

Law or the Legal Field
[ ] Myself  [ ] Family/Friend

Criminal Justice or Law Enforcement
[ ] Myself  [ ] Family/Friend

National Security or Intelligence
[ ] Myself  [ ] Family/Friend

Private Investigations
[ ] Myself  [ ] Family/Friend

Corrections, Jails, or Prisons
[ ] Myself  [ ] Family/Friend

Firearms or Explosives
[ ] Myself  [ ] Family/Friend

Engineering
[ ] Myself  [ ] Family/Friend

Political Science or Foreign Affairs
[ ] Myself  [ ] Family/Friend

Religion or Philosophy
[ ] Myself  [ ] Family/Friend

Counseling, Mental Health, or Social Services
[ ] Myself  [ ] Family/Friend

Archaeology or Tribal Artifacts
[ ] Myself  [ ] Family/Friend

News Media
[ ] Myself  [ ] Family/Friend

Land Management or Conservation
[ ] Myself  [ ] Family/Friend

Ranch Owner or Ranch Hand
[ ] Myself  [ ] Family/Friend

9 - JUROR QUESTIONNAIRE
Question 13 (continued)

(a) If you answered “yes” to any of the above, please state the nature of the training and, if other than yourself, please state the person’s relationship to you.

______________________________________________________
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(b) Is there anything about this that would make it difficult for you to sit as a fair an impartial juror in this case?

[ ] Yes    [ ] No

If “yes,” please explain: _________________________________
______________________________________________________
______________________________________________________
______________________________________________________
______________________________________________________
14. (a) How often do you attend religious services?

[ ] Regularly  [ ] Occasionally
[ ] Seldom     [ ] Never

(b) How often did you attend religious services growing up?

[ ] Regularly  [ ] Occasionally
[ ] Seldom     [ ] Never

(c) Have you or anyone in your family ever studied for or served in any position of responsibility in your church, temple, mosque, or other religious organization?

[ ] Yes  [ ] No

If “yes,” please explain: ______________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________

15. The Defendants in this case are charged with crimes related to events in January and February 2016 at the Malheur National Wildlife Refuge near Burns, Oregon. It would be your duty as a juror to decide whether the government has proven a particular Defendant guilty beyond a reasonable doubt based only on the evidence presented in court and on the Court’s instructions as to the law. Is there anything about the nature of this case that would interfere with your ability to do so?

[ ] Yes  [ ] No

If “yes,” please explain: ______________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
16. (a) Have you ever written to any elected or appointed government official, newspaper, or magazine; called in to a television, radio, or internet program; or written on any internet forum or social-media page to express your opinion about so-called “militia groups,” or about issues generally related to federal control of public lands?

[ ] Yes  [ ] No

If “yes,” please explain: ___________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________

(b) Have you ever written to any elected or appointed government official, newspaper, magazine; called into a television or radio program; or written on any internet forum or social-media page about the events at the Malheur National Wildlife Refuge in January and February 2016?

[ ] Yes  [ ] No

If “yes,” please explain: ___________________________

_________________________________________________________________

_________________________________________________________________

(c) **Do you regularly write** to any elected or appointed government official, newspaper, or magazine; call into a talk show; or write on any internet forum or social-media page to express your opinion about any particular issue?

[ ] Yes  [ ] No

If “yes,” what was the issue? ________________________

_________________________________________________________________

_________________________________________________________________
17. Is there any political or ideological group that you do not feel comfortable being around?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________________________

___________________________________________________________

___________________________________________________________

18. What community, civic, social, union, professional, fraternal, political, religious, environmental, or recreational organizations do you and/or your spouse or partner belong to, or have belonged to recently (e.g., Parent-Teacher Association, Kiwanis, American Legion, National Rifle Association, Sierra Club, etc.)?

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

19. What are your hobbies or interests? What do you like to do in your spare time?

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

13 - JUROR QUESTIONNAIRE
20. What are your primary news sources? (Check all that apply)

[ ] Internet  [ ] Radio  [ ] Magazines
[ ] Television  [ ] Newspapers  [ ] Other

21. What newspaper(s) and/or magazine(s), if any, do you read regularly?

___________________________________________________________
___________________________________________________________

22. What radio programs, if any, do you listen to regularly?

___________________________________________________________
___________________________________________________________

23. What internet websites, if any, do you view regularly?

___________________________________________________________
___________________________________________________________

24. What television shows, if any, do you view regularly?

___________________________________________________________
___________________________________________________________

25. Do you have any opinions about “bloggers” or independent journalists?

[ ] Yes  [ ] No

If “yes,” please explain: _____________________________________
___________________________________________________________
___________________________________________________________

14 - JUROR QUESTIONNAIRE
26. Have you, your spouse, or partner ever been a member of, or otherwise involved with, any group that: (check all that apply)

[ ] takes a position on social, political or legal issues (e.g., abortion, health care, tax policy, etc.)

[ ] focuses on crime prevention (e.g., neighborhood watch, crime stoppers, etc.)

[ ] focuses on victims’ rights (e.g., domestic-abuse shelters or crisis centers, etc.)

If any, please indicate who was involved and the name(s) of the organizations:  Please do not list the person’s name

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

27. Have you, or anyone close to you, ever been a member of, or otherwise involved with, any group that focuses on gun issues such as gun control, gun safety, or gun rights?

[ ] Yes  [ ] No

If “yes,” please explain: __________________________________________

________________________________________________________________

________________________________________________________________

________________________________________________________________

________________________________________________________________

________________________________________________________________

15 - JUROR QUESTIONNAIRE
28. (a) How would you describe your position on firearms or guns?

[ ] Strong supporter of gun rights
[ ] Supporter of gun rights
[ ] Neutral on gun rights
[ ] Opponent of gun rights
[ ] Strong opponent of gun rights
[ ] Undecided or Don’t know

(b) Do you own or regularly carry any firearms?

[ ] Yes [ ] No

29. Have you ever participated in a protest?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

30. Do you think a person who wishes to protest an existing law he or she believes is wrong should be entitled to disregard or break another law while protesting without consequences?

[ ] Yes [ ] No

Please explain: _________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

16 – JUROR QUESTIONNAIRE
31. What is your opinion regarding the First Amendment right to freedom of speech?

___________________________________________________________

___________________________________________________________

___________________________________________________________

32. What is your opinion regarding the Second Amendment right to bear arms?

________________________________________________________________

________________________________________________________________

________________________________________________________________

33. Do you believe a person exercising such rights (e.g., First or Second Amendment rights) must also observe lawful limitations on those rights such as not yelling “Fire!” in a crowded theater or carrying a firearm where it is prohibited by law?

________________________________________________________________

________________________________________________________________

________________________________________________________________

17 - JUROR QUESTIONNAIRE
34. Have you ever served as a juror?

[ ] Yes, at trial    [ ] Yes, on a grand jury    [ ] No

(a) Please complete for each case on which you have served in the same manner as the example provided:

<table>
<thead>
<tr>
<th>Year</th>
<th>Criminal, Civil, or Grand Jury?</th>
<th>State or Federal Court</th>
<th>Nature of the Case</th>
<th>Reach a Verdict? “Yes” or “No” only</th>
<th>Were you the Foreperson?</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>Civil</td>
<td>State</td>
<td>Personal Injury</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

(b) Have your experience(s) as a juror generally been negative or positive? Explain, if necessary.

__________________________________________________________________________

__________________________________________________________________________
Question 34 (continued)

(c) Is there anything about your experience as a juror that would make you not want to serve again, or that affected your opinion about the jury system?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
______________________________________________________
______________________________________________________

(d) Is there anything about your experience as a juror that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: ____________________________
______________________________________________________
______________________________________________________
35. Have you, or anyone close to you, ever been the victim of or witness to a crime, whether or not that crime was reported to law enforcement?

[ ] Yes  [ ] No

(a) If “yes,” please complete for each incident in the same manner as the example provided:
   *Please do not list the person’s name*

<table>
<thead>
<tr>
<th>Person’s Relation to You</th>
<th>Were you/they a victim or a witness?</th>
<th>Type of Crime</th>
<th>Was the crime reported?</th>
<th>Did you/they testify?</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self</td>
<td>Witness</td>
<td>Car Theft</td>
<td>Yes</td>
<td>No</td>
<td>Don’t know</td>
</tr>
</tbody>
</table>

(b) Is there anything about that experience that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes  [ ] No

If “yes,” please explain: ____________________________
_________________________________________________________________
_________________________________________________________________
_________________________________________________________________
36. Have you, or anyone close to you, ever been involved in or the target of a criminal investigation or charged with a crime?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
_________________________________________________________
_________________________________________________________
_________________________________________________________
_________________________________________________________
_________________________________________________________

If “yes”:

(a) Do you feel the individual investigated was treated fairly by the criminal justice system?

[ ] Yes  [ ] No

Please explain: ______________________________________
______________________________________________________
______________________________________________________
______________________________________________________
______________________________________________________
______________________________________________________

(b) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________
37. To your knowledge, have you, a family member, or a close friend ever been the subject of surveillance (visual, photographic, or electronic) by law enforcement, or had a car or home searched by law enforcement?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

38. Have you, or anyone close to you, ever been involved in any legal action or dispute with any federal, state, or local government body?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

(a) Is there anything about this experience that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________________________
___________________________________________________________
___________________________________________________________

22 - JUROR QUESTIONNAIRE
39. Have you, or anyone close to you, ever worked for, applied to work for, or volunteered in; or are you, or anyone close to you, otherwise affiliated with any state or federal law enforcement (e.g., Police, Sheriff, District Attorney’s Office, U.S. Attorney’s Office, Department of Corrections, Federal Bureau of Investigations, Internal Revenue Service, etc.)?

[ ] Yes [ ] No

If “yes,” please indicate the relationship of the person and describe the job and identify the applicable law enforcement agency:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

(a) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If “yes,” please explain: ___________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
40. Have you, a family member, or close friend ever owned, leased, or worked on lands owned or managed by a federal or state agency?

[ ] Yes [ ] No
If "yes," please explain: _________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

41. What opinion, if any, do you have about the state and federal government dedicating land to wildlife refuges and state and national parks?

___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

42. How do you view efforts of the federal or state governments to manage public lands, grazing or mining contracts, or agricultural contracts?

___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

24 - JUROR QUESTIONNAIRE
43. Do you have any opinion of or experiences with the United States Bureau of Land Management?

[ ] Yes  [ ] No

If “yes,” please explain: __________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

44. Do you have any opinion of or experiences with the United States Fish and Wildlife Service?

[ ] Yes  [ ] No

If “yes,” please explain: __________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

45. Do you have any opinion of or experiences with the Federal Bureau of Investigation?

[ ] Yes  [ ] No

If “yes,” please explain: __________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

_________________________________________________________

25 - JUROR QUESTIONNAIRE
46. Please review the names of the individuals listed on Attachment A. Do you or any of your close friends or relatives know any individual listed on Attachment A, do you have any personal connection to an individual listed on Attachment A, or have you read or heard anything about any individual listed on Attachment A?

[ ] Yes [ ] No

If "yes," please identify which individuals who you are familiar with, or have heard of or read about, and explain your connection to them:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

(a) Is there anything about this that would make it difficult for you to sit as a fair and impartial juror in this case?

[ ] Yes [ ] No

If "yes," please explain: ______________________________

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
47. How would you describe the amount of media coverage you have seen or heard about this case:

[ ] A lot (read many articles, etc.)
[ ] A moderate amount (just basic coverage in the news)
[ ] A little (basically just heard of it)
[ ] None (have not heard of this case before)

48. Have you formulated any opinions about this case based on anything that you have read, seen, or heard in the media?

[ ] Yes          [ ] No

If “yes”:

(a) What is your opinion? ____________________________________________

________________________________________________________

________________________________________________________

(b) Can you set aside any opinion that you have formed in order to decide this case fairly and impartially based only on the evidence received at trial and the Court’s instructions on the law?

[ ] Yes          [ ] No

Please explain: ____________________________________________

________________________________________________________

________________________________________________________

________________________________________________________
49. Some witnesses in this case will be law enforcement officers.

(a) Do you have any strong feelings, impressions, or opinions that would prevent you from evaluating the testimony of a law enforcement officer fairly and impartially?

[ ] Yes [ ] No

If “yes,” please explain: __________________________

____________________________________________________

____________________________________________________

(b) The testimony of a witness employed by the government who acts in a law-enforcement capacity deserves the same fair consideration as that of any other witness. Will you be able to follow the Court’s instructions in this regard?

[ ] Yes [ ] No

If “no,” please explain: _____________________________

___________________________________________________________

___________________________________________________________

50. Some of the evidence in this trial may come from lawful searches of homes, cars, computers, and/or email accounts performed by law enforcement officers. Do you have any feelings about such searches that might affect your ability to consider such evidence fairly and fully?

[ ] Yes [ ] No

If “yes,” please explain: _________________________________

___________________________________________________________

___________________________________________________________

___________________________________________________________

28 - JUROR QUESTIONNAIRE
51. Each of the Defendants has pleaded “not guilty” to the charges in the Superseding Indictment. Each Defendant is presumed to be innocent of any wrongdoing unless and until a jury unanimously decides that the government has proven his or her guilt beyond a reasonable doubt. In the absence of such proof, this presumption of innocence alone is sufficient to find a Defendant not guilty. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: __________________________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________

52. Because each Defendant is presumed to be innocent, the burden of proving the guilt of any Defendant beyond a reasonable doubt rests entirely on the government throughout the trial and it never shifts to the Defendant. In other words, a Defendant never has the burden of proving his or her innocence, and never has to present any evidence of innocence at all. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: __________________________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________

_________________________________________________________________
53. Each Defendant has the constitutional right to remain silent and not to testify at his or her trial. If a Defendant does not testify, the jury must not draw any inference of guilt from his or her silence, and the jury must not hold it against him or her in any way during deliberations. The jury may not speculate as to why the Defendant did not testify, and the jury may not attach any significance whatsoever to that fact. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: __________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________

54. Should a Defendant decide to testify and/or to present evidence on his/her own behalf, the fact that he/she did so does not shift the burden of proof to the Defendant. That burden always remains with the government. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: __________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
__________________________________________________________
55. You may hear testimony from or about the people listed on Attachment B during the trial. Please review the names of the individuals listed on Attachment B. Do you or any of your close friends or relatives know any individual listed on Attachment B, have you any personal connection to an individual listed on Attachment B, or have you read or heard anything about any individual listed on Attachment B?

[ ] Yes [ ] No

If “yes,” please identify which individual(s) you are familiar with, or have heard of or read about, and explain your connection to them:

___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

56. Do you have any religious, philosophical, moral, or other belief that might make you unable to render a verdict for reasons unrelated to the law and evidence?

[ ] Yes [ ] No

If “yes,” please explain: ______________________________________

___________________________________________________________
___________________________________________________________

31 - JUROR QUESTIONNAIRE
57. The jurors are the sole judges of the facts. However, the jury must accept and follow the principles of law as instructed by the judge. The jury may not follow some rules and ignore others. Even if the jury disagrees or dislikes the rules of law or does not understand the reasons for some of the rules, the jury must still follow the law. Do you have any personal beliefs that would make it difficult to follow the Court’s legal instructions, whether or not you agree with them?

[ ] Yes  [ ] No

If “yes,” please explain: ____________________________________________

_______________________________________________________________

_______________________________________________________________

58. In the event the jury finds a Defendant is guilty of any charge, the jury must not consider the question of possible punishment. Pursuant to your Juror’s Oath which will be given to you upon your final selection as a juror, you cannot allow a consideration of the punishment that the Court may impose to enter into or influence your deliberations in any sense or manner. The duty of imposing sentence rests exclusively upon the Court. Will you follow this rule of law?

[ ] Yes  [ ] No

If “yes,” please explain: ____________________________________________

_______________________________________________________________

_______________________________________________________________
59. Under the law, emotions such as sympathy, bias, and prejudice must not enter into the deliberations of the jurors as to whether the government has proven the defendant guilty beyond a reasonable doubt. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: __________________________________________________________

_____________________________________________________________________________

_____________________________________________________________________________

60. As a potential juror in this case, you must avoid reading, viewing or listening to any and all media coverage about this case in any form. You may not use the internet for any purpose as to any aspect of this case, including research. In other words, you are forbidden from reading any magazine, newspaper, or any printed articles about this case, or from “Googling” this case or learning about it online. You also may not email, instant message, blog or post on social media about it, or talk about it with anyone in person, by computer, cell phone, or any other electronic device. Do you have any reservations or concerns about your ability or willingness to follow this instruction?

[ ] Yes  [ ] No

If “yes,” please explain: ________________________________

_____________________________________________________________________________

_____________________________________________________________________________

(a) If you are seated as a juror, will you immediately inform the Court if you are exposed to any information about the case outside of the Courtroom whether accidentally or otherwise?

[ ] Yes  [ ] No
61. (a) As long as you are a potential juror in this case and, thereafter if you are seated as a juror to try the case, you must not to discuss the case with anyone, except with your fellow jurors in the jury room after the judge directs you to begin your deliberations at the end of the case. Will you follow this rule of law?

[ ] Yes  [ ] No

If “no,” please explain: ______________________________
______________________________
______________________________

(b) Will you immediately inform the Court if you observe any juror discussing the case at any time with non-jurors or if you observe any juror discussing the case with other jurors before the judge directs you to begin your deliberations?

[ ] Yes  [ ] No

62. (a) If you are chosen to serve as a juror on this case, you must not be influenced in any way by the feelings or opinions of family, friends, or coworkers. Will you disregard such information in deciding the case?

[ ] Yes  [ ] No

If “no,” please explain: ______________________________
______________________________
______________________________

(b) Would you feel pressure to explain your vote to family, friends, or coworkers?

[ ] Yes  [ ] No
63. Is there anything about the nature of the charges, or the facts of the case, as they have been explained to you thus far that cause you to doubt your ability to be fair and impartial?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________

64. Is there any other matter that you should bring to the Court’s attention that may have any bearing on your qualifications as a juror or may affect your ability to render a fair and impartial verdict based solely on the evidence and the Court’s instructions on the law?

[ ] Yes  [ ] No

If “yes,” please explain: _________________________________
___________________________________________________________
___________________________________________________________

65. If the roles were reversed and you were the one charged with a crime, would you be comfortable with someone in your frame of mind sitting as a juror on your case?

[ ] Yes  [ ] No

If “no,” please explain: _________________________________
___________________________________________________________
___________________________________________________________
66. Is there any reason why you don’t want to be a member of the jury?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

67. Do you have any difficulty speaking, reading, or understanding English?

[ ] Yes [ ] No

If “yes,” please explain: __________________________________________

___________________________________________________________

___________________________________________________________

68. Do you have any physical problem (for example, sight, hearing, inability to sit for long periods of time) or emotional problem that would interfere with your ability to serve?

[ ] Yes [ ] No

If “yes,” please describe: ________________________________________

___________________________________________________________

___________________________________________________________

36 - JUROR QUESTIONNAIRE
69. If you currently visit with a doctor or other medical professional on a regular basis, would those visits interfere with your ability to serve on a jury four days per week for up to three months?

[ ] Yes  [ ] No

If “yes,” please describe how often these visits occur and why they would interfere with your ability to serve:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

70. Are you taking any medication that could affect your ability to serve as a juror?

[ ] Yes  [ ] No

If “yes,” please describe:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

71. Do you have any dietary or physical restrictions that need to be accommodated?

[ ] Yes  [ ] No

If “yes,” please describe:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

37 - JUROR QUESTIONNAIRE
72. Is there any reason not yet covered why you think you cannot or should not serve on the jury?

____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

73. Are you willing to serve as a juror in the trial of this case?

[ ] Yes [ ] No

If “no,” please explain: ______________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

74. Did anyone help you complete this Juror Questionnaire?

[ ] Yes [ ] No

If “yes,” who helped you and why? ______________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

Under penalty of perjury, I swear or affirm that my answers to this Juror Questionnaire are true and complete.

_________________________________________  ____________
Signature                        Date

38 - JUROR QUESTIONNAIRE
PRELIMINARY JURY INSTRUCTIONS AND JUROR OATH

Before you complete the Juror Questionnaire, you must read, understand, and agree to follow these Preliminary Instructions of law that apply now and throughout this case. You must sign and return the Juror Oath (at the end of these Instructions) in the enclosed postage-paid envelope.

The federal criminal proceeding for which you have been called as a potential juror involves events at the Malheur National Wildlife Refuge in Harney County, Oregon, in January and early February, 2016. Thereafter, a Grand Jury returned a Superseding Indictment by which the government charges 26 persons with federal crimes arising from their conduct at the Refuge.


This jury trial involves charges against some, but not all, of these persons who will be identified to you if you are called to Court to complete this process.

The fact the government has brought criminal charges against the Defendants does not prove anything. Each Defendant for this jury trial has pleaded Not Guilty to the charge or charges against him or her, and each Defendant is presumed to be innocent of any wrongdoing. This presumption of innocence carries the force of law and remains in full effect as to each Defendant unless and until, after a trial by jury, the government proves a particular Defendant is guilty of a particular charge or charges beyond a reasonable doubt.

Outside of official court proceedings, do not allow yourself to be exposed to any information about the case or the people it involves. It is fundamental to the constitutional right to jury trial that a jury decides a case based only on the facts proved at trial and by applying to those facts the law as the Court instructs whether or not a juror agrees with the law. Thus, it is vital to the fairness of the upcoming jury trial that you do not research the facts of this case or allow yourself to be exposed to anything about the case outside of court proceedings.

In particular, the following instructions are now in effect:
1. You must not be exposed to any information about this case or the people it involves except through court proceedings while at the Courthouse at which you are present in your capacity as a juror.

2. Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about this case or anything to do with it.

3. Do not read, watch, or listen to any accounts or commentary about the case or anything to do with it.

Finally, do not to discuss the Juror Questionnaire or your answers with anyone else. If, however, you need someone to help you write out your answers, that person may do so as long as that person also agrees not to discuss the matter with others. It is vital that the answers you provide are your answers and yours alone. There are no “right” or “wrong” answers to any of these questions, and there is not any particular question that will necessarily qualify or disqualify any individual from serving on the jury. Instead, the only requirement is that each of your answers are complete and true.

PRELIMINARY JUROR OATH

I, _____________________________, certify that I have read and understand the above Instructions. Under penalty of perjury, I swear or affirm:

1. I will follow all of the Court’s instructions on the law whether I agree with the law or not.

2. Until I am discharged from jury service in this case:
   a. I will not communicate with anyone in any way about the case nor allow anyone else to communicate with me in any way about the case.
   b. I will not research the facts of this case.
   c. If I am exposed to any information about this case, I will disregard that information except only to note when and how I came into contact with it so that I can inform the Court when asked.

3. I will answer the Juror Questionnaire truthfully and completely.

__________________________  ______________  __________________
Signature              Date                  Participant Number
ATTACHMENT A
TO JUROR QUESTIONNAIRE

In response to Question 46, please review the following names, listed alphabetically by last name, to determine whether you have any personal connection to any listed individual, or have read or heard anything about any listed individual.

1. Benjamin T. Andersen
2. Dylan Anderson
3. Sandra Lynn Anderson, also known as Sandra Lynn Pfeifer Anderson
4. Sean Anderson
5. Amy M. Baggio
6. Tyl W. Bakker
7. Jeff Wayne Banta
8. Geoffrey A. Barrow
9. Jason Charles Blomgren
10. Todd E. Bofferding
11. David Brown
12. Ammon Bundy
13. Ryan Bundy
14. Brian Cavalier
15. Thomas K. Coan
16. Blaine Cooper
17. Shawna Cox
18. Travis Cox
19. Duane Leo Ehmer
20. Rich Federico
21. Eric Lee Flores
22. Marc P. Friedman
23. David Lee Fry
24. Craig J. Gabriel
25. James F. Halley
26. Tiffany A. Harris
27. Paul A. Hood
28. Samuel C. Kauffman
29. Jamie S. Kilberg
30. Wesley Kjar
31. Ethan D. Knight
32. Michele Lynne Kohler
33. Andrew M. Kohlmetz
34. Corey Lequieu
35. Lisa J. Ludwig
36. Lisa A. Maxfield
37. Matthew G. McHenry
38. Kenneth Medenbach
39. Jesse A. Merrithee
40. Marcus R. Mumford
41. Per C. Olson
42. Joseph O’Shaughnessy
43. Ramon A. Pagan
44. Jason Patrick
45. Ryan Payne
46. J. Morgan Philpot
47. Paul Piche
48. Robert W. Rainwater
49. Rena Rallis
50. Jon Ritzheimer
51. Jake Ryan
52. Robert L Salisbury
53. Peter Santilli
54. Matthew A. Schindler
55. Krista M. Shipsey
56. Geoffrey Stanek
57. Darryl William Thorn
58. Typhany Tucker
59. Neil Wampler
60. Ronnie Walker
61. Ernest Warren, Jr.
62. Travis Welter
63. Terri Wood
ATTACHMENT B
TO JUROR QUESTIONNAIRE
PAGE ONE

In response to Question 55, please review the following names, listed alphabetically by last name, to determine whether you have any personal connection to any listed individual, or have read or heard anything about any listed individual.

You will notice titles in parentheses beside some individuals’ names. These titles are present solely to assist you in determining whether you have any personal connection to, or have heard or read anything about, the listed individual.

Below is a list of abbreviations or initialisms used in these titles:

IS - FBI Investigative Specialist OSP - Oregon State Police
Lt. - Lieutenant SA - FBI Special Agent

1. Marco Acevdeo (SA) 30. Duncan S. Evered
2. Frederick Alexander 31. Terrance Foreman
3. Zackary Anderson 32. Duane Freilino
5. Richard Baltzersen (SA) 34. Cary Goss
6. Angela Banta 35. Steven E. Grasty (Judge)
8. Daniel Baringer (SA) 37. Faye Healy
9. Brandon Baron 38. Terri Hellbusch
12. Kenneth Berry 41. Jeffrey B. Holdaway (IS)
13. David Blanchard (SA) 42. Kevin Johnson
15. Timothy Blount 44. Robert Jay Joseph
16. Carla Burnside 45. Chad Karges
17. Susan Bush 46. Rhonda Karges
18. Wayne Bush 47. Adam Krametbauer (SA)
19. Christy Cheyne 48. Chad Lapp (SA)
20. Dan Cox 49. Steven Liss (SA)
22. Monte R. Czaplewski (SA) 51. Cody McConnell
23. Matthew Dahl (SA) 52. Taylor McKinnon
25. Tucker Dunbar 54. Tara McLain
27. Ryan English (SA) 56. John Megan
28. Emily N. Erwin 57. Medrano Metala (SA)
29. Derek Espeland (SA) 58. Craig Miller
## ATTACHMENT B
### TO JUROR QUESTIONNAIRE
#### PAGE TWO

<table>
<thead>
<tr>
<th>Number</th>
<th>Name</th>
<th>Role</th>
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<tbody>
<tr>
<td>59.</td>
<td>Gary Miller</td>
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<td>60.</td>
<td>John Miller</td>
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<td>61.</td>
<td>Marilyn Miller</td>
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<td>62.</td>
<td>David G. Mistretta (SA)</td>
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<td>63.</td>
<td>William Modey</td>
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<td>64.</td>
<td>Michael Wesley Moss</td>
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<td>65.</td>
<td>Edward G. Moulton</td>
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<td>66.</td>
<td>Brian Needham (Lt.)</td>
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<td>Paul Richard Nelson</td>
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<td>68.</td>
<td>Kelly Novak</td>
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<td>69.</td>
<td>George Orr</td>
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<td>70.</td>
<td>Dory K. Osgood</td>
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<td>71.</td>
<td>Dorthy M. Ousley</td>
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<td>Charles Overton</td>
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<td>73.</td>
<td>Patricia Overton</td>
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<td>74.</td>
<td>Glenn Palmer (Sheriff)</td>
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<td>75.</td>
<td>Tami Perry</td>
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<td>Andrew Renc</td>
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<td>Westley Richardson</td>
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<td>78.</td>
<td>Charlotte Roderique</td>
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<td>Jeff Rose</td>
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<td>Richard Roy</td>
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<td>Susan Safstrom</td>
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<td>Jeff Schlitz (SA)</td>
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<td>Todd T. Scott (SA)</td>
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<td>Mark Seyler (SA)</td>
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<td>Jennifer Shipman (SA)</td>
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<td>Chad A. Simkin (SA)</td>
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<td>Jeremy Evan Smith</td>
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<td>James Spurlock</td>
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<td>90.</td>
<td>Sara Spurlock</td>
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<td>91.</td>
<td>Marie Katherine Stiles</td>
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<td>Kieran Suckling</td>
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<td>Pete Summers (SA)</td>
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<td>Timothy Swanson (SA)</td>
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<td>Shane Theall</td>
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<td>Tara Thissel</td>
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<td>98.</td>
<td>Erich Timko (OSP Trooper)</td>
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<td>99.</td>
<td>Frank Erich Torkel (SA)</td>
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<td>100.</td>
<td>Ronnie Walker (SA)</td>
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<td>101.</td>
<td>David Ward (Sheriff)</td>
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<td>102.</td>
<td>Jess Wenick</td>
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<td>103.</td>
<td>Alex White (SA)</td>
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<td>104.</td>
<td>Travis Williams</td>
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<td>105.</td>
<td>Josh Wolcott (OSP Trooper)</td>
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<td>106.</td>
<td>Christina Wright</td>
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<td>107.</td>
<td>Tyler Wright</td>
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INSTRUCTIONS FOR ACCESSING JUROR QUESTIONNAIRE ONLINE

1. On the internet, navigate to https://ord.uscourts.gov/bdyq to download the Juror Questionnaire.

2. After you have completed the Juror Questionnaire, save the file to your computer and email the completed Questionnaire as an attachment to BR-Jury@ord.uscourts.gov.

Please complete and return the Juror Questionnaire no later than August 5, 2016. If you have any questions or would like to request a paper copy of the Juror Questionnaire, please call (503) 326-8100.
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, 3:16-cr-00051-BR

Plaintiff,

v.

AMMON BUNDY, RYAN BUNDY, ORDER REGARDING
SHAWNA COX, PETER SANTILLI, PEREMPTORY CHALLENGES
DAVID LEE FRY, JEFF WAYNE
BANTA, KENNETH MEDENBACH, and
NEIL WAMPLER,

Defendants.

BROWN, Judge.

This matter comes before the Court on the parties’ requests regarding the number of peremptory challenges allowed in voir dire.

In the ordinary course, defendants in a non-capital felony trial are entitled to ten (10) peremptory challenges collectively and the government is entitled to six (6) peremptory challenges. Fed. R. Crim. P. 24(b)(2). In a case with multiple defendants, however, “the court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.” Fed. R. Crim. P. 24(b).
The Court notes this complex criminal trial involves eight
Defendants, each of whom have many issues in which they share
common interests and strategies, but also have issues on which
their interests may diverge.

Moreover, Rule 24(c)(4) provides the parties are entitled to
additional peremptory challenges if the Court seats alternate
jurors. In particular, if the Court seats one or two alternate
jurors, the government and Defendants collectively are each
entitled to one additional peremptory challenge. Fed. R. Crim.
P. 24(c)(4)(A). If the Court seats three or four alternate
jurors, the government and Defendants collectively are each
entitled to two additional peremptory challenges. Fed. R. Crim.
P. 24(c)(4)(B). If the Court seats five or six alternate jurors,
the government and Defendants collectively are each entitled to
three additional peremptory challenges. Fed. R. Crim. P.
24(c)(4)(C).

Because this case relates to a subject on which some members
of the public have strong opposing views, involves consistent
coverage in the media from the beginning of the case, and is
scheduled for a trial that is expected to last between two and
three months, the Court, with the agreement of all of the
parties, will seat eight alternate jurors.

Balancing all of these factors in the unusual circumstances
of this case, the Court concludes it is appropriate to exercise
its discretion to permit the parties to have additional peremptory challenges. Although Defendants collectively have requested the Court to allow each Defendant four peremptory challenges for a total of 32, the Court concludes it is not necessary to allow that many challenges (and thereby require the qualification of an excess number of potential jurors) in light of the robust jury-selection process in this case. Instead, in the exercise of its discretion, the Court allocates 24 peremptory challenges to Defendants collectively.

Even though Rule 24 does not explicitly authorize additional peremptory challenges to be allocated to the government, the Court concludes it would be fundamentally unfair to grant Defendants more than double the ordinary ten challenges without a proportional increase in the number of government challenges. Accordingly, the Court also exercises its discretion to allocate to the government 14 peremptory challenges.

Peremptory challenges will be exercised in the following order: The government will begin by exercising its first two peremptory challenges, followed by Defendants exercising four peremptory challenges, followed in turn by the government exercising two more challenges. The parties will proceed in that manner until they have exhausted their peremptory challenges.

Because the Court allocates 24 peremptory challenges to Defendants collectively, the Court leaves the decision to
Defendants as to how they choose to distribute those challenges among themselves. If Defendants advise the Court that they have been unable to reach agreement on how to distribute the challenges, the Court will allocate three peremptory challenges to each Defendant. In that instance, Defendants will exercise their challenges in the order in which they are listed in the Superseding Indictment, but in the same pattern (i.e., the government will exercise two challenges, the first four Defendants named in the Superseding Indictment will then exercise one peremptory challenge each, the government will then exercise two more challenges, then the next four Defendants will exercise one peremptory challenge each, and so forth) until all peremptory challenges are exhausted.

Finally, as to peremptory challenges for alternate jurors, the Court allocates four peremptory challenges to the government and four to Defendants collectively proportionately consistent with Rule 24(c)(4).

IT IS SO ORDERED.

DATED this 25th day of August, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case No. 3:16-cr-00051-BR Date: November 30, 2016

Case Title: US v Bundy, et al

Presiding Judge: Anna J. Brown Courtroom Deputy: Bonnie Boyer

DOCKET ENTRY: Order

Having made a preliminary review of the Motion (#1581) of "Interested Media" to Intervene, to Modify Protective Order, and for Release of Jurors Names, the Court makes the following Order:

The Court agrees the Interested Media have standing to make this Motion and, therefore, it is not necessary for the Court to determine whether a formal motion for intervenor status must be heard and granted. The Court, therefore, denies as moot, that part of Motion #1581 by which the Interested Media seek intervenor status in this proceeding.

The Court notes the Interested Media did not address in its arguments the fact that another jury trial as to seven other Defendants remains set for February 14, 2017, and did not offer any analysis whether the issues related to empaneling a fair and impartial jury for that trial bear on the Court's assessment of the factors to be considered in deciding Motion #1581. In particular, the Court notes that Defendant Jason Patrick (through Standby Counsel Andrew Kohlmetz) sought at the November 21, 2016, Status Hearing (and subsequently received) authorization to retain a jury consultant on behalf of all Defendants set for trial on February 14, 2017, because, according to Defendants, there exists in social media and possibly elsewhere evidence of significant negative sentiments against the jurors from the first trial. These are, of course, the same jurors whose identities the Interested Media now seek.

In light of such assertions, the Court concludes a factual record needs to be developed as part of the process to resolve this Motion addressing the potential for any risks to jurors from the first trial, potential jurors for the February 14, 2017, trial, and the judicial process associated with these proceedings in general arising from the requested disclosure of the identities of the jurors involved in the first trial.

Accordingly, the Court directs counsel for the Interested Media to confer with Mr. Kohlmetz (and as needed with counsel for the government and the other Defendants set for trial on February 14, 2017) to determine the factual bases for Defendants' concerns about anti-juror sentiments arising from the first trial that may affect the jury selection process for the February 14, 2017, trial and that may bear on the Court's resolution of this Motion. In addition, the Court directs the Interested Media to file no later than Noon on December 15, 2016, a supplemental memorandum addressing the concerns expressed in this Order.
Finally, to the extent any party to the February 14, 2017, trial wishes to be heard on this Motion, such party must file no later than Noon on December 15, 2016, a memorandum stating that party's analysis of the issues raised by this Motion.

The Court will issue another scheduling order after reviewing the record as of the December 15, 2016, filings.
viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 12/15/2016 at 11:27 AM PST and filed on 12/15/2016
Case Name: USA v. Bundy et al
Case Number: 3:16-cr-00051-BR
Filer: Document Number: 1621(No document attached)

Docket Text:
Order by Judge Anna J. Brown. The Court has reviewed the Supplemental Memorandum [1620] filed by Interested Media re Disclosure of Jurors' Names. It is clear to the Court from the arguments stated therein that, in order for the Court to weigh fairly the potentially competing interests raised in the Motion [1581] of the Interested Media, it is necessary to contact the jurors whose identities are the subject of the Protective Order and which the Interested Media seek for the purpose of developing an accurate factual record, including as to whether any of such jurors has been the subject of threats or other adverse reactions to their jury service in the trial that began September 7, 2016. The Court also finds that none of the parties to this action are in a position to represent the jurors' collective interests adequately. Accordingly, the Court hereby appoints as Pro Bono counsel the following attorneys to represent the collective interests of such jurors in this Motion: David B. Markowitz, Laura R Salerno Owens, and Harry Wilson of Markowitz Herbold PC, 1211 SW 5th Avenue, Suite 3000, Portland, OR 97204, 503-295-3085. The Court directs Pro Bono counsel to file an appearance in this action to confirm this appointment and to thereby acknowledge they are subject to the existing Protective Order protecting from public disclosure the identities of the subject jurors. The Court will then notify the jurors of the appointment of counsel and will provide the jurors and counsel their respective contact information. The Court directs Pro Bono counsel to file no later than January 13, 2017, a Memorandum and any other necessary filings to develop the factual record and legal arguments regarding the collective interests of the jurors in the Motion [1581] of the Interested Media. No later than January 27, 2017, the Interested Media and any other party to this matter may file responsive memoranda. At that point, the Court will review the record to determine whether oral argument is warranted on the Motion. (bb)

3:16-cr-00051-BR-1 Notice has been electronically mailed to:

Brad S. Daniels    bsdaniels@stoel.com, dmholland@stoel.com, docketclerk@stoel.com

Charles F. Hinkle   cfhinkle@stoel.com, dmholland@stoel.com, docketclerk@stoel.com

Craig J. Gabriel    craig.gabriel@usdoj.gov, beth.gunderson@usdoj.gov, CaseView.ECF@usdoj.gov, janice.debiase@usdoj.gov, melissa.stewart@usdoj.gov
TO: All September 7, 2016, Trial and Alternate Jurors in United States v. Bundy et al.

Jurors:

As you may know, various media representatives have filed a Motion asking the Court to change the Protective Order entered in this case to permit public disclosure of your identities. Here is an electronic version of the Motion that was filed:

After the Motion was filed, I directed the “Interested Media” parties to file a supplemental memorandum addressing the potential that you jurors whose identities are protected by court Order may have concerns about your identities being disclosed. Here is an electronic version of the supplemental memorandum just filed:

Because I have concluded that your collective interests in potentially not having your identities publicly disclosed are not represented by any of the parties or the "Interested Media" who filed the Motion (#1581), I have appointed three lawyers from the Portland law firm of Markowitz Herbold as your attorneys collectively for the purpose of responding to this Motion on your behalf. Here is an electronic version of the Order appointing these attorneys:

These attorneys are: David B. Markowitz, Laura R. Salerno Owens, and Harry Wilson. They will be assisted by their Paralegal, Greg Scott. The law office contact information is: Markowitz Herbold PC, 1211 SW 5th Avenue, Suite 3000, Portland, OR 97204, 503-295-3085. One of the attorneys or Mr. Scott will be contacting you in the very near future. Please wait to be contacted by one of them before reaching out to the attorneys.

The Court’s appointment of these attorneys is on a “pro bono” basis, that is, they have agreed to serve at the Court's request without charge to you or to the Court for their services. Each of these attorneys is highly regarded in our legal community, and I am very grateful they are willing to take on your collective representation to ensure your interests are adequately protected as the Court considers and resolves this Motion. These attorneys are now, in fact, your attorneys for purposes of this Motion, so you should speak with them freely regarding any concerns you may have regarding the public disclosure of your identities as well as any facts that support those concerns. In due course, and presently no later than January 13, 2017, these attorneys will be filing in the case record a response to the Motion on your collective behalf, at which point the Court will consider and decide the Motion.

I am providing these attorneys with your contact information, and, as noted, you should expect to hear from one of them or from Greg Scott in due course. I am also sending this message to you by U.S. Mail. Please let Ms. Boyer know if you would like to receive print copies of any of the documents attached to this email message. Because I will need to rule on this disputed Motion, I am not able to speak with any of you directly about it, and, therefore, you should direct your questions to your attorneys once they contact you.

JUDGE ANNA J. BROWN
Chapter 2B

Media Access in High-Profile Cases

The Honorable Julie Frantz
Multnomah County Circuit Court
Portland, Oregon

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

STATE OF OREGON,  )
    Plaintiff,    )
v.                )
VANCE D. DAY,    )
    Defendant.   )

)  Case No. 16CR73159
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D. Still cameras: Media representatives may use hand-held still cameras or cell phone cameras after registering with the court. The user must remain seated while taking photographs. The camera must be in silent mode while in operation if available. The court retains discretion to terminate the use of cameras if operating noise interferes with court proceedings. The user may not use any audio or video recording function of the device. No flash or artificial light device is allowed. Zoom lenses or other attachments are allowed. Persons operating a still camera must be seated in the last row of the courtroom.

E. The court retains discretion to allow one additional video and/or audio recording device for a media agency to post on its online website if the television broadcast or radio broadcast format is not compatible with its software. Arrangements must be discussed with the court prior to the hearing. Other than as mentioned above, no other video, audio or photographic recording is permitted by any person.

F. No depictions, photographs or recording of the jurors are allowed at any location. No one other than court staff may contact the jurors. No audio recordings are allowed of defendant's conversations with his attorneys. No operation of public access coverage equipment during recesses is permitted.

G. Notwithstanding the limitations on the numbers of public access coverage equipment operators, there is no limitation on the number of reporters who may be present in the courtroom. The court may exercise discretion to limit the number of reporters depending on space limitations and considerations of public access to the courts.

H. Media representatives may use electronic devices including laptops, tablets or smartphones after registering with the court. Only one person per publication or broadcast agency is allowed to use an electronic device while in the courtroom. All devices must be set in silent mode.

I. No live streaming of audio or video is permitted at any time. No one may post, send or transfer any text, photographs, video recording, or audio recording or any link to such while the court is in session, but may do so during court recesses.

J. No media interviews or discussions with witnesses, attorneys, or other persons may occur in the courtroom. All interviews within the courthouse shall be in the area designated for that purposes.
II. ORDER REGARDING USE OF ELECTRONIC DEVICES, INCLUDING LAPTOPS, TABLETS, SMART PHONES OR OTHER DEVICES BY OTHERS

A. Attorneys who represent the parties in this case and who have identified themselves on the court record may use electronic devices including laptops, tablets or smart phones at any time during trial proceedings without requesting verbal permission. Attorneys may not use the camera, audio or video recording function of those devices in the courtroom without prior court permission.

B. All court observers (unless otherwise addressed in this order) must have any electronic device in their possession turned all the way off (not just in silent mode) while in the courtroom and may not use such a device for any purpose while in the courtroom, whether the court is in session or not.

C. Representatives or staff of attorneys who represent parties in the case may possess electronic devices turned on in silent mode after registering with the court. They may read and respond to text messages or e-mails and may monitor incoming calls but are not otherwise permitted to use the devices within the courtroom.

D. All persons are required to use the texting or transmission functions of all electronic devices, including phones, tablets, or laptops, in the hallways or common areas outside of the courtroom only as authorized by SLR 3.182. No one is permitted to operate or use any audio, video or photographic recording functions while in the hallways, lobbies, courtrooms or other common areas of the courthouse, except in the area designated for such purpose. Additionally, users may not make audible phone calls or voice texts or memos while in the hallway area set forth in Section I (J).

E. Jurors must have any smart phone, tablet or laptop in their possession turned all the way off (not just in silent mode) and may not use the device at any time while all jurors are in court or are in the room deliberating. Jurors may not use any electronic device to look up any information in relation to the deliberations until they have been discharged by the court. Jurors may use an electronic device in the jury room during breaks in trial or during deliberations for their personal business.

F. However, no juror is permitted to operate or use any device's audio, video or photographic functions at any time while in the courtroom or in the jury room, whether the jury is then deliberating or not. All other verbal instructions given to jurors apply as well.

G. The defendant in this case may view items via electronic means, such as laptops, tablets or smartphones, as shown to them by their attorney. The defendant is not to be in possession of, use or operate any such device at any time.
H. Witnesses must have any electronic device in their possession turned all the way off (not just in silent mode) while in the courtroom and may not use such a device for any purpose while in the courtroom without first obtaining permission from the court. The witnesses may view items via electronic means and operate devices as necessary for the presentation of evidence and testimony while under oath.

III. ADDITIONAL TRIAL ORDERS

A. All persons present in the court are expected to behave in a manner that preserves the solemnity, decorum and dignity of the court. Pursuant to UTCR 3.010, no one may be permitted to enter or remain during the proceedings who is wearing any item that exhibits any sign, message, design or depiction which in the court's discretion, may tend to influence any juror or affect the orderly administration of these proceedings. The court may make such an order upon a motion by a party or upon its own motion.

B. Jurors and attorneys representing the parties may have beverages in closed containers such as water bottles or insulated cups with lids that can be closed. Courtroom observers and others may have water. No other food or drink is permitted in the courtroom.

IV. ENFORCEMENT

The Multnomah County Sheriff's Office and its deputies and court staff may enforce the provisions of this order by notifying the person they see in violation of the provisions of the order and by bringing any violations to the court's attention. Deputies may also enforce its provisions in compliance with any other training, policies, or orders they follow in acting as courtroom security and bailiffs in this case. The court shall enforce this order in accordance with the procedures set out in UTCR 3.180(9) and (10), and if applicable, with contempt proceedings.

These procedures apply for any and all portions of this trial whether on or off the record. The provisions of this order may be modified in writing or verbally by the court at the court's discretion. Pursuant to UTCR 3.180(3), the court may deny or limit public access coverage if there arises a reasonable likelihood public access coverage would interfere with the rights of the parties to a fair trial, would affect the presentation of evidence or outcome of the trial, or interfere with the efficient administration of justice.

IT IS SO ORDERED this __ day of October 2018.

_____________________________
Senior Judge Julie E. Frantz
Juror Questionnaire

You are prohibited from discussing the above questions or your answers, or communicating in any form about these questions, with any other jurors.

1. Have you heard anything about the case of State v. Vance Day?

If so, please describe what you have heard about the case, and the source from which you heard about the case. For example, did you learn about the case from another person, the internet, the media (newspaper, publication, television, radio or other media outlet), social, professional or organizational gathering, or other source.

2. Do you know Vance Day?
If so, how do you know him?

3. Do you know anything about Judge Vance Day, and if so, please describe in detail what you know about him?
4. Where or from whom have you obtained information about Judge Vance Day?

5. Do you have any opinion about this case or the defendant Vance Day? If so, please describe your opinion.

6. What are your usual sources of news and/or current events? If your response is “the web,” please list all websites you typically visit for news and/or current events. If your response is “newspapers or magazines,” please list all newspapers or magazines you typically rely on for news and/or current events. Similarly, if “radio or TV stations,” please list all radio and/or TV stations you typically rely on for news and/or current events.
ORDER REGARDING TRIAL PROCEDURES AND PUBLIC ACCESS
Permitted Uses of Public Access Coverage Devices
For Registered Media Members

1. **Television cameras:** Limited to one pool camera in courtroom. No live streaming. No filming in hallways. [Additional camera may be permitted for specialized needs.]

2. **Audio recording equipment:** Limited to one pool recording device in courtroom. No recording in hallways. No live streaming.

3. **Still cameras:** Hand-held still cameras permitted. No artificial lighting permitted, but zoom lenses are permitted. Must be in silent mode. Remain seated in back row while taking photos. No photographs in hallways.

4. **Cell phones:** Must be in silent mode.
   a. Operator may not use video recording or audio recording functions at any time in courthouse.
   c. Texting, typing and transmitting allowed in courtroom and hallways. [See #6 and #7]
   d. No phone calls or audible voice memos or voice texting in courtroom, and not in hallways unless in a permitted area designated by court.
5. **Laptops and tablets:** Texting, typing and transmitting permitted in courtroom and hallways. (See #6 and #7). No use of audio, photo or video recording functions at any time. No use of video conferencing such as Skype or other oral or video communications.

6. **While court is in session:** No transmitting of text, photos, social media posts or other communications while court is in session.

7. **While court is in recess:** Operator may transmit text, photos or social media posts during court recess from courtroom or hallway. No recording of defendant’s conversation with attorneys.

8. **Jurors:** No depictions, photographs or recording of jurors are allowed at any time. No one other than court staff may contact jurors.

9. **Liquids in the Courtroom:** Water or clear, uncolored beverages are permitted. No other food or drink is permitted.
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

STATE OF OREGON,               No. 16CR73159
    Plaintiff,                  )

vs.                             )  PUBLIC ACCESS ORDER

VANCE D. DAY,                   )
    Defendant.                 )

This matter came before the court on its own motion for the issuance of a Public Access Order, pursuant to the authority found in UTCR 3.180.

The court finds it is important that a written Public Access Order be entered and thereafter provided to the media. A public access order must give clear direction of how, when, where and what media coverage will be authorized by this court should the media choose to cover or report on the above-entitled matter. This Public Access Order will facilitate appropriate and reasonable public access coverage, while at the same time ensuring a fair trial for both the Defendant and the State of Oregon; NOW THEREFORE,

IT IS HEREBY ORDERED media or other public access coverage of court events in the above-entitled matter will be subject to this order. Should the solemnity, decorum and dignity of the court be adversely affected by the presence, activities or deportment of the media, or if there develops such conditions or circumstances creating the potential for negatively impacting the Defendant’s right to a fair trial, then the court on its own motion, or on the motion of the Defendant or the State of Oregon, will enter such remedial order as is authorized by UTCR 3.180(9), which provides:

(9) A judge may impose other restrictions or limitations necessary to preserve the solemnity, decorum, and dignity of the court and to protect the parties, witnesses, and jurors. A judge may terminate any or all public access coverage at any point upon finding, based on substantial reasons in the record, that this UTCR or other rules imposed by the judge have been violated.

IT IS HEREBY FURTHER ORDERED

1. There shall be no use of any audio, video or photographic equipment anywhere in the courthouse except in the courtroom where the trial is being held; the permitted use of audio and visual recording in the courtroom is set forth below. This prohibition includes courthouse hallways and lobbies.
2. If so requested, the court will allow one pool video camera and one still camera in the courtroom during the proceedings. All video and still photos shall be shared with all media requesting access to the proceedings, including the print media.

   - The Court has been advised the Statesman Journal made the first request for use of a still camera for print coverage; and that KATU made the first request for use of a video camera for the purpose of broadcast news;
   - Members of the media must identify themselves and provide media credentials to the court staff prior to court commencing;
   - Equipment and camera operators must be in place prior to the court proceeding and not moved during the court proceeding;
   - No artificial lighting device of any kind may be used in the courtroom;
   - The use of any video or audio recording device beyond the pooled video, still and authorized recording is prohibited.

3. No recording equipment of any kind shall be used during the following proceedings:

   - jury selection/voir dire process;
   - motions or evidentiary objections heard outside the presence of the jury;
   - conversations intended to be private including those between counsel and the judge at the bench and those between counsel and clients;
   - court recesses.

4. Cell phone and laptop/tablet/social media devices use in the courtroom is restricted as follows:

   - Cell phones must be in the silent mode; no calls shall be either made or received, and voicemail shall not be accessed while in the courtroom;
   - Laptop, tablets computers are permitted provided the sound device is disabled and typing on the device is not audible;
   - No use of cell phones or laptops or similar electronic devices shall be used for recording purposes in the courtroom while court is in session.

5. No person shall use any equipment to broadcast live from the courtroom while in court is in session; nor shall there be live chats, blogs, instant messages, text messages, tweets, or other electronic transmissions to the public from the courtroom during the trial proceeding

6. No person shall take video or still photographs of any juror summoned to court for this matter at any time - neither inside or outside of the courthouse.

7. Interviews of any person regarding on matters related to this case are permitted only in accordance with the following:
• Interviews, if granted, of any person, and public access coverage inside the
courthouse, is limited to the common area at the entry to the courthouse;
• No interviews are permitted in the courtroom, court hallways or adjacent rooms.
• No contact nor coverage in any form whatsoever with any potential or seated
juror during the pendency of this trial.

IT IS HEREBY FURTHER ORDERED that should any person request relief from the
terms of this Public Access Order, such request shall be in writing to the Trial Court
Administrator for the 3rd Judicial District, 100 High Street, Salem OR 97301, with a copy
served on the Defendant, his attorneys, and the attorneys for the State of Oregon.

Dated: ________________

____________________________________
JUDGE JULIE E. FRANTZ
Senior Judge, pro tem
Chapter 3A
Learning from Jurors

The Honorable Stephen Bushong
Presiding Judge
Multnomah County Circuit Court
Portland, Oregon

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I. Comments from Jurors

Why do the lawyers keep repeating the same things over and over? Do they think we’re stupid? We get it.

I felt like that lawyer was trying to manipulate me. I didn’t appreciate that; it seemed disrespectful.

Was this [lawyer’s] first trial? He/she seemed very disorganized.

It seemed like we were only getting part of the story. Why didn’t they call X as a witness?

Why were there so many long breaks in the middle of trial? It seemed like there was a lot going on that we weren’t told about.

Why did this case have to go to trial? It seemed like they should have been able to settle this on their own.

[Lawyer] seemed very professional. It seemed like he/she really knew the case.

Why did [lawyer] beat up on the other side’s expert witness? It really seemed unnecessary.

It seemed like a lot of money to award plaintiff, but the defense didn’t give us an alternative damage theory/calculation.

Was this covered by insurance?

II. Resources


*United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967) (After a private investigator working for a law firm conducted post-verdict interviews of jurors, the court enjoined the defendant, his attorneys, and investigators from communicating with jurors after the verdict, but declined to recommend disciplinary action for the attorneys).

*Bright v. KDC Farming, Inc.*, No. 1007-09974, 2011 WL 8106447 (Or. Cir. Dec. 13, 2011) (Dying motion for new trial based in part on information obtained from jurors in post-trial communications, stating: “This court facilitates contact between jurors who wish to talk with lawyers post trial but does so mindful of the requirements that must be complied with before any information obtained can be used to seek a new trial”)
What Do Jurors Think? Using Post-Trial Jury Interviews to Find What Is Important in Trial

Fresh off the heels of a jury trial, trial attorney Edd Peyton offers insights about the importance of conducting post-trial juror interviews.

By Edd Peyton and Escarlet Escobar

New and young lawyers will definitely receive training on how to conduct voir dire. Unfortunately, training on how to properly conduct a post-trial interview of jurors is far less ubiquitous. Voir dire relies on assumptions about how a juror may respond to the facts and case presented. These assumptions are based on his or her background and other personal attributes. A properly conducted post-trial interview provides insight into the thoughts of a juror and the juror's analysis of a case. Attorneys use post-trial juror interviews to openly discuss juror opinions. These interviews are especially useful to obtain feedback and analyze the effectiveness of the trial strategy, attorneys, and witnesses.

Attorneys can use post-trial juror interviews to determine where jurors could not agree. For instance, in a recent wrongful death case, the attorneys from both sides briefly interviewed jurors in the hallway after trial. This specific case ended in a hung jury. There was animosity among the jurors because of their inability to reach a verdict. A small group of jurors exited the court room and could not be interviewed. The remaining jurors congregated in small groups outside the courtroom. The attorneys spoke with the jurors, but any chance of effectively interviewing jurors was frustrated because of the attorneys' inability to speak with jurors individually and away from opposing counsel. Neither side wanted to openly discuss juror opinions for fear of informing opposing counsel as to their theory of why the jury could not agree. However, these attorneys could have taken steps to better manage the post-trial interview process, as discussed below.

The first step to a successful trial interview is to understand local rules regarding communication with a juror. A trial court determines if and when a juror interview may occur. Some courts prohibit post-trial interviews while other courts allow them upon request. The majority of courts thank
their jurors for their service and advise them that they may speak with the attorneys about the case, but jurors are also advised that they are not required to do so.

Many attorneys choose not to conduct juror interviews when the verdict is in their favor because attorneys fear the interview will reveal details that could lead to the verdict being overturned. While that may be a legitimate concern, if opposing counsel appears likely to appeal or if the verdict was against your client, then it is worth considering doing a post-trial juror interview.

Assuming a post-trial interview is allowed, the second step is to determine when the interview should take place. Before the trial concludes, decide when and where you will speak to the jurors. It is also helpful to think of the subject for your conversations. It is usually difficult to have any meaningful conversation with jurors immediately following trial because these conversations are often rushed. The conversations are rushed because some jurors may feel overwhelmed with the process and simply want to leave, but there is also the possibility that a juror may be talkative and you will not be able to break to speak to a different juror. It is most efficient to introduce yourself, thank the individual for jury service, and ask whether you can contact the individual later to discuss the case. Once you receive contact information, make the call within two to three weeks of trial and contact as many jurors as possible.

The third step is deciding who should make the call. Jurors answer questions differently based on the person to whom they are speaking. Jurors may be more willing to go into detail when answering questions for the side they favor. Some jurors may be more willing to speak with someone other than the lawyer from trial. Helpful alternatives include paralegals, staff, or a third-party vendor. It is best that whoever makes the call introduces himself or herself, states the party he or she represents, and explains the purpose of the call. It may be best that the interviewer be someone other than the attorney who conducted trial in order to avoid potential bias in the interview. Any initial reluctance to discuss and share will often go away once a caller establishes rapport with a juror.

Finally, what information should be discussed? Before making the call to jurors, it is best to outline the intended subject matter. Attorneys often think that they know what information is or is not important at trial. The jury may believe differently. Look to determine what facts the jurors considered important and what strengths and weaknesses of the case they saw. Allow jurors to talk about what they considered important and why. This can all be achieved by asking open-ended questions. The following are some example questions: What facts or information was persuasive? Were there facts or information that jurors wanted but did not receive? How did the jurors
deliberate? Did any juror strongly advocate for a specific side? What does the juror remember from opening and closing arguments? Which witness was most persuasive? Were trial aids effective? How were damages decided? What did the juror think of each attorney? Most importantly, listen to the jurors and use their comments to lead the conversation.

An attorney should document all information received in a post-trial interview. This information can be extremely helpful for later use and analysis. Ask a juror's permission to record the interview from the start of the call. This can avoid missing information because it can be difficult to take notes and listen. Whether or not the interview is recorded, make sure the information is summarized in a memo for preparing to try similar cases. In addition, share the information with the critiqued attorneys for their use and reflection.

Ultimately, post-trial juror interviews are extremely helpful to gather information on what went right or wrong. Attorneys often do not receive feedback on their performance. A juror's opinion and feedback are important for future cases. Being open to listening is key. Jurors often have many thoughts and reactions they want to share, and these are likely the concerns they had in their analysis of the case.

Edd Peyton is with Lewis Thomason King Krieg & Waldrop, PC, in Memphis, Tennessee. Escarlet Escobar is a third-year student at University of Memphis School of Law.
The Genie is Out of the Bottle and the Jury is Out of the Box

By Kelly L. Andersen

On Aug. 25-26, 1999 I had the privilege of being the plaintiff’s attorney in the first case in Jackson County in which three innovative procedures were allowed: 1) attorneys were permitted to make “mini” opening statements before jury selection; 2) jury questions were allowed during trial; and 3) a jury interview was permitted after the verdict. I found the experience overwhelmingly positive, and would encourage all attorneys to ask for and all judges to permit these three innovative procedures in all jury trials.

THE CASE

Our case involved a 78-year old woman who was struck in the crosswalk of a four lane highway by a car being driven by an 85-year old man. Two eyewitnesses sitting in a car near the end of the crosswalk testified that plaintiff had “just stepped off the curb” when she was hit. They swore that there was nothing the driver of the car could have done to avoid the accident. A driver behind the defendant said, however, that he could see that the pedestrian was going to enter the crosswalk, and that the defendant did have time to react, either by swerving or braking, but failed to do so.

The defendant had admitted to the investigating police officer that he had not seen the plaintiff before impact, and that he was taking a number of prescription medications. Four days later the defendant admitted to an investigator that he had had cataract surgery and as a result of that surgery had lost sight in his left eye. He also admitted that he had glaucoma in his right eye, and had been unable to see the “red dots” on a vision test administered by the Motor Vehicles Division. Initially denied a driver’s license, he had gone to his doctor, who had said, “They can’t do that to you,” and had written a letter permitting the defendant to get his license.

Defendant retained an accident reconstruction expert who would testify that the average reaction time of a driver to perceive, decide and apply the brake is 1.5 seconds, and that the average walking speed of a person in her 70s is about three to five feet per second. He would conclude that it would have taken plaintiff less than 1.5 seconds to reach the point in the crosswalk where she was struck, and therefore the defendant simply would not have had enough time to react, must less stop, before hitting the plaintiff. In cross-examination the defendant would also admit, however, that the distance between the landmark where one eyewitness placed the defendant’s car and the crosswalk was 76 feet, and that this was more than enough distance for the defendant to have reacted and to have stopped before hitting plaintiff.

Damages involved two broken legs and a fractured pelvis. In addition to medical expenses, the plaintiff had also incurred sizeable home health care expenses, both on
her own behalf, and also on behalf of her mentally impaired older sister whom she had cared for up until the time of the injury. Since plaintiff and her sister had lived together for years and had shared and commingled all their assets and expenses, the home health care for the sister was arguably a direct financial loss to the plaintiff. Although I had hesitated to stress it, the plaintiff also had moved out of her upstairs apartment that she had lived in for 28 years into a ground floor apartment because she could no longer climb the stairs. Although the ground floor apartment was the same size, and was still within the same apartment complex, it did not have the same view or the same memories.

The defendant died before the trial. Because I did not want it to appear that damages would be paid by his widow, I proposed to defense counsel that we simply stipulate that the case could continue as it had been pleaded before the defendant’s death, and thus avoid the time and expense of naming a personal representative. I offered, in exchange, that we would agree to satisfy any verdict out of the available insurance policy, and not seek to collect any verdict in excess of policy limits. Because the case had the potential of exceeding policy limits, defense counsel agreed.

At trial defense counsel asked that the widow be permitted to sit with him at counsel table. This request was denied by the judge because the widow was not a party. Defense counsel worried throughout the trial that the jury would assume deep pocket insurance coverage.

THE TRIAL

After a brief introduction of the plaintiff and both attorneys, the judge permitted both attorneys to make “mini” opening statements limited to no more than five minutes. I took about two minutes and tried to state the case as neutrally as possible, not because the judge had required a neutral statement, but because I believed that to openly advocate the case at that point would steal the thunder of the real opening statement to come after jury selection. I also sensed that jurors wanted to know the issues as objectively as possible, and that to advocate in the mini opening statement would squander precious credibility.

Defense counsel essentially agreed with my characterization of the case, and added a few neutral statements of his own. Jurors now had a solid concept of the issues in the case, and neither attorney had needed to edge or sneak in the statement of the case during voir dire.

During voir dire one of the first questions asked by a juror was: “How do you collect money from a dead person?” I answered that it was not for the jury to consider how the money would be paid, but only to consider the issues of liability and the nature and extent of damages. I added that our system of determining these issues would be frustrated if the jury attempted to assume any other role than that. I then asked the judge if I had stated this concept to his satisfaction, and he confirmed what I had said. The jurors now solidly knew that they had an important but carefully defined role in a larger legal process. (This exchange with the juror would later prove to have been very important, as we would learn in the post-verdict interview with jurors.) During the free
exchange of information and feelings during voir dire I learned that virtually every juror had had a bad experience at one time or another with an elderly driver, and four jurors personally knew of someone suffering from glaucoma. (This information would also later prove to be very important.)

After voir dire the judge excused all prospective jurors, and the bailiff led them outside the courtroom. The judge then asked the attorneys to exercise their peremptory challenges openly on the record. This we did by simply naming, in alternating turns, the unacceptable jurors. As we did so we moved the replacements on paper into the vacant seats. (This was a vast improvement over the traditional method of passing folded notes to the judge, who then individually announces which poor souls among the jurors have been weighed in the balance and been found wanting.) When all peremptory challenges had been exercised or waived, the judge called the jurors back into the courtroom and announced the chosen Twelve. By exercising the peremptory challenges outside the jurors’ presence, no prospective juror was made to feel that she had been hanging on a meat hook while curious inspectors had secretly concocted reasons for rejection.

After jury selection the judge gave a number of cautionary instructions and then informed jurors that they would be permitted to submit written questions to any witness during the trial. Such questions, if any, were to be passed to the table nearest the judge, who would then read the questions to the attorneys out of the presence of the jury. The judge explained that either attorney would be permitted to object to any question, and that if a question was not asked there was a legal reason for not asking it, and that the juror asking the question should not be offended. The judge did not encourage or discourage juror questions and announced the option but once.

Very few questions were asked during the trial (perhaps ten questions during a two day trial with 12 witnesses). One or two of the questions seemed irrelevant or already answered, but the remainder were solid gold. For example, one juror asked the police officer which tire had left the skid mark that was visible in the police photograph. (I flinched as I realized I had not made that clear.) Another asked if there was positive proof — in the form of a receipt — showing that the defendant had been at a certain drug store just prior to the accident. One question was even clothed with advocacy and went something like this: “Since the plaintiff had been able to leave her disabled sister for several hours during the day before the accident, why did the disabled sister need 24 hour home health care services after the accident?” (The advocacy in the question let me know that I was having a serious problem selling that part of our damages.) After reading the permitted questions to the witness, the judge allowed each attorney to then ask follow-up questions. In so doing we were able to respond to juror concerns. I shudder to think what things would not have been stressed and perhaps not even mentioned had jurors not been permitted to ask a few questions.

The judge instructed the jury before closing arguments and also sent 12 copies of his written instructions into the jury room. After reading the written instructions, the judge then cautioned that often jurors become confused about whether they should reduce damages to account for comparative fault, or whether the judge would do that. He unmistakably and clearly explained that if jurors got that far in their deliberations, he
would reduce damages to account for comparative fault and that the jurors should not do that. (The verdict form also contained language to the same effect.)

The jury got the case at 4:15 p.m. on the second day of trial, and deliberated until 5 p.m., then returned the next day and deliberated from 8:30 until just before noon. At that point they sent out a written question to the judge, asking if they found each party to be at fault, should they reduce the total damages, or would the judge do that?

By 1:20 the jury announced that it had a verdict. After the verdict was read the judge asked the jurors to meet him briefly in the jury room. There he thanked them for their service and invited any jurors who wished to remain and talk with the attorneys. Meanwhile the judge had sent the attorneys to another room so that any juror could easily leave without having to make any excuse. To my delight and surprise all 12 jurors made the walk to the room where the two attorneys had been assigned.

THE POST-VERDICT INTERVIEW
I had always wondered how attorneys would conduct a post-verdict jury interview. I feared that jurors would be very reticent. I need not have worried. After a few tense moments, the jurors began to respond to our questions, and soon were volunteering all kinds of thoughts and information. Often several jurors were talking at once, adding to what another was saying. Soon the whole room was bubbling with gestures and enthusiasm as jurors told both attorneys and the judge how they had decided the case. After about half an hour the judge ended the meeting, before any juror showed any sign of wanting to go. What had always been a mystery -- how the jury had reached its decision -- was now plainly clear in this case. I learned that:

1. Despite the defense attorney’s worries, the jurors had not even considered whether or not the defendant was insured. They seemed genuinely surprised, in fact, when defense counsel asked if they had assumed there must be insurance. Only one juror said that the thought had crossed his mind, and that was only after the verdict had been reached. They had taken seriously the caution that they were only to decide issues of liability and damages, and were not to be concerned about how any verdict would be paid.

2. They felt that the defense attorney should have produced some evidence about the defendant’s eyesight. Absence such proof, they felt that defendant’s vision must have been as bad as plaintiff claimed. (To defense counsel’s credit, he had tried unsuccessfully to get that very testimony.)

3. They felt the defendant’s accident reconstruction expert had been more helpful to the plaintiff than to the defense, and wondered why the defendant had called him as a witness.

4. Several of the jurors had valued plaintiff’s loss of her apartment of 28 years as a much greater loss than I had ever imagined. One juror was on the verge of tears
as she described what a terrible loss that would have been.

5. The jurors were not consciously influenced by the personalities of the attorneys. In fact, one of the strongest advocates of the plaintiff volunteered that she did not like my style of speaking.

6. They unanimously agreed that the videotape of the treating doctor was boring and said that it was cruel for us to have subjected them to that late in the afternoon. They said we should have given it to them in the morning when they were fresh. (In retrospect, I should not have given it to them at all. It would have been kinder to summarize the salient parts of the deposition and simply read an encapsulated summary, rather than playing the video tape. The testifying doctor had frequently fractured his sentences with long pauses, and “ah...” articulated almost every sentence.)

7. Several jurors had applied their own special knowledge to the facts of the case. For example, one had just completed an accident reconstruction course, and well knew about average reaction times in emergency situations. Several others were very familiar with glaucoma, and what it would do to a person’s eyesight.

LESSONS LEARNED
Over the years some attorneys have paid handsomely to have mock jurors listen to a case in progress and provide questions and thoughts as the trial unfolds, so that likely concerns of the real jury can be addressed. Experts touting themselves as “jury consultants” have made jury profiling a cottage industry. But for years we have overlooked the best and easiest way of finding out what jurors are thinking, and that is simply to ask them. By allowing jurors to ask a few questions during a trial, and by permitting attorneys to interview jurors after a trial, the inscrutable enigma has been broken, and all who participate in jury trials are enriched by the process.

I predict that in years to come a new generation of lawyers and judges will ask how we could have been so ignorant for so many years in not recognizing the value of jury questions and post-verdict jury interviews. That same generation of lawyers and judges will laugh openly at our needlessly antiseptic tradition of not allowing mini-opening statements before jury selection. In allowing mini-opening statement, juror questions and post-verdict juror interviews, the genie has come out of the bottle, and no amount of stuffy pressing and starchy tradition can get it back in. A new era has brightly and happily dawned.

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I am now involved in a rash of post-trial juror interviews. Currently, I have interviews in progress in three cases. As luck would have it, there is one win, one loss, and one draw (mistrial). While the calls have occupied a fair amount of my time lately, post-trial interviews more broadly are not as common as they should be. There are some reasons for that: suspicion by judges and jurors, as well as simple fatigue from lawyers who either need to stop billing at the end of the case, or wish to just move on. But post-trial interviews can open a unique window into jurors’ attitudes and process. Look at it this way: In a mock trial, the jurors have generally heard only one day’s worth of information, and we will spend weeks analyzing their feedback. In the actual trial, the jurors have heard everything. Granted, the case is often (but not always) over, but most attorneys will face similar cases in the future, and many of the parties — particularly the large organizations — will also be involved in future suits. So why not wring every last ounce of education and understanding out of the experience?

My current involvement in post-trial calling has me thinking about the basic rules that we apply to these interviews. Here are nine of the most important principles:

1. **Don’t Settle for a Hallway Conversation**

   It is a heavy temptation for attorneys to discuss the case and the verdict with available former jurors immediately after the jury has been discharged. These courtroom or hallway conversations can be quite useful, but they can be rushed as well, or subtly biased toward the party who is asking the questions. It is better to talk later by phone at a time that is convenient for the former
If you do end up talking in the courtroom, make sure the jurors know that they might be contacted later, since you don’t want them to feel like they’ve shared all there is to share in just a few minutes in the immediate aftermath.

2. Use a (Perceived) Neutral Voice

Jurors will share more if they don’t feel like they are directly speaking to one side or the other. In order to avoid the feeling that they’re directly telling one side or the other that they didn’t do very well, or never had much of a case, it is better for jurors to feel that they’re talking to an interested third party. The ex-jurors may know, or suspect, that they are talking to an agent of one of the parties, but if the interviewer is not one of the voices they recognize from court, then that awareness is likely to be less salient and less likely to subtly bias the feedback.

3. Wait a Bit, But Not Too Long

The other problem with conversations immediately after a verdict is that it all might be too fresh. Jurors could be emotionally drained, or distracted by all of their own personal and work issues that they’ve neglected during trial. You don’t want to wait too long or memories become stale. But waiting a bit — perhaps just long enough to find the jurors’ phone numbers and draft a plan for the interview — can provide time for jurors to relax, refocus, and gain some perspective on their own reactions and their decisions. That time can also be useful to the trial team in allowing them a chance to think about what issues might be most important for next time.

4. Be Thorough

Create an outlined plan for the interview, and have that plan reviewed by everyone who will be interested in the feedback. That plan should cover the key facts, the main strengths and weaknesses of the case, each verdict element, as well as witnesses and the attorneys’ performance. A comprehensive outline should offer the former jurors plenty of opportunities to talk about what was most important to them. It should also seek out reactions to the more specific facts and questions on your mind. It should extend beyond the general questions and focus on specific issues, testimony, and other pieces of evidence.

5. Ask Open-Ended Questions

While you want reactions to the specific questions on your mind, you also want to know what is important to the jurors. Practice a funnel technique, starting out with general questions before narrowing down to the specifics. Early on in the interview, ask open-ended questions like the following:

- Of everything that you heard, what stands out the most?
- How did you go about arriving at a verdict?
- What is the single most important argument or piece of evidence?

6. Focus on Process and Not Just Product

As the adage goes, “It’s the journey and not just the destination.” That goes double for deliberations. In addition to just asking about static opinions (e.g, What do you think about issue
A?) ask about how they got there (e.g, How did you go about deciding issue A? How did you start? What were the disagreements?). The process can be the most interesting part. It is also the part that carries the most relevance for future cases. The testimony and the evidence may be idiosyncratic, but the jury’s approach in reasoning their way to a conclusion is likely to be more predictive of future reactions.

7. Talk To As Many As You Can

Think about a group of eyewitnesses: In theory, they all saw the same thing, but each has a different perspective on it. The same goes for deliberations, and it is common for each juror to have a different understanding of what they did and why. For that reason, you will get a somewhat skewed version of deliberations by talking to any one juror. It can be difficult to find jurors in an age of cellphone-only households, unlisted numbers, and families who won’t pickup for unknown callers, but try to make contact with as many former jurors as possible.

8. Make a Record

In addition to answering the questions of the moment, you also want to preserve a record for the future. The time when you will want to review the feedback for a similar case could be years from now. We make a practice of digitally recording the call as it occurs, and then sending it out for a transcript. In some states, you need permission to record, and it is always a good practice to ask. In all the years, I have only had one juror refuse that request.

9. Keep the Focus on Education

In the vast majority of cases, your only goal in conducting post-trial interviews is to learn for the future. That educational focus should govern your tone as you ask questions. Be the interviewer, not the advocate, and remember that you aren’t conducting discovery either. Once the former jurors understand that the goal is just to learn, the interview will feel more worthwhile to them. It feels good to provide helpful feedback, and for jurors, the interview can be a way of reaping additional benefits from the time they put into the case.

Photo Credit: Christopher; Flickr Creative Commons (edited)
FORMAL OPINION NO 2005-143
Communicating with Jurors after Trial

Facts:

After a verdict has been rendered and the jury has been discharged, Lawyer would like to interview jurors to determine what did or did not impress them about Lawyer’s arguments, and determine whether any conduct of the jurors might give Lawyer an additional argument on appeal.

Question:

May Lawyer initiate contact with the jurors?

Conclusion:

No.

Discussion:

Oregon RPC 3.5(c) and (e) provide that a lawyer shall not

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment;

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.
Both Oregon UTCR 3.120\(^1\) and LR 48-2 of the United States District Court for the District of Oregon\(^2\) generally prohibit a lawyer from initiating contact with jurors concerning a case that they were sworn to try. Violation of either the state or federal court rules would in turn violate Oregon RPC 3.5(c)(1). Even if contact is permitted by the court, Lawyer must be mindful of the requirements of Oregon RPC 3.5(c)(3).

**Approved by Board of Governors, August 2005.**

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\(^1\) UTCR 3.120 Communication with Jurors:

(1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:

(a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict, or;

(b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

\(^2\) LR 48-2 No Communications with Jurors—before, during, and after Trial

Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

**COMMENT:** For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.7 (seeking to influence the tribunal or a juror) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 115 (2000) (supplemented periodically); and ABA Model RPC 3.5.
Richard Keith ALAN, II, Appellant,  
v.  
STATE of Florida, Appellee.  

No. 1D08-3012.  
District Court of Appeal of Florida,  
First District.  

May 26, 2010.  

Richard Keith Alan II, pro se, West Palm Beach.
Bill McCollum, Attorney General, and Michael T. Kennett, Assistant Attorney General, Tallahassee, for Appellee.

HAWKES, C.J.

Richard Keith Alan, II, appeals a judgment of indirect criminal contempt and his resulting incarceration. Because the trial court did not abuse its discretion or otherwise err in adjudicating and sentencing Mr. Alan, we affirm its ruling.

Facts

The day after her selection to the jury in a proceeding in which Mr. Alan served as defense counsel, one of the jurors asked the court to excuse her from further participation in the proceeding, claiming to have a medical condition that prevented her continued presence on the jury. As a result, the court excused the juror and substituted an alternate juror in her place. Immediately after the juror was excused from the jury, Mr. Alan accused her of having been “tampered with” and made an oral request that the court permit him to obtain her medical records. The court expressly denied this request calling it “nothing short of outrageous.”

At the close of trial, Mr. Alan filed a document entitled “[Defendant’s] Motion for New Trial, Notice of Intent to Interview Jurors, and Request for Extension of Time to File Motion for Permission to Interview Jurors.” Two days after filing the motion (and without receiving authorization from the court), Mr. Alan contacted the juror via telephone.

The juror testified to the content of that conversation as follows:

[Mr. Alan] told me that he had got permission from the Judge to contact me and to contact some other jurors. And basically he said he had a couple of more questions to ask me. And some of the questions he wanted to find out about my medical information . . .
He wanted to get my medical records. But I told him that he couldn’t get my medical records. But the Judge could get my medical records. I would give the Judge permission to get my medical records, but I didn’t feel that he had permission to get my medical records . . . So, I wasn’t comfortable with him getting my medical records.

Yes, [the phone call upset me]. I was crying, and I went in the restroom. Because my son was there and it was—I was just like so upset and—because I didn’t mind the Judge getting my medical records. I had no problem with her getting them.

The only thing I came up [to the courthouse] to see, did he have permission from the Judge. Because I had told Mr. Alan that I was going to come up here to see if he had permission from the Judge.

Upon learning the nature of Mr. Alan’s contact with the juror, the court charged him with criminal contempt for willfully and knowingly contacting her “without court authorization in violation of the Court’s ruling.” Mr. Alan was adjudicated guilty and sentenced to five months and twenty-nine days in jail.

**Applicable Statutes**

Both the Rules Regulating the Florida Bar and the Florida Rules of Criminal Procedure set forth the specific procedures an attorney must follow if he wishes to communicate with a juror.

Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar provides:

A lawyer shall not:

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court. (emphasis added).

Florida Rule of Criminal Procedure 3.575 provides:

A party who has reason to believe that the verdict may be subject to legal challenge

[39 So.3d 345]

may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the
verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. (emphasis added).

Pursuant to these rules, attorneys who suspect juror misconduct are permitted to interview individual jurors, but may do so only after they file a notice of intent to interview and the presiding court enters an order authorizing the interview. See Ramirez v. State, 922 So.2d 386 (Fla. 1st DCA 2006) (explaining the dichotomy between Rule 4-3.5(d)(4) and Rule 3.575). An attorney who interviews a juror regarding suspected juror misconduct without receiving prior authorization from the presiding court risks facing criminal contempt charges. Id.; see also § 38.22 Fla. Stat. (2008) (stating Florida courts have inherent authority to punish contempts against it “whether such contempts be direct, indirect, or constructive”); and see Aaron v. State, 345 So.2d 641, 642-43 (Fla.1977) (holding such inherent authority enables courts to “maintain order and dignity in court proceedings, and to punish acts which obstruct the administration of justice”).

Analysis

Mr. Alan made an oral request that the court permit him to obtain the juror’s medical records. The court expressly denied this request, calling it “nothing short of outrageous.” Despite the court’s express denial, Mr. Alan proceeded to undermine the court’s authority by (1) contacting the juror in an effort to obtain her medical records; (2) falsely representing to the juror that he had obtained a court order permitting juror interviews; (3) falsely claiming the juror was required to turn over her medical records to him; and (4) generally harassing the juror to the point that she deemed it necessary to bring his actions to the court’s attention. Clearly, the court’s statement that Mr. Alan’s request was “outrageous” and therefore denied, taken in context, relates directly to Mr. Alan’s ability to seek the juror’s medical records. Such facts, when read in conjuncture with rule 3.575, Florida Rules of Criminal Procedure, indicate the court was well within its authority to hold Mr. Alan in criminal contempt for his actions.¹

Moreover, although Mr. Alan filed a document titled “[Defendant’s] Motion for New Trial, Notice of Intent to Interview Jurors, and Request for Extension of Time

[39 So.3d 346]

¹ Courts are granted great discretion in their inherent power to punish those who commit contempt. Orr v. Orr, 141 Fla. 112, 192 So. 466 (1939). While this Court might not have entered the same sentence, we are not free to reweigh evidence and make such a determination absent a clear abuse of that discretion. The circuit court’s sentence was not totally disproportional to the actions for which Mr. Alan was held in contempt. Citizens showing up for jury duty need to be protected from harassment and unnecessary invasions into their privacy.
to File Motion for Permission to Interview Jurors”; the circuit court did not, at any time, enter
an order granting him permission to interview any juror. In fact, the record indicates the motion
contained neither a legal nor factual basis for his request to interview the juror. This is
demonstrated by the circuit court’s denial of the motion, in which the court stated:

[The motion] is completely confusing and incomplete as to [the juror]. It never names her. A
general description of a juror with no name or time or date of anticipated interview under the
criminal rule, does not meet the terms or spirit of the rule of professional conduct. Moreover,
the rule requires the lawyer have a reason to believe grounds for a challenge exist. No such
grounds were alleged, nor do they exist. [Mr. Alan] does not even appear to request an interview
of the juror described in his motion.

Conclusion

Because the record supports the circuit court’s decision to hold Mr. Alan in criminal
contempt for improperly interviewing the juror, we affirm the trial court’s ruling finding Mr.
Alan guilty of criminal contempt.

AFFIRMED.

WOLF, J., concurs; BENTON, J., concurs in part and dissents in part.

BENTON, J., concurring in part and dissenting in part.

We review contempt orders for abuse of discretion. See Thomas v. State, 752 So.2d 679, 685 (Fla. 1st DCA 2000). But a “‘judge cannot base contempt upon noncompliance with
something an order does not say.’ Under such circumstances, the standard of review is legal
error, not abuse of discretion.” DeMello v. Buckman, 914 So.2d 1090, 1093 (Fla. 4th DCA 2005)
(quoting Keitel v. Keitel, 716 So.2d 842, 845 (Fla. 4th DCA 1998)).

More than a year after appellant appeared as defense counsel in a criminal trial, the
circuit court found him in contempt of court, and sentenced him to five months and twenty-nine
days in jail. In my view, except insofar as it rests on defense counsel’s a) getting to court late the
day the criminal trial began and b) misrepresenting a court order in the course of a post-trial
telephone call, the adjudication of contempt should be reversed, and the case should be
remanded for resentencing.

The day the criminal trial began appellant was an hour and thirteen minutes late for
court because he decided to go personally to another court (this one) in an (unsuccessful) effort
to block the start of trial. The trial judge was well within her rights to adjudicate him in
contempt for this deliberate tardiness. See State v. Harwood, 488 So.2d 901, 902 (Fla. 5th DCA 1986) (concluding that if “the court was of the opinion that the failure of the assistant state
to appear on time was an offense against the authority or dignity of the court, the
procedure prescribed by Florida Rule of Criminal Procedure 3.830 for direct criminal contempt
should have been followed”); James v. State, 385 So.2d 1145 (Fla. 3d DCA 1980) (noting that
failure of counsel to appear at a regularly set trial court hearing he had a duty to attend could
constitute a direct criminal contempt); see also Smith v. State, 954 So.2d 1191, 1194 (Fla. 3d
DCA 2007) (“[D]irect criminal contempt may be based upon ... an act which is facially
contemptuous.”).
Chapter 3A—Learning from Jurors

But the conduct that the learned trial judge seems to have found most deserving of punishment—and which became the basis for four of the five separate contempt specifications she drew—occurred in the course of a telephone call that defense counsel made, after the criminal trial in which he represented one of the defendants was over, to a woman who did not serve on the jury, although she had been initially selected. At oral argument, the state conceded that the predicate for two of the specifications based on the telephone call had inadequate support in the record.

Upon learning of the telephone call, the trial judge charged Mr. Alan with indirect criminal contempt, on the following grounds:

a. Defendant wilfully and knowingly contacted Juror Gwendolyn Wiggins without court authorization in violation of the Court’s ruling.

b. Defendant wilfully and knowingly misrepresented to Juror Gwendolyn Wiggins that he had the Court’s permission or order which allowed him to interrogate Ms. Wiggins.

c. Defendant wilfully and knowingly interrogated Juror Wiggins against her will, or failed to cease contact when she clearly expressed her participation in the interrogation was not free and voluntary.

d. Defendant wilfully and knowingly sought production from Juror Wiggins of her medical records or interrogated her further about them, in direct contravention of the Court’s ruling.

... 

e. Defendant wilfully and knowingly failed to appear timely for trial with his client on 12/11/06 at 9:00 a.m.

(Emphasis supplied.) The final specification (e), added almost as an afterthought, was the only one not based on the telephone call.

The trial judge found that Mr. Alan misrepresented to Ms. Wiggins that he had express judicial permission to contact her regarding her medical records. Such an intentional misstatement constitutes indirect criminal contempt. See Ex parte Crews, 127 Fla. 381, 173 So. 275, 278-79 (1937) (concluding that an information charging that Mr. Crews approached a defendant and “represented and pretended” that he “could influence the decision and judgment of the court by [ ] payment of money” sufficiently alleged contempt); Eubanks v. Agner, 636 So.2d 596, 598 (Fla. 1st DCA 1994) (“If no order has been violated, contempt can only be found

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2 The specification charging Mr. Alan with failure to appear timely with his client on the first day of trial could have been the basis for a finding of direct criminal contempt at the time, see State v. Harwood, 488 So.2d 901, 902 (Fla. 5th DCA 1986), but the trial judge did not treat it as contempt of court until after learning of Mr. Alan’s telephone call to the venireperson.

3 The specification that Mr. Alan interrogated the venireperson against her will appears to be another way of alleging that he misrepresented his authority.
if the conduct is calculated to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen the court’s authority and dignity.”).

One species of “indirect criminal contempt concerns conduct that has occurred outside the presence of the judge that violates a court order.” Via v. State, 633 So.2d 1198, 1198 (Fla. 2d DCA 1994)). See also K.M. v. State, 962 So.2d 969, 970 (Fla. 4th DCA 2007) (disposition listing juvenile’s probation requirements was not a “valid court order” that could support finding juvenile in indirect criminal contempt after juvenile’s arrest for violating probation by breaching curfew); M.W. v. Lofthiem, 855 So.2d 683, 685 (Fla. 2d DCA 2003) (“Neither does M.W.’s admission to prior use of marijuana constitute indirect criminal

contempt unless the use violated a valid court order that was in effect at the time he used the drug.”); Shields v. Shields, 636 So.2d 169, 170 (Fla. 2d DCA 1994) (“In an indirect criminal contempt proceeding, the movant must prove, beyond a reasonable doubt, that the defendant willfully violated the court order.”). Accord Baker v. United States, 891 A.2d 208, 215 (D.C.Cir.2006) (“We ... hold that the elements of criminal contempt in these circumstances may be satisfied upon a showing of: (1) conduct committed in the presence of the court that disrupts the orderly administration of justice; or (2) willful disobedience of a court order, committed outside the presence of the court.” (emphasis in original)).

The court order violated need not have been reduced to writing. Indirect criminal contempt can be based on noncompliance with an oral order when “an individual acknowledges understanding a court order, and disobedience of it.” First Midwest Bank/Danville v. Hoagland, 244 Ill.App.3d 596, 184 Ill.Dec. 250, 613 N.E.2d 277, 284 (1993) (cautioning courts to “use extreme caution in holding an individual in indirect civil contempt of court based upon the violation of a court order not found in the court record” because “[h]olding an individual in contempt of court is a drastic remedy, especially where the sanction involves incarceration of the alleged contemnor”).

Appellant was found guilty of two specifications in the present case which alleged he violated a court order.4 When—after the prospective juror mentioned various medical problems—the trial court allowed a belated “back strike” and excused her, defense counsel voiced the (apparently groundless) suspicion that she had been “tampered with,” and moved for a three-hour “stay” in order to obtain her medical records. The trial judge ruled that defense counsel’s “claim and request ... is nothing short of outrageous, and that is denied.” But the trial court did not order defense counsel not to contact the prospective juror or any other venireperson. Since the only request addressed to the court was for a “stay” or continuance of

4 Incidentally, it is not clear that a court order is ever required in order for counsel to speak to a venireperson excused from jury service. A court order is not even required for counsel to speak to a juror once the trial is over if counsel follows “the alternative procedure under Rule Regulating The Florida Bar 4-3.5(d)(4), which allows an attorney with ‘reason to believe that grounds for such challenge may exist’ to interview a juror or jurors to determine whether the verdict may be subject to legal challenge after merely ‘fil[ing] in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed.’” Ramirez v. State, 922 So.2d 386, 389 (Fla. 1st DCA 2006).
the proceeding, the request for a “stay” or continuance was the only request that was denied. At oral argument, the State conceded that the trial court’s ruling did not, if intended to prohibit contact, constitute an order “express enough to survive scrutiny on appeal.”

Since the evidence did not prove beyond a reasonable doubt that appellant violated a court order, he was improperly adjudicated in contempt on that basis. Because other grounds were proven, the case should be remanded for resentencing\(^5\) as punishment for only those grounds that were proven.

\(^5\) A remand for resentencing would make it unnecessary to reach Mr. Alan’s contention that the trial court abused its discretion in imposing the sentence now under review for reasons extraneous to the case.
Chapter 3A—Learning from Jurors

276 F. Supp. 333
UNIVERSAL STATES of America
v.
Daniel J. DRISCOLL, Defendant.
66 Cr. 129.
United States District Court S. D. New York.
November 1, 1967.

Frank G. Raichle, Buffalo, N. Y., for defendant. Thomas A. Bolan, Saxe, Bacon & Bolan, New York City, of counsel.

OPINION
McLEAN, District Judge.

This is a motion by the government to restrain defendant and his attorneys and investigators from interviewing members of the jury which, on October 2, 1967, returned a verdict of guilty on each of three counts of an indictment which charged defendant with willful failure to file his federal income tax returns for the respective years 1960, 1961, and 1962 within the time required by law. I held a hearing and took testimony. On the basis of that testimony, I find the facts to be as follows.

A few days after the verdict, William J. Whelan, a private investigator, had telephone conversations with three jurors and a more extended face-to-face interview with a fourth. The substance of these conversations was as follows.

On October 4, Whelan telephoned juror no. 6, Newton Perlman, stated that he represented the law firm of Saxe, Bacon & Bolan (of which defendant is a member) and asked to see Perlman about the case. Perlman said that he was too busy to see Whelan at that time. A few days later Whelan telephoned Perlman again and inquired, “By the way, do you know that there was a hung jury on this?” This was a reference to defendant’s first trial on this indictment, at which the jury disagreed. In response to Perlman’s question as to whether a discussion of the case would be proper, Whelan said, “We usually do this. It is done in certain cases.” Perlman made a tentative appointment to see Whelan but because of the temporary restraining order which I granted pending a determination of this motion, the interview never took place.

On October 4, Whelan telephoned juror no. 10, George J. Gurner. He said that he was from Saxe, Bacon & Bolan and asked for an interview. According to Gurner, Whelan said that his purpose was “to ask how I felt about the defense attorney’s handling of the trial, why I rejected the insanity plea, did I know that there was a previous trial * * * in December 1966 at which time the trial ended with a hung jury, six for and six against, and what other aspects did I feel were hurtful to the defendant’s case.”

Whelan said that there was “nothing irregular” in this procedure. In his own testimony at the hearing, Whelan amplified this remark by stating that he said to Gurner:

“We do this usually in case of a new trial, or any material that we can gather for an appeal, or so. * * * Oh, that’s what is done. You file papers for an appeal, and things like that.”

Because of the temporary restraining order, Whelan had no further conversation with Gurner.
On October 3 or thereabouts, Whelan telephoned juror no. 2, Rosalie Carruba. She testified that “the gist of the whole conversation was where did they go wrong.” Whelan assured her that a discussion of this subject was not irregular. He asked her to sign “a paper, a petition of some kind.” She understood that this was a petition for a new trial. According to Whelan, he was referring to a petition for leniency in sentence. Mrs. Carruba declined to see Whelan. She declined to sign the petition.

On October 4, Whelan went to the place of business of juror no. 7, Vincent Michael Martin, and talked to Martin for approximately forty minutes. When Martin at first hesitated to discuss the case, Whelan told him that it was “legal” to do so.

Whelan asked Martin what the weak points of defendant’s case had been and what evidence the jury considered damaging to defendant. Martin discussed with him at some length what the evidence was and how it had impressed the jury.

Whelan inquired why the jury found defendant guilty. He said, “Do you know you could have voted for an insanity plea?” In this connection, he asked why the jury had not been impressed with some of the testimony on this subject. Whelan testified that he said to Martin after Martin had answered this inquiry:

“I says, ‘Well, that’s where the mental block came in, see?’”

Whelan asked how the jury had proceeded in its discussion of the case and “whether we the jury polled ourselves.” He told Martin that at the first trial the jury had divided six to six and that at that trial one juror “had stuck to his guns and said he wouldn’t change his verdict.” The context of this remark indicates that Whelan made it clear that this resolute juror had voted for acquittal. He wanted to know why the present jury voted the defendant guilty when the previous jury had disagreed. Whelan said that he had been “wary” of some of the present jurors when they were first selected, particularly the two women.

Whelan asked Martin to sign a petition for leniency. Martin was unwilling to commit himself to do so.

Subsequent to this interview, about a week before the hearing upon the present motion, Whelan telephoned Martin to say that Martin would probably be contacted by the U.S. Attorney’s office. He asked Martin if he thought that Whelan had “harassed or intimidated” him, to which Martin replied, “No. It was just a conversation.”

Whelan testified that he had been asked to interview the jurors by John F. Lang. Lang testified to the same effect. Lang is a lawyer who at one time was employed by Saxe, Bacon & Bolan and is now employed on the legal staff of one of that firm’s principal clients. Lang was present during the trial and apparently assisted in the defense.

Lang testified that no one asked him to retain Whelan to interview the jurors but that he did so because:

“I have been working with Mr. Bolan on cases in this Federal Court and other cases where I have been an associate counsel with him over the past four or five years. And we have been doing that in every case that we have been on. And originally, when I was working for Mr. Bolan, he would tell me to contact Mr. Whelan, and have him interview jurors, and this happened in all the cases that I was on with him.”

He went on to say that although Mr. Bolan did not ask him to retain Whelan in this particular instance, this was the “standard practice” of Saxe, Bacon & Bolan. He testified that he assumed Whelan’s compensation would be paid by Saxe, Bacon & Bolan because Whelan was on a yearly retainer with that firm.
Lang also testified that immediately after the jury returned its verdict of guilty on October 2, Lang spoke to the foreman, Staulings, on the street outside the courthouse, that he asked what the most persuasive evidence was against the
[276 F. Supp. 336]
defendant, and that Staulings told him about a certain documentary exhibit which the jury considered most important.

Upon the return of the order to show cause in this matter on October 10, at which time I set the motion down for an evidentiary hearing to be held on October 24, Thomas A. Bolan, a member of the firm of Saxe, Bacon & Bolan, and one of defendant’s attorneys throughout this and the previous trial, stated, when asked by the court whether he wished to say anything:

“As to my own participation, I would prefer to defer answering that, if it should be necessary, to some future time, as to whether I had any knowledge.”

At the hearing on October 24, Bolan said that he wanted to make a statement. He thereupon testified that although Lang had not specifically requested his authorization to employ Whelan to interview these jurors, Lang’s action had Bolan’s full approval and he took full responsibility for it. He said that he believed such interviews to be entirely proper and that “practically every trial that I have been involved in there have been interviews of jurors,” not only at his instance, but in some cases at the instance of the opposing party as well. He specifically referred to the trial of another member of the firm of Saxe, Bacon & Bolan (which eventually resulted in an acquittal) after which he and the United States Attorney’s office each caused the jurors to be interviewed, as they had after the abortive first trial of the present defendant. He said that such interviews in his experience were “common practice among trial attorneys.”

Bolan and Lang each testified that he had no reason to believe that the jury had acted in any way improperly in its consideration of this case, or that any improper outside influence had been brought to bear upon it. They made it clear that the purpose of the interviews was not to secure evidence of any such impropriety. Bolan testified that “basically, what Mr. Lang and I have been interested in * * * is what evidence did influence the jury in their verdict * * *.”

Whelan’s testimony was to the same effect. He said that Lang had not told him that the jury had done anything it should not have done, or that anyone had brought improper pressure to bear on it, or that any fraud was involved.

Defendant Driscoll testified, after having been advised by the court that he was not obligated to do so and need not answer the court’s questions. He testified that he had not known of Whelan’s activities in interviewing the jurors and that he had not authorized the interviews or discussed them with anybody. As to the practice of the firm of Saxe, Bacon & Bolan of which he is a member, he said that although he had heard in a general way that after the trial of his partner jurors had expressed certain feelings, he had nothing to do with it because he was never in actual litigation.

Frank G. Raichle, defendant’s trial counsel, stated to the court that he had not been aware of the interviewing of jurors and had not requested or authorized it.

Two questions have been argued on this motion, each of which must be considered and decided by the court: (1) whether the requested injunction against further interviewing of jurors in this case should be granted; (2) whether the authorization or approval of the interviews by certain of the attorneys was unethical conduct on their part warranting disciplinary action. The two questions, although somewhat related, are separate and distinct. The answer to one does not necessarily depend upon the answer to the other. Clarity will be furthered by considering them separately. I will first deal with the question of the appropriateness of injunctive relief.
The general principle applicable here was stated so admirably by Judge Prettyman in Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir. 1948), cert. denied, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380 (1948), in language which so clearly

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expresses my own views that it merits quotation in full. He there said:

“The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it.”

Similar opinions have been voiced by other courts which have considered this question. The state courts of New Jersey have a formal rule prohibiting an attorney, either by himself or through an investigator, from interviewing any juror with respect to the verdict or deliberations of the jury except on leave of court. In State v. La Fera, 42 N.J. 97, 199 A.2d 630 (1964), the court said (199 A.2d at 635):

“A jury deliberates in secrecy to encourage each juror to state his thoughts, good and bad, so that they may be talked out. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.’ Clark v. United States, 289 U.S. 1, 13, 53 S.Ct. 465, 469, 77 L.Ed. 993, 999 (1932).

* * * * * *

“It is true that no settled rule bars extrajudicial, post-trial disclosures by a juror of his own views even though in cases of public interest the trial judge not infrequently cautions against such disclosures. Yet one of twelve may not be able to disclose his own part without revealing something the other jurors are entitled to have protected. Moreover the public too has a stake in the promise of secrecy to insure free debate in cases to come. In these circumstances it is appropriate to protect all the jurors against efforts of others to browse among their thoughts in search of something to invalidate their verdict.”


“I am compelled to unequivocally disapprove the practice of interviewing a juror after a trial as to his state of mind during the trial.”

Defendant cites two recent decisions, Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), and United States ex rel. De Lucia v. McMann, 375 F.2d 759 (2d Cir. 1967). In Parker, the Supreme Court reversed a defendant’s conviction because of prejudicial remarks made by a bailiff to one
of the jurors during the course of the trial. The Court held that defendant’s right under the Sixth Amendment to be confronted by the witnesses against him had been thereby violated.

In United States ex rel. De Lucia v. McMann, the Court of Appeals vacated an order of the district court which had denied a defendant’s petition for habeas corpus to review his conviction in the New York courts. It appeared that the jury during the trial had visited the scene of the crime without the permission or knowledge of the court. The Court of Appeals said that it would afford the New York courts, which had refused to reverse defendant’s conviction, another opportunity to reconsider the matter in the light of Parker v. Gladden. Following this decision, the New York Court of Appeals on reargument changed its previous decision and remitted the case to the trial court for a further hearing.

In each of these cases the fact of the misconduct was proved by statements of jurors themselves which had been obtained by defendant’s investigators after the trial. It can plausibly be argued that the decision in each case necessarily presupposes that it was proper for defendant to secure these statements in this fashion. But these decisions do not overturn in every case the salutary rule expressed in the judicial opinions previously quoted. Both Parker and De Lucia involved either improper conduct of the jury or improper external influence exercised upon them. In De Lucia, at least, the defendant had reason to suspect the existence of such conduct before he began the extensive jury inquiry. It does not follow from the fact that in those cases the court, impliedly at least, approved defendant’s private investigation, that such an inquiry should be allowed in every case. There is no claim here of improper external influence or of jury misconduct. On the contrary, defendant’s attorneys expressly testified that they had no reason to suspect any such misbehavior.

According to Bolan, the purpose of the inquiry was to find out “what evidence did influence the jury in their verdict,” presumably, as defendant’s counsel argues, to instruct these attorneys in the ways of juries as a guide to their trial strategy in future cases. I do not accept this explanation. It is apparent that the purpose was, in the words of the court in La Fera, “to browse among their (the jurors’) thoughts in search of something to invalidate their verdict.” Why else would Whelan inquire whether the jury had “polled themselves”? Why would he argue the insanity defense by stating to Martin, “That’s where the mental block came in, see?” It is significant that Whelan made it a point to tell the jurors that the previous jury had disagreed. Indeed, he went further in advising Martin about the juror at the first trial who had “stuck to his guns” in favor of acquittal.

Such statements amount to a thinly-veiled criticism by Whelan of this jury’s decision, a not so subtle implication that this jury also should have “stuck to their guns,” that they should have found defendant insane. This is not idle curiosity or laboratory research in trial technique for educational purposes. It is a “searching hostile inquiry,” whether juror Martin recognized it as such or not.

In Bryson v. United States, 238 F.2d 657 (9th Cir. 1956), rehearing denied, 243 F.2d 837 (1957), cert. denied, 355 U.S. 817, 78 S.Ct. 20, 2 L.Ed.2d 34 (1957), the trial court at the conclusion of a criminal trial directed that no one should talk to the jury. Nevertheless, a newspaper reporter did so, and thereby developed the information that two of the jurors had not understood the meaning of the word “affiliated”

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1 United States v. Beach, 296 F.2d 153, 95 A.L.R.2d 342 (4th Cir. 1961), also cited by defendant, is not in point. There defendant raised the suspicion that the jury might have improperly conducted an experiment in the jury room. The Court of Appeals remanded the case with instructions to the District Court to inquire of the jurors about this. This is obviously different from permitting defendant to interrogate the jurors through a private investigator. Inquiry by the trial court, in a proper case, would seem to be much the preferable method of ascertaining the facts.
which apparently played some part in the case. The defendant thereupon asked the trial court for permission to make inquiry of the jurors. The court refused. This order

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was affirmed by the Court of Appeals which said (238 F.2d at 665):

“This and other courts have condemned the practice of interviewing jurors on the course of their deliberations in the jury room. It is incumbent upon the courts to protect jurors from the annoyance and harassment of such conduct.”

This is a decision that the trial court, in a proper case, may forbid a defendant and his attorneys from communicating with the jurors after the verdict. It follows that this court has power to enjoin a defendant from doing so on a motion such as this. This is a proper case for such an injunction. Moreover, under the circumstances, an injunction should issue here, even though defendant’s attorneys now claim that they do not intend to interview additional jurors.

I accept Raichle’s statement that he was not a party to these activities. I also believe defendant’s testimony that he did not know of or authorize these interviews. This affair will have no bearing upon the sentence ultimately to be imposed upon defendant for the crime of which he has been convicted. Nevertheless Bolan, Lang, and Whelan acted on defendant’s behalf, although without his knowledge. The injunction should run against defendant and his attorneys and investigators.

I turn now to the ethical aspects of the case. Here the situation is confused by apparently contradictory opinions issued by the Committee on Professional Ethics of the American Bar Association and the comparable committee of the Association of the Bar of the City of New York.

Canon 23 of the American Bar Association’s Canons of Ethics states in part:

“A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.”

On March 10, 1934, the American Bar Association Committee on Professional Ethics issued Opinion 109, in which it answered in the negative an inquiry as to whether a lawyer, for his own guidance, may properly inquire of members of the jury, after the verdict, as to “how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions.” The Committee said:

“The committee is of opinion that, upon the facts stated, the conduct of the lawyer is unethical. It tends to destroy the secrecy which should, on account of ancient usage and public policy, safeguard the activities in the jury room.”

The Committee also said:

“This opinion, of course, is not intended to extend to a situation where there has been a mistake in the announcing or recording of a verdict, and in the protection of his client’s interests, it may be necessary for a lawyer to interview members of the jury to prevent a miscarriage of justice. Nor does it extend to a case where a juror has been guilty of fraud. See Clark vs. United States, 281 289 U.S. 1, 53 Sup.Ct.Rep. 465 77 L.Ed. 993. Compare note in 47 Harvard Law Review 717 (Feb., 1934) on United States vs. Pleva, 66 F.(2d) 529 (C.C.A.2d, 1933).”

Subsequently in “Informal Decision” No. 535 dated October 6, 1962, the American Bar Association Committee on Professional Ethics ruled that a lawyer could not properly write to jurors after the case is over to thank them for their service. At the end of this opinion the Committee expressed a dictum as follows:
“Our Committee entertains the opinion, however, that after the trial, as a matter of self-education, or where necessary to prevent fraud or a miscarriage of justice, the lawyer may, with entire propriety, interview the jurors.”

The Committee on Professional Ethics of the Association of the Bar of the City of New York has issued two opinions on this subject. On September 28, 1933, that Committee was asked substantially the same question as was later propounded to the Professional Ethics Committee of the American Bar Association and which resulted in Opinion 109 quoted above. The Committee replied:

“The Committee, however, is of the opinion that there is no violation of professional ethics for an attorney to communicate with members of a petit jury after the jury has returned its verdict.”

This opinion was contrary to Opinion 109.

On January 14, 1952, the Professional Ethics Committee of the Association of the Bar of the City of New York was asked the following question:

“Is it improper for an attorney to spend considerable time interviewing jurors after a trial in order to determine what factors influence their deliberations and how the matter may be more effectively presented at a subsequent trial of the same or similar issues?”

The Committee replied:

“The Committee is of the opinion that it is not improper for an attorney to interview individuals who have been members of a jury that has been discharged. The Committee does not believe that Canon 23 of the Canons of Professional Ethics makes such action improper. Your attention, however, is called to Opinion 109 of the Committee on Professional Ethics and Grievances of the American Bar Association, which does not accord in all respects with this opinion.”

In the present case Bolan argued that a New York lawyer should be able to rely on the opinions of the Committee on Professional Ethics of the Association of the Bar of the City of New York. He implied, although he did not say so expressly, that he had relied on them. The latest of these opinions, quoted above, makes the flat unqualified statement that:

“It is not improper for an attorney to interview individuals who have been members of a jury that has been discharged.”

Such a broad, undiscriminating treatment of the problem is unfortunate. Although it may be doubted that the Committee intended to approve or condone what has been done in this case, the brevity of the Committee’s pronouncement leaves room for argument as to what it intended. Under these circumstances, although what was done here was improper and will be enjoined, on the ethical question I will give these attorneys the benefit of the doubt and will not recommend disciplinary action in this instance.

Settle order on notice.

**Supplemental Opinion**

Since my opinion granting the government’s motion for an injunction in this case was filed on November 1, 1967, the American Bar Association has sent to me a copy of Formal Opinion No. 319, dated August 26, 1967, issued by its Committee on Professional Ethics. I was not previously aware of this opinion, nor, presumably, were any of the parties or counsel in this case, as it was not cited to me by either side. The opinion is not contained in the 1967 volume of the opinions of the Committee on
Professional Ethics of the American Bar Association, doubtless because it was issued after that volume was printed.

This opinion modifies to some extent the Committee’s Formal Opinion No. 109 and Informal Opinion No. 535 which I quoted in my opinion dated November 1, 1967. The Committee said:

“Certainly as to states in which the testimony and affidavits of jurors may be received in support or against a motion for new trial, a lawyer, in his obligation to protect his client, must have the tools of ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors.

* * * * *

“On the other hand, it would be unethical for a lawyer to harass, entice, induce or exert influence on a juror to obtain his testimony. The task of

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being a good juror is not an easy one and lawyers should not in their efforts to represent clients do anything that will tend to make it more difficult to obtain qualified jurors.”

The Committee also said that “it is not unethical, in States where it is not illegal, for the purpose of self-education, to communicate in an informal manner with jurors who are willing to talk. In so doing, however, great care should be used to protect the desire of particular jurors not to talk and to avoid harassment, enticement, inducement, or improper influence.”

I note this opinion here for the sake of completeness. It does not affect, however, the conclusions expressed in my opinion dated November 1 either as to the impropriety of the interviewing that took place in this case, or as to the inappropriateness, under all the circumstances, of disciplinary proceedings here against the lawyers involved. Accordingly, I have signed the attached order submitted by the government.
Plaintiffs have moved for a new trial, alleging irregularities in the proceeding, a verdict contrary to law and errors committed during the trial to which timely exceptions were taken.

The two asserted irregularities are both based on information obtained from jurors in post trial conversations or observations made in the jury room. Disclosures by jurors not obtained with the express prior authorization of the court are not sufficient to support a motion for a new trial as a matter of law. This court facilitates contact between jurors who wish to talk with lawyers post trial but does so mindful of the requirements that must be complied with before any information obtained can be used to seek a new trial.

Even if the statutory procedures had been followed, permission obtained and the information appropriately submitted to the court in support of a motion for a new trial, the court would deny the motion on the grounds presented. There is nothing submitted with this motion from which the court could conclude that any errors were committed or that any alleged error had a material effect on the substantial rights of a party. Neither the possible confusion of the jurors suggested by their chart nor the late realization by one juror of having had some limited (although close) contact with Mr. Bright 18 or 20 years prior to the trial would be sufficient to justify granting a new trial.

The verdict is asserted to have been contrary to law because of the jury’s alleged failure to conclude that the defendants must have been negligent in that the defendants’ vehicle was not “as nearly as practicable entirely within a lane.” What is “practicable” is entirely a matter of fact. There was evidence from Mr. Welker, the driver of the defendants’ vehicle, that he was as close to the edge of the road as was safe, and the jury is entitled to believe Mr. Welker regardless of what was said by other witnesses, expert or not.

The plaintiffs’ final contention is that the failure to give certain instructions was an error of law sufficient to justify the granting of a new trial. The appropriateness of these instructions was fully litigated at trial. Perhaps unnecessarily the court has reconsidered whether the decision not to give those instructions was error. Once again the court concludes it was not.
IT IS THEREFORE ORDERED that the plaintiffs’ motion is denied. Signed this 9th day of December, 2011.

Signed this 9th day of December, 2011

<<signature>>
Edward Jones, Circuit Court Judge
Chapter 3B

Notes on Jury Feedback

THE HONORABLE SUSIE NORBY
Clackamas County Circuit Court
Oregon City, Oregon

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The Honorable Randy Wilson, “From My Side of the Bench,” The Advocate (The Litigation Section of the State Bar of Texas), Fall 2013 ......................... 3B–7

Notes on Jury Feedback

**Jury Selection**

- Jurors wonder why they were selected, and why others weren’t. They draw conclusions about which litigant removed certain potential jurors.
  
  **TIP: REFRAIN FROM FOCUSING ALL QUESTIONS ON 1-2 CONCERNING JURORS.**

- Jurors are puzzled by lawyers who focus most or all questions on the jurors in the box.
  
  **TIP: QUESTION THE VENIRE MEMBERS INCLUSIVELY.**

- Jurors’ pride in jury service is primed by the juror video shown at orientation before trial. Lawyers who assume they don’t want to be there can come across as misinformed... these are the folks who showed up!
  
  **TIP: WATCH THE JURY ORIENTATION VIDEO PRE-TRIAL DAY.**

**Opening Statements**

- Jurors’ expectations are shaped by lawyers’ opening statements. They notice if you promise something you don’t deliver.
  
  **TIP: WHEN IN DOUBT, LEAVE FACT OUT (IN OPENING).**

- Jurors hope for a basic understanding of your pitch and the important evidence you will rely on. Too much detailed embellishment may be lost on them this early in the trial. Visual aids are appreciated.
  
  **TIPS: A PICTURE IS WORTH A THOUSAND WORDS. SHOW & TELL.... CONCISELY.**

**Evidence; Direct and Cross Examination**

- Jurors look for clues in witness testimony to decide whose version of facts they trust. Witnesses who exaggerate or self-aggrandize are doubted. Witnesses who are understated and humble are trusted. This is true of both lay witnesses and experts.
  
  **TIP: DISCOURAGE WITNESSES FROM OVER-STATING THEIR TESTIMONY. CHOOSE EXPERT WITNESSES WHO SPEAK PLAINLY AND SIMPLY.**

- Jurors want to see your exhibits. They are frustrated to have to wait until deliberations. They’re disappointed if lawyers are not clear about which exhibit contains what info.
  
  **TIP: ALWAYS ASK TO PUBLISH EXHIBITS. BRING 12 COPIES TO GIVE EACH JUROR ONE. DON’T FORGET TO ENTER ALL EXHIBITS IDENTIFIED.**
Closing Argument

• Jurors remember the evidence, and don’t want you to merely repeat it. They want help understanding the law and how it intersects with the evidence to prove your point.
  
  **TIP:** INVOKING JURY INSTRUCTION CONCEPTS EARLY AND OFTEN IN CLOSING.

• Each juror is probably already leaning one way or the other when closing arguments are made. Refrain from insulting your opponent’s witnesses and claims to avoid inadvertently insulting a juror’s preliminary perspective.
  
  **TIP:** ANIMATED CONFLICT MAY BE TEMPTING, BUT RATIONAL DEBATE IS BETTER.

Jury Instructions/Verdict Form

• Jury Instructions are the juror’s textbook and the Verdict Form is the jury’s final exam. At the end of deliberations, their instructions are tattered and worn from ongoing use. When an instruction is not in plain language, it causes jury conflict.
  
  **TIP:** PROPOSE REVISIONS THAT CLARIFY INSTRUCTIONS. OFFER INTERPRETATIONS IN CLOSING ARGUMENTS.

• Verdict forms with multiple questions and / or multiple claims are confusing. Jurors wonder how the answers inter-relate and feel blind-sided by questions the lawyers never mentioned.
  
  **TIP:** WHEN DRAFTING A VERDICT FORM, ASK NON-LAWYER STAFF TO REVIEW IT. REFINE SEQUENCE AND LANGUAGE UNTIL YOUR NON-LAWYER STAFF APPROVE. THEN SUBMIT.

Deliberations

• Jurors generally start out discussing impressions of the facts then go to Question #1 on the Verdict Form. If there is dissention, they read each other the applicable Jury Instructions and debate what they mean. They prefer not to ask the court questions, but if something is unclear, and debate gets heated, they submit a question to the court.
  
  **TIP:** DON’T AVOID JUROR QUESTIONS DURING DELIBERATIONS. PROPOSE HELPFUL ANSWERS THAT GO BEYOND: “The court already gave you the evidence and instructions.”

• Two common complaints about deliberations are: (1) The exhibits were a mess – we couldn’t find anything we needed; (2) We could have used some advice on the math.
  
  **TIP:** ORGANIZE EXHIBITS ENTERED IN NOTEBOOK OR WITH TABLE OF CONTENTS. BE CLEAR DURING TRIAL & CLOSING ABOUT CRUCIAL EXHIBIT NUMBERS.
Chapter 3B—Notes on Jury Feedback

Oregon State Bar Bulletin — OCTOBER 2013

Law & Life

A Diversity Within: 
The Mystery of the Missing Juror  
By the Hon. Susie L. Norby

It is mid-morning on the first day of trial. The large jury venire files into the courtroom in awkward silence. A clerk efficiently ushers jurors to their places according to the seating chart already in the lawyers’ hands. Every seat appears to have a body in it. The clerk calls out: “All rise!” The crowd snaps to attention. A judge strides into the courtroom and takes the bench. “You may be seated,” she says, before the clerk swears the jurors.

The judge introduces the lawyers and their clients, describes the burden of proof, and asks the jurors to sum themselves up in 20 words or less. One juror after another gives an abbreviated statement of who they are. The lawyers jot notes. Everything appears in order. Nothing, no one, seems to be missing. And so, voir dire begins. A lawyer rises and ambles toward the jury box.

“Ms. Marple, I’ll pick on you first. You’ve heard the phrase ‘preponderance of the evidence,’ haven’t you? What do you think that means?”

Ms. Marple struggles through a stilted, halting reply.

“That was not quite right, but a good try, Ms. Marple. I’ll let you off the hook now, thank you. Would anyone else like to take a stab? Mr. Holmes? Do you have an idea what ‘preponderance of the evidence’ means?”

As we visualize this scene, we feel an absence we cannot quite see. A juror is missing. No seat has emptied, no body has been lost. But a juror has clearly vanished. Solving the mystery of the missing juror takes empathy, wisdom and insight. Whoever can it be?

The missing juror we know, but cannot see, is the one that once lived in us. We were once as jurors are now — unsure of the law, intimidated by the power of the court, naively clear about our expectations of justice. But after many years of study, debate about elastic interpretations and humbling realizations of the law’s nuanced complexities, our juror’s brain has become a lawyer’s brain. The distance we’ve travelled from who we were to who we are has carved a chasm between our conscious lawyer self and our forgotten juror self. That chasm also separates us from the twelve people to whom we must entrust the final word on justice.

Our former selves, our juror selves, are like strangers to us now. And so we wonder: Who are these jurors? How do they think? What do they know? Do they understand? Do they care? Can we trust them to do what is right? Does this process work? Can it work with such legally inexperienced decision makers? Or does all our work and effort merely culminate in a coin toss?
As a judge, I have the incalculable privilege of learning answers to these questions, and the answers reconnect me to my own inner juror. I have met with dozens of juries after verdicts and listened to explanations of their processes. Allow me now to dispel some myths and mysteries and share the answers I have collected. My goal is to encourage the construction of bridges across the chasms that separate our long lost, subconscious juror brains and our conscious, hard-won lawyer brains. I believe that remaking this connection can help improve our confidence in, respect for, and appreciation of the jurors that grace our courtrooms every day. It can also build our own confidence, so that speaking to jurors, and selecting them, can become less mystifying and more inspiring.

Jurors come to the courtroom with the same questions about us that we have about them: Who are these lawyers and judges? How do they think? What do they know? Do they understand? Do they care? Can we trust them to do what is right? Does this process work? Can it work with such legally convoluted thinkers in charge? As these questions whirl through their minds, many jurors also feel concern about their wish to earn the respect and confidence of the very lawyers they doubt, and of their fellow jurors. This is where they begin.

**Myth #1: Jurors Arrive With Minds Made Up**

With few exceptions, jurors do not come to the courtroom with unyielding preconceived notions about the greed of plaintiffs, the motives of defendants or the likelihood that a particular claim or charge has merit or is bogus. They come with open, curious and unprejudiced minds. People untrained in the law are far less inclined to assume patterns and predict outcomes than those of us the law has relentlessly ingrained with a compulsion to glorify consistency. We lawyers devote our careers to identifying patterns, categorizing sequences and anticipating judicial interpretations.

But before our legal training, once upon a time, we took things as they came. Our long-ago juror brains held opinions lightly and considered them subject to change without notice. It is only our lawyer brains that reflexively commit to opinions, relishing opportunities to defend them with our inexorable logic. The longer we practice law, the more we presume that other people are as vigorously committed to their opinions as we are. But it isn’t true.

Getting in touch with our forgotten inner juror begins with remembering a time when our opinions were not carved in stone, but merely tentative theories easily shaken out of us by a feisty law professor’s skillful inquisition. Whatever doubts jurors have about lawyers, they respect our legal acumen and generally want to live up to it with their verdict. They come to serve, to meaningfully contribute and to individualize their decision to the case they hear. Jurors want their experiences in court to reinforce their confidence in justice. Forcing a preconceived outcome would undermine their goal.

**Myth #2: Jurors’ Primary Objective Is to Get It Over With**

While many jurors acknowledge that they come to court hoping not to stay, I have it on excellent authority that their wish to depart falls to a very low priority, or disappears entirely, once they are selected and sworn. It is a misconception that jurors grow angry in lengthy trials and carelessly rush through deliberations. I received the most compelling proof of the contrary in a nine-week civil jury trial. The case was originally expected to last six weeks, and the jurors were told to plan accordingly. In the seventh week, the trial’s end was nowhere in sight. A juror delivered a letter to my clerk with a
note from her employer. The letter informed me that jury duty had become too onerous for her and her family, that her inability to work was about to trigger suspension of medical coverage her spouse needed for an ongoing condition, and that her employer’s business was suffering significantly from her absence. I met with the attorneys to discuss the juror’s situation, and we agreed to allow her to step down and to replace her with an alternate.

I invited the juror to my chambers to thank her and release her. Before I uttered much more than a word, I saw a tear roll down her face. I asked what it meant. She told me that she was compelled to submit the letter by her husband and employer, but she did not want to go. I reassured her that we could continue without her, and that she had done enough. She replied, “It’s just not right. This is hard, but there are so many others on the jury who have it harder, yet who are determined to see it through. My troubles are comparatively small. My husband and employer will manage, but only if you order me to stay. I am invested now. I owe this duty to our community, and I don’t want to quit. Please make me stay.” We did as she asked, and she completed all nine weeks of trial.

Her story, and those that went untold in that lengthy trial, illustrate how seriously jurors take their duty of service. Understanding this phenomenon reminds me once again of our forgotten inner jurors. Our current perspective as lawyers is diluted by our experiences handling hundreds of cases. Each has been important to us, but over time, we have had to recalibrate our perception of the magnitude of them all. For jurors, though, their case is always the first (or among the first) they will ever hear and decide. There is no timeworn softening of their perception of the magnitude of the work. Our forgotten inner juror can remember our earnest sense of importance in our first trial and the monumental impact that feeling had on us. Even when we wanted to go home, we stayed at the office, we stayed at the client meeting, we stayed at the court, because we felt the work was greater than ourselves, and we felt invested in completion.

That sense of enormity is something we lose along the way, so it’s something we easily forget that jurors still feel. In fact, though, that sense of importance and larger meaning overrides jurors’ instincts to hurry back to their usual lives and instills focus and commitment while they work within the courts.

**Myth #3: Jurors Make It Up As They Go Along**

Ultimately, many lawyers’ most significant concern involves the mystery of jurors’ decision-making process. What do they do in deliberations? If their verdict is not the one expected, does that mean that they lacked intelligence? Does it mean that they didn’t care about the outcome and tossed a coin to end it? If not, what were they thinking?

I do not ask jurors how they reached their verdicts, especially when their verdicts surprise me. But almost without fail, juries want to explain. Jurors show me charts with damages figures, sections of jury instructions, details in photographs. They explain their logic, their math, the concerns they took most seriously, and they ask if I think they were right. They care a great deal about getting it right. They take turns telling me which important point each one of them “discovered.” They tell me their final interpretation of confusing jury instructions and describe how the interpretation changed their analysis of the case and altered the vote on the verdict.
Prior to these conversations, I would not have believed the depth of their determination or the extent of their grasp of details large and small. Factual details, legal details, visual details — nothing is missed. The fact that there are twelve of them inevitably means that they retain more details as a collective body than I could ever retain as a single individual. It also means that they consider more alternative theories than I could ever come up with alone.

Jurors see reaching a verdict as completing an open-book test that must not be failed. In the end, they work the law and the facts just as our forgotten inner jurors did when we were new to law school. We read and re-read the law. So do they. We dissected the facts. So do they. We arranged the facts around the law, then tried it in reverse. So do they. We did not throw our hands in the air and give up — we discussed cases with our study group; we used the tools the professor gave us; we reached the best answer we could with the pieces we were given. So do they. As serious as we were when we first attempted to conquer the law, so are they. Their methods are not mysterious. They are methodical.

Conclusion

Searching for the missing juror in ourselves is an enlightening and rewarding venture. It is a reminder that there is diversity not only among us, but within us. We are not only our present selves, we are the people we once were, but have forgotten. We are the sum of our experiences, fears and expectations, just like the strangers we meet in the jury box.

One small step toward embracing diversity in the outside world, and bridging the chasms between us and those we don’t think we understand (like jurors), is to recognize and embrace the diversity within us, between who we are and who we have been in the different stages of our lives. The mystery of the lost juror is a mystery of aging, of changing and of coming back to trusting ourselves so that we can better understand and trust the others we rely on in our communal quest for justice.

ABOUT THE AUTHOR

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Chapter 3B—Notes on Jury Feedback

FROM MY SIDE OF THE BENCH

Jury Notes

BY HON. RANDY WILSON

IN 2011, THE TEXAS RULES OF CIVIL PROCEDURE were amended to make clear that jurors are permitted to take notes and use those notes during deliberations.1 Previously, it was up the discretion of the judge whether the jurors were permitted to take or use notes during deliberations.

Recently, I read a fascinating article in Voir Dire, the publication of ABOTA, the American Board of Trial Advocates.2 In that article, former Denver district judge Christina Habas describes her experience with jury notes. In Colorado, jurors have long been permitted to take notes and were assured of the confidentiality of those notes. Judge Habas, however, at the conclusion of trial requested and received permission from many jurors to review and retain the notes in order to assist lawyers in improving their presentations. The notes she published were fascinating and I had to share them.

Repetition. The most oft-cited complaint by jurors is needless repetition. Jurors hate repetition. They feel it insults their intelligence and unnecessarily prolongs their jury service. The beating the dead horse drawing is priceless.

Lawyer Objections and Judge Rulings. Do jurors pay attention to objections by lawyers and rulings by the judge? Absolutely. If a lawyer continually makes frivolous objections that are routinely overruled by the trial judge, jurors take note, even to the point of keeping score. Indeed, one juror thought the whole proceeding looked like judicial whack a mole.

Watching Juror Reactions. Trial lawyers often watch jurors to see how the jury is reacting. Lawyers naturally want to see whether the jury is buying the case. What lawyers

Jurors get bored. Not surprisingly, many of the notes reflect juror frustration with the process and the speed with which the trial progresses. While there’s a lot the judge can do to streamline and move the trial along, much of the blame for jury boredom rests of the lawyers.

1 See Tex. R. Civ. P. 62.
don’t realize, however, is that constantly watching the jury makes the jury uncomfortable. This juror’s reaction to “piercing eye contact w/me” was “eeek!” I’ve had the same experience. I once had a 7 day in which, mid-trial, a juror gave us a note which said, “the lawyer with the dark hair keeps staring at us to see our reaction and it’s making us very uncomfortable.” Fortunately, or unfortunately, both the plaintiff and defendant had lawyers with dark hair, so we didn’t know to whom the note was directed. I gave the note to the lawyers and all lawyers spent the remainder of the trial staring ahead with tunnel vision, never once glancing at the jury.

A Final Note on Repetition. While I don’t look at jurors’ contemporaneous notes taken during trial, I do send questionnaires to the jury after trial to get their reaction to the trial and see if there are things that the court and staff can do better, as well as solicit comments about the lawyers. By a huge margin, the biggest criticism of lawyers is repetition. Here’s a sampling of comments by jurors when I ask them for comments about the attorneys. I could provide many more examples, but you get the point—don’t repeat! I’ll close with one of my favorite trial cartoons:

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective.

2 Christina Habas, What Is Going on in their Minds? A Look into Jury Notes, VOIR DIRE at 26 (Fall/Winter 2012).

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What Is Going On In Their Minds?
A Look Into Jury Notes

By Christina M. Habas

Honestly, I absolutely adore jurors. They are fascinating, smart and hard-working. Although some may complain a bit in the beginning, once they are selected and sworn, they step up to the plate in a big way to do their jobs properly.

So what are those stoic-looking people thinking during trial? As you might expect, many are thinking that the presentations are dull. Some others are thinking about questions that they have about the evidence. Still others are watching the parties, and the lawyers, very carefully to get some useful signals in their efforts to judge the evidence. And many others are thinking some very unexpected things.

In Colorado, we have long allowed jurors to take written notes during trial. They are told at the start of trial that they are not required to write notes, but that if they do, they should feel assured that no person, not even me, will read their notes without their express permission. We encourage them to use their notes in any way that will assist them in their job, and that includes doodling and drawing, on occasion. At the end of trials, I always make a pitch to jurors to allow me to review their notes, and to use them when I teach lawyers how to be more effective. Sometimes jurors turn me down — and that is perfectly fine. But the vast majority willingly share their notes, and therefore their insights, hoping that lawyers might improve.

What follows is an abbreviated review of some of the more interesting jury notes. As you review these notes, try to imagine whether your performance in a past trial would have justified some of these comments. Also consider whether the questions and observations contained in these notes might apply to one of your performances.
And some friendly advice from a juror:

"When you find yourself in a hole, stop digging."

Objections are also frequently seen in jury notes. One juror actually kept a tally of those objections during trial.

Still another juror told me that one of the attorneys was constantly objecting, and the objections were routinely overruled. This was how that juror saw things.

During one particularly interesting trial, involving a prison gang, the batteries in our clock had run down. One juror was apparently ecstatic when we finally replaced those batteries.
One juror in a particularly lengthy medical malpractice case had the time and the inclination to express his feelings artistically.

However, it is not always the length of time taken by a lawyer that gets a reaction. Often, I see jurors getting visibly annoyed by tactics, especially during Cross Examination. Here is one play-by-play of cross examination of a lead expert by a defendant’s attorney.

And some additional observations

And that cross examination on payments to expert witnesses?

I don’t care how much experts make to testify
-- It’s the same rate for this type of work
-- It’s a normal function of medical malpractice suits
-- They need to be paid to practice medicine, just as there is in other occupations.
I guess I was wrong. I have since abbreviated my own comments, so that we might get to the “Big Show” as soon as possible.

Judges are not immune, either. I willingly share with you the following note that directly relates to the jury orientation that I had believed to be scintillating.

The single most frequent complaint I have from jurors in their debriefings is that lawyers have a tendency toward unnecessary repetition. There is a very fine line between emphasizing certain evidence, and redundancy. What follows is a specific note written by a juror, who explained to me that she decided to draw a brick in a wall every time she heard the same question asked of a certain witness. Her frustration finally ended when the questioning was completed, but her reaction remains.

They say that it is the “little things” that matter. Nothing could be more true when you are presenting your case to jurors, who are complete strangers to the facts. When a lawyer mispronounces a name, it can have a major impact. This note came during a trial where a lawyer had filed suit against his successor counsel in an employment case. One of the major themes of his presentation was that he truly cared for his clients, and that he worked hard on their behalf and therefore was deserving of a share of the attorney’s fees. One of the jurors picked up on some behavior that contradicted that theme.

And the details of testimony are important. This juror was extremely frustrated with a diagram that didn’t apparently match the actual layout of the room depicted.
Every lawyer has a war story about “eye contact” with jurors. Here are just a couple of notes that remark on this.

We often are reminded that trial lawyers are storytellers. I can attest to this fact, having been relegated to being a “professional audience” for the past eight years. Case presentations without the context that a story provides are extraordinarily difficult to remember, and they certainly are unpersuasive. That lesson is one that any trial lawyer must learn early on, or suffer from defeat.

One of the concepts in great storytelling is that you must fill in the gaps with information — if you do not, then the jurors will fill in those gaps with their own view of the world. While I promise jurors that I will never explicitly identify them when I use their notes, and not specifically identify the case upon which they served, I can tell you that these notes relate specifically to a rather grisly murder. The prosecution’s view was that this defendant had become enraged over his friend’s actions in taking some crack cocaine and smoking it. That upon learning of this theft, the defendant had beaten his friend into a coma, thrown him into a closet, and later disposed of the body by using a chainsaw to dismember the body, and put pieces in trash bags all over the city. The allegation continued that the defendant then attempted to unsuccessfully set fire to the friend’s home to destroy the evidence of the crime. Given the involvement of drugs and the neighborhood where the case took place, one of the jurors who had lived in that area constructed his own very detailed story.
If your personality is a strong one, beware of juror drawings that encompass their opinions of you.

In the end, most lawyers believe that they will win their case if they are effective in Closing Arguments. My limited experience in reviewing jury notes from hundreds of trials indicates to me that jurors pay close attention during Opening Statements, and write down much of what they hear. They use those notes as a "checklist" against the evidence that comes later in the trial. By Closing, they are saturated.

In the end, that particular juror was discharged (as an alternate) and so we will never know what impact his conclusions would have had on the ultimate deliberations of the jury. It is not unusual, however, for a single juror with some specific knowledge of the location, or the type of people, involved in a given case to hold enormous authority with the other jurors. That one juror with previous experience living in that neighborhood was never asked a single question during voir dire.1

I hope you have enjoyed reading this small collection of jury notes. While they are certainly indicative only of the trials that those particular jurors were watching when they wrote the notes, there are sufficient patterns that demand we pay attention. If we are to preserve the right to a civil jury trial in the future, we must consider what those jurors are thinking. So, the next time you look over at a juror, furiously scribbling notes during your trial presentation, ask yourself what that juror is really thinking? ■

Former Denver District Judge Christina M. Habas now serves as a trial lawyer in Denver. She is a long time ABOTA member and the recipient of the 2012 Judicial Excellence Award given by the Colorado Chapter of ABOTA.

1 The methods and questions used during voir dire is beyond the scope of this particular article. Suffice to say that whether it is due to the extraordinary limitations placed on time for jury selection by some judges, or just individual lawyer's inability to ask meaningful questions, many jurors remain on the jury that probably ought not to remain.

This article originally appeared in Voir Dire magazine, Fall/Winter 2012 issue. It is reprinted with permission.
1. “The purpose of the summation, particularly after a trial of length is to teach your friends on the jury how to successfully argue with your enemies on that same jury – because the “final argument” will not take place in the courtroom but rather in the adjoining jury room.”  

   Guide the jury with the use of rhetorical questions.

   Example: “Some of you jurors have been wondering why ____________? During deliberations, when one of you asks this question, we’ll all know the answer.

   Carefully look at Exhibits 16 and 21. They answer this question.” Explain their significance while physically holding tangible exhibits. Project them onto a screen if they’re documents, with highlighting for emphasis. Preempt your opponent; make the exhibits yours! The same approach works nicely with key questions on a special verdict form.

2. Conservative jurors are rule driven, liberal jurors are equity driven. I emphasize the law and instructions to these jurors. I lift my themes and arguments from the exact words of the instructions. Examples are UCJI 70.06 (“as is” or previous infirm condition)’ UCJI 23.02 (multiple causation), UCJI 70.02 (pain, suffering and humiliation) and then I prepare and request special instructions on mental anguish and suffering (Feheley vs. Senders, 170 Or 457, 135 P2nd 283 (1948)) and enhanced future susceptibility (Feist vs. Sears, Roebuck & Co., 267 Or 402, 413, 517 P2nd 675, 680 (1973)). This legitimizes my damages claims and arguments. When the judge instructs the jury, and the jury also has their own set of instructions for reference during their deliberations, it all becomes a chorus for my case.

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3. Turn negligence allegations into “breach of contract” arguments. The strong predisposition of jurors is that stuff happens, everyone makes mistakes, “There but for the grace of God go I,” and the plaintiff should have been more careful. However, conservative jurors also believe people should keep their word, and therefore that contracts are important. Concepts of negligence can seem soft.

Try these arguments in your next personal injury car wreck case:

When we get our driver’s license from the state, we are entering into a contract with the State of Oregon and all other drivers who are legally on the road. The laws of our state are the contract we all agree to follow. Among other things, all of us agree to yield when the state puts a yield sign up. A year and a half ago, at the corner of Elm and Shuster, Mr. Simpson broke that contract.

Your earlier cross-examinations should have developed this theme:

Q: When you got your driver’s license, you were promising to follow the laws of this state?
Q: This was a promise made to the state?
Q: This was a promise made to all other drivers?
Q: You knew other drivers were promising the same thing to you?
Q: It is part of what made you feel safe on the road – the promises of these other drivers to follow the laws?

Everyone makes mistakes, but if you break a contract – even by mistake – you have pay.

Zero in on your audience’s values. Don’t change the facts, just the lens through which your jury, and therefore you, views them – a lens your audience will value.  

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JURY SELECTION

My goal in jury selection is to identify: 1) those jurors who are predisposed to vote against my client; 2) jurors who would be such strong leaders that we would take on too much risk leaving them on; and 3) to begin to establish some level of rapport with the jury. Based on my own experience in trials for many years and based on my observation of other lawyers and post-trial debriefings of juries, here are tips that have worked for me.

1. Ideally, jury selection begins in advance of trial with you and perhaps a trial consultant identifying a jury profile that makes sense for your case. This should be done sufficiently in advance of trial to allow you to determine a profile of who you don’t want and also will allow you to determine whether a jury questionnaire specific to the case is warranted.

2. Pay attention when jurors come into the room. Who is talking with whom? Who is carrying a newspaper? Who is looking at their phone? Who appears to be friend with whom? This will help you with questioning and also will, however indirectly, assist in close calls for keeping a juror if you know that a friend of theirs is already on the jury.

3. Keep in mind that you, not the jury, are on stage. Act the part. They are the audience, you are the performer and voir dire is a performance.

4. In preparation for jury questioning, stay in touch with what the media is putting out. Pay attention. Sometimes items in the news become an easy way to break the ice to talk about with a jury.

5. Keep in mind that jury questioning creates an immediate imbalance of power. Be aware of this as you start your questioning and be prepared to adjust your body language, tone of voice, and volume.

6. Jury selection is your first chance to speak meaningfully to the jury and you are going to do this extemporaneously until you need to ask a specific question. You should do this with a script so as to have precise language. This which will have to be fluid, because for jury selection to be effective, you have to pay attention to answers and read your audience. If you can, get help on this part, it’s tough to facilitate dialogue from people and keep track of everything they are saying, see other jurors reactions, etc.

7. Be low key and confident. Nervousness is contagious. Make eye contact particularly when using probing follow-up questions

8. If you are asking questions, stay off your laptop.

9. This is extemporaneous public speaking. It helps if you practice speaking with a group and not talking to a group. Standing in front of an audience and chatting informally in a confident manner is not something that you can pick up on the fly. It requires preparation and practice. The best way to learn how to be an effective public speaker is to speak publicly. Projecting your voice at public speaking level helps with credibility and control of the room.
10. I find it useful to explain to the jury why I am asking questions. I explain that I am seeking information that will help me understand their attitudes toward certain issues that might arise in the case. I very forthrightly say I am seeking information regarding bias and then I use an example of bias to disarm that term. People are more comfortable with you if you are open, natural, and honest.

11. Make it clear that there are no wrong answers, you are just gathering information. In reality, the jury selection process in state court should be much closer to a jury focus group than an opportunity to try to swing the jury your direction before any evidence or opening statements are heard. If you have that attitude, your questions will actually make more sense and you will get more meaningful information. Maybe most importantly, if you make it easy for people to tell you how much they hate your client, maybe you’ll get an extra cause challenge or two.

12. Try to avoid putting prospective jurors on the spot. Pay attention to who appears to be shy. In this regard, once I get a response from a juror, I can then turn to the group at large and say, “Is there anyone else who wants to comment or weigh in on that issue?”

13. Don’t pander to the jury to try to “bond” with the jury. I don’t try to sell my case, and I don’t discuss legal burdens of proof. I try to get a discussion going so that individuals feel free to share their opinions and sometimes disagree with what other jurors say. My job is to try to figure out attitudes, which are frequently driven by experiences, but not always. Again, maybe most important, trying to sell your case in voir dire can really backfire if the other side is smart enough to take advantage of it. You could have some juror agreeing with you on everything in voir dire and have the other side identify them and strike them for cause.

Additional References:

SELECTED READINGS ON IMPACT OF JUROR DEMOGRAPHICS ON DECISION MAKING AND TRIAL OUTCOMES

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<th>PART I IMPACT OF AGE</th>
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### PART II IMPACT OF GENDER


### PART III ADDITIONAL LITERATURE


### BIBLIOGRAPHY


Abstract: This paper uses data from more than 700 felony trials in Florida to examine the role of age in jury selection and trial outcomes. The results imply that prosecutors are more likely to use their peremptory challenges to exclude younger members of the jury pool, while defense attorneys exclude older potential jurors. To examine the causal impact of age, we employ a research design that isolates the effect of the random variation in the age composition of the pool of eligible jurors called for jury duty. Consistent with the jury selection patterns, the empirical evidence implies that older jurors are significantly more likely to convict. Results are robust to controls for county, time, and judge fixed effects. Thus, many cases are decided differently for reasons that
are completely independent of the nature of the evidence in the case—that is, there is substantial randomness in the application of criminal justice.


Summary: Women remain underrepresented in many aspects of political and civic life. This column explores the empirical significance of representation, exploiting a 1919 law that made women eligible to serve on English juries. Archival court data show that female representation boosted convictions in sex offenses cases. The magnitude of results highlights how dramatically underrepresentation can influence the functioning of civic institutions.


Abstract: This paper examines the extent to which criminal conviction rates are affected by the similarity in gender of the defendant and jury. To identify effects, we exploit random variation in both the assignment to jury pools and the ordering of potential jurors. We do so using detailed administrative data on the juror selection process and trial proceedings for two large counties in Florida. Results indicate that own-gender juries result in significantly lower conviction rates on drug charges, though we find no evidence
of effects for other charges. Estimates indicate that a one standard deviation increase in expected own-gender jurors (\sim 10 percentage points) results in an 18 percentage point reduction in conviction rates on drug charges, which is highly significant even after adjusting for multiple comparisons. This results in a 13 percentage point decline in the likelihood of being sentenced to at least some jail time. These findings highlight how drawing an opposite-gender jury can impose significant costs on defendants, and demonstrate that own-gender bias can occur even in settings where the importance of being impartial is actively pressed on participants.


Retrieved from 


Abstract: We assess the degree to which seated juries in U.S. criminal trials might fall short of the constitutional ideal of impartiality. We first ask if certain demographic and socioeconomic characteristics are related to pre-deliberation biases that individual jurors hold or to the verdicts at which juries arrive collectively. We do not focus solely on race, but also jointly consider other characteristics – sex, age, religiousness, education, and income – that existing literature has largely neglected. A uniquely rich dataset on non-capital felony jury trials held in four major state trial courts allows us to identify within-case effects and to control for typically unobservable aspects of the trial and its participants. We find that jurors with higher income and religiousness hold more favorable sentiments for the prosecution, while blacks hold more favorable sentiments for the defense. These pre-deliberation biases are reflected in trial outcomes, with juries with
a higher average income and a greater proportion of religious jurors acquitting on fewer counts, and juries with a greater proportion of blacks convicting on fewer counts. However, these jury composition effects are smaller and account for less of the explained variation in verdicts than the effect of evidentiary strength. Moreover, while we find that prosecuting/defense attorneys prefer juries with higher/lower average income, indicating that attorneys are aware of the effect of income on predispositions and verdicts and may therefore attempt to leverage this knowledge to manipulate trial outcomes in their favor, we also find evidence that they are mistaken about the effects of other characteristics.

Our results thus raise some concerns regarding the trustworthiness of U.S. criminal trials, but also provide important context for such concerns, especially by illustrating that the sources of jury bias may be more nuanced and multidimensional than an analysis based on race alone would imply.


Abstract: The purpose of this study was to investigate whether jurors would be biased in favor of guilt when a defendant’s gender was congruent with stereotypes associated with certain crimes (i.e. a gender–crime congruency effect) and the role of juror gender in informing such an effect. A gender balanced sample (N = 200) of participants read a six-page fabricated grand theft of a motor vehicle or shoplifting trial transcript, in which we manipulated defendant gender. Results did not support the prediction that a woman charged with shoplifting and a man charged with auto theft would yield harsher decisions among same-gender mock jurors. However, there was a significant juror gender by crime-type interaction effect on defendant impressions. For jurors who were women,
shoplifting was associated with more positive defendant impressions, with no such effect for men. While this study did not provide evidence of a gender–crime congruency effect, future researchers should consider other crime types and moderator variables.


Abstract: This paper reports on investigation and research explaining possible factors that affect the final award amount given by juries in civil cases. The two key variables examined are urbanicity and median household income. Data on civil trials collected through the United States Department of Justice, Bureau of Justice Statistics’ The Civil Justice Survey of State Courts provided the primary data set for the study. The data set includes 156 counties and is a nationally representative sample of bench and jury trials. Urbanicity ratings, as well as median household income, were reported for each county. Pearson’s correlations indicated no statistically significant relationship between urbanicity ratings and final award amount or between median household income and final award amount for cases decided by a jury. Evaluations of the linear relationship between final award amount and urbanicity using Pearson’s correlation indicated no significant correlation between final award amount and urbanicity ratings. This study concludes that juries were not as susceptible to external influences or factors such as their location and income when awarding the plaintiff of a civil case.


Abstract: We explored the effects of pretrial publicity (PTP) and juror age on decision making and source memory. Mock jurors read news articles containing negative PTP, positive PTP, or unrelated stories. One week later they viewed a murder trial, made decisions about guilt, and completed a source memory test. We found that only positive PTP had a significant effect on older jurors' verdicts and impressions (positivity effect); while only negative PTP had a significant effect on younger jurors' verdicts (negativity effect). PTP and juror age had significant effects on accurate source memory judgments (accurately attributing trial information to the trial) with older jurors and those exposed to PTP being less accurate. Only PTP had a significant effect on jurors' critical source memory errors (misattributing information in the PTP to the trial or both the trial and the PTP) with those exposed to negative PTP making more of these errors than jurors in the other PTP conditions.

ESTABLISHING CREDIBILITY WITH THE JURY

1. In my experience, the best way to establish credibility with the jury is to be open and candid with the jury early and often, such that the jury comes to depend on you to get to the truth of whatever the issue is. In my experience, this takes the form of admitting to the jury that certain parts of your case may not be as strong as other parts.

2. In line with establishing credibility, consider carefully how to use your objections, however legitimate those objections may be. If the jury believes you are seeking to block information from them, whatever the rules of evidence may be, it can have an impact on your credibility as the lawyer who is willing to let the jury hear all the information, good or bad for you. (As an aside to this point, my experience has been that if you don’t object, jurors may well not understand the significance of information, facts, or testimony which you believe is harmful. If you do object, they will all sit up, take notice, and grasp its importance.)

3. Your credibility is not limited to what you say, but also includes how you act; in other words, your respect for the process. While juries as a combined group may not notice everything, it has been my experience that at least a few jurors will notice just about everything happening in the courtroom, whether you are speaking or not. In other words, you are on the stage at all times, even in a non-speaking role. Keep that in mind as you joke with a colleague, scribble notes furiously to one another, roll your eyes, slouch in your seat, appear bored with the proceedings, or any other conduct that can be observed.

4. While you should treat your opposing counsel with professionalism and courtesy, unless the situation mandates it, don’t be so friendly with your opponent that you create the impression that this is just a game. Your credibility as to the passion of your position can be impaired if you appear to be able to turn it on or off at will. Jurors pick up on that kind of conduct.

5. Treat all the witnesses and your opposing counsel with professional courtesy. Juries are offended by rudeness. With respect to witnesses, keep in mind that juries generally identify with the witnesses and not you. Keep this in mind in questioning. Your prowess in cross examination might not be as impressive to your audience as it is to you, particularly if you are inappropriately confrontational with a witness.

6. Fighting and bickering with your opponent in front of the jury leaves a bad taste in the mouths of the jury, no matter who is at fault, and hurts your credibility as a professional.

7. While it is important to be aware of juror’s reactions to a witness or to testimony, do not pander to the jury nor try to seek recognition from the jury that they understand how powerful a point you just made.
CROSS EXAMINATION OF THE
PREVIOUSLY UNDISCLOSED EXPERT

OSB – Litigation Institute & Retreat – Skamania Lodge
March 2, 2019

By: David B. Markowitz
Markowitz Herbold PC

1. Preliminary discussions
   a. Cross or no cross
   b. Constructive or destructive cross

2. Discovery and Investigation
   a. Review expert’s file
      - require production of materials not brought to court; e.g. email
   b. Internet search
      - regulatory agencies
      - websites
      - advertising
- litigation

c. Other attorneys
3. Consider attacking expert’s opinions based on
   - Major premises
   - Minor premises
   - Analysis
   - Major premises will be expert’s strength, minor premises will be yours. Demonstrate:
     - Lack of knowledge of important facts
     - Misconception of important facts
       - show reason for misconception
     - Demonstrate reliance:
       - Major premises that will be contradicted by other experts
       - Minor premises that will be contradicted by fact witnesses
       - Erroneous analysis (e.g. miscalculation)
Chapter 4—Persuading the Jury: What Works and Doesn’t Work

4. Other attacks

   a. Bias

      - fees earned

      - connections and affiliations to client, attorney, issue, industry

   b. Qualifications

      - specific to issues of the case

      - contrast to your expert’s strengths

   c. Predispositions

   d. Destruction of earlier work product

   e. Attorney and client participation in creating and changing opinions

   f. Concealed opinions
g. Prior inconsistent statements
   - or no statements on subject

h. Inadequate preparation and information withheld by opposing counsel

i. Reliance on information that is not usually relied on to form opinions

j. Timing and strength of opinions
   - Reached before data obtained
   - still tentative and subject to change
   - Inflexible; won’t change regardless of later discovered errors

5. Constructive Cross

a. Favorable opinions held and information known by witness that were not disclosed in direct examination

b. Favorable opinions that will be reached through presentation of additional information or hypothetical questions
Chapter 4—Persuading the Jury: What Works and Doesn’t Work

PERSUADING THE JURY: WHAT WORKS AND DOESN’T WORK in OPENING STATEMENTS AND DIRECT EXAMINATION

OSB - Litigation Institute Retreat – Skamania Lodge - March 2, 2019

Opening Statements – Roadmaps, Recipes or Roman à Clef

By Charese Rohny

No matter the approach, we all agree opening statements are critical. Whether we choose to present a chronological roadmap, strive to perfect a proven formulaic recipe, or tell a roman à clef (a story with a thinly-disguised version of actual characters and events), there are two goals for opening statement:

➢ Gain credibility

➢ Tell our client’s story in a compelling manner

Some studies show that:

• Opinions about liability that jurors form after opening are retained 80% of the time

• Jurors determine fault in opening statement and damages in closing.ii

• Jurors rarely make up their minds by the end of opening statement.iii

There is no dispute that during opening, jurors start to lean one way or the other. And, that lean creates a primacy of belief which colors how they receive and process the rest of what they hear and see at trial.iv

1. Credibility.

It is well known that lawyers are generally not admired by the public. As of 2013, only 18% of Americans thought lawyers contributed “a lot” to society, down from 23% in 2009.v

According to a Pew Research Center survey, on professional public esteem, lawyers were rated at the bottom of the barrel of all professions in the survey.vi (In the face of decades of propaganda on tort reform, the esteem of plaintiff’s lawyers may be even lower.) Therefore, a

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key objective in opening must be to establish credibility in the juror’s mind. That’s a steep, uphill climb to reach that goal.

a. **Do not advocate too soon.**

No one wants to be told what to think. No one especially wants to be told by a lawyer. Jurors want to hear what someone did, not what you think about it. It is very important not to advocate too soon. If your opponent does, even if objectionable, let it go.

b. **Tightly control what is presented.**

Don’t wing it. We know our case backwards and forwards, and can put together a quick outline of it on a moment’s notice. But if we prepare that way, most of us will take more time than we should in opening statement or, worse, insert argument too soon. A more structured outline, with key phrases scripted, can serve us better. Trials are not intended to present every fact and every possible legal argument. So, avoid “TMI” – too much information. Less is more. This is challenging for many of us, and can require some thought, analysis, and many revisions to craft a concise outline of the crucial facts of the case. The devil is in which details to keep and which to toss. The test is whether the fact is necessary to the theme or will help later with a key aspect of your cross-examination. Let everything else go.

c. **Developing a theme.**

“A good story cannot be devised, it has to be distilled,” according to Raymond Chandler (a novelist known for *The Big Sleep, The Long Goodbye* (praised anthology of American crime stories)). The same is true for the theme of your case.

It was once common practice to simply state something like: “This is a case about a careless driver.” A plain statement is not as persuasive today and doesn’t gain a juror’s trust or develop a lawyer’s credibility. Unsupported assertions will only risk suspicions.

A principle to remember, as Seattle trial attorney Paul Luvera states: “My theory is that the jury is generally bored.” So whatever you do, make the theme interesting.

d. **Telling a compelling story.**

At its basic level, a compelling story only needs a beginning, a middle, and an end. For the beginning, I like the journalist approach to an opening: “A 12-year old boy, who dreamed of becoming a marine biologist, died after he was hit by a school bus that drove onto the sidewalk in front of his grade school.” It captures the theme and the key facts.
2. **Recipe for a plaintiff’s opening statement.**

   According to David Ball, who writes trial guides for plaintiff’s lawyers, you should start with what the rule is, what the act was which violated that rule, and why the rule is important. Some examples:

   - “A doctor facing a potential life and death situation needs to be really sure of his diagnosis before deciding it’s safe to send the patient home.” (Medical malpractice - failure to diagnose.)
   - “Child safety is always the primary consideration in any decision concerning pupil transportation.” (Bus stop case.)
   - “The Company must treat its policyholders’ interests with equal regard as it does its own interests. This is not an adversarial or competitive process.” (Bad faith.)

   The tried-and-true recipe for plaintiff lawyers, as developed by David Ball, applies the following elements:

   a. **Rules/consequences.**

      Tell the juror the rule at issue at the outset. “Whatever a company manufactures has to be safe to use. If it is not safe and it hurts someone, the company is responsible for the harm. Now let me tell you a story....” It is not a time to state the jury instruction, but merely to state the rule and how the act violated it.

   b. **Story.**

      Describe what the defendant did – this is about the defendant’s choices. The goal here is to not have the jurors think it’s about just money; it is to tell the story of what the defendant did without implying any blame (i.e., it’s not time to tell the speed limit yet; if you do jurors shift into adversary mode and circle back to you being a predatory attorney).

   c. **Blame.**

      Describe who you are suing and why.

   d. **Undermine.**

      Describe what is wrong with liability defense. Explain what you did to investigate and determine the truth. For instance, in a plaintiff’s motor vehicle case representing Mr. Monroe you might say:

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“Before we decided to come to trial several things needed to be determined. For example, Ms. Cartwright states that Mr. Monroe came ‘zooming out of nowhere.’ So we had to determine if that happened. Because if that was the reason why Ms. Cartwright didn’t see Mr. Monroe, it may explain why she unsafely entered the intersection. We gathered witnesses’ testimony and looked at the scene. One interesting fact, we identified that there are speed bumps along Capitol Hill Road.” Then explain why Mr. Monroe had to have slowed down.

e. Causation and damages.

Explain the losses and harms, mechanism of harm, personal consequences, treatment, and what cannot be fixed. Here is where you describe your expert testimony and other basis for causation, and link that to damages. Tell a mini-story not just a before and after. For instance,

Don’t say: “Kaeli used to be an A student, but now can’t remember anything she studies, no matter how hard she works at it.”

Instead tell a mini-story…

“Kaeli worked all day. She studied zoology, geometry, English literature, and mechanical drawing. Her mom and sister helped, shared the heartbreak when Kaeli came home in tears after the test, and said ‘it all just went away.’”

Then contrast it with before one spring day when Kaeli received a great report card.

f. Money.

What do you want from the jury? If you are a plaintiff you want money. Carefully word this.

3. A classic story spine can be used by plaintiff and defense counsel.

Whether you are a plaintiff’s lawyer or a defense lawyer, the narrative framework is time-tested to pull people into a story-like opening. We are hard-wired for story, jurors can easily track – it creates interest so the jurors want to hear more. Think hero-centric stories: The Odyssey, The Hobbit, Wizard of Oz, Star Wars, or The Matrix. You can make your client the hero or jurors can be heroes. Jury consultants say leave plaintiff out of story--there is an open question there.

Carl Bettinger, in Twelve Heroes, One Voice: Guiding Jurors to Courageous Verdicts, provides this structure to an opening statement, that is the classic story spine:

• “Once upon a time…” (back story of protagonist)
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- “And every day” (ordinary world of protagonist)
- “Until one day” (inciting event that destroys old world – all is not well)
- “And as a result of that…” (crossing road into new world – loss of part of hero, there is no question that something horrible has happened)
- “And as a result of that…” (new world – in a more complicated story add this next layer; hero undergoes tests or confronts villains)
- “And as a result of that…” (new world – loss of part of hero’s beliefs/character)
- “Until finally” – climax.
- “And ever since then…” (moral of the story; the world is a different place)

By the end of your opening statement, the roles of each person in the courtroom should be clear to the jurors. And, the jurors should understand the seriousness of the matter. The line of action in the plot (your theory of your case) can be as wide as the Amazon River and include a lot of divergent activity, but all of this action must ultimately flow in the same general direction.

The important part of learning about stories is really to be creative and have a more powerful approach to your case. Regardless of the level of creativity you engage, an opening statement should include the following:

- Be easy to understand.
- Include a principle the other side cannot credibly dispute.
- Include rules of the case.
- Have intellectual integrity.
- Provide a blueprint for direct examination and cross examination.
- Be interesting.
- Be creative and have fun.
Before your next opening statement, read something about story-telling and the power of a story arc that is not law related. Then, simply follow what 2013 President of the Litigation Counsel of America, Peter Perlman says about opening statements:

“Be careful, be consistent, and be clear.”

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3 On Damages, David Ball (2011)
4 On Damages, David Ball (2011)
5 https://abovethelaw.com/2013/07/lawyers-the-most-despised-profession-in-america/
6 https://abovethelaw.com/2013/07/lawyers-the-most-despised-profession-in-america/
7 On Damages, David Ball, (2011) p. 113
8 On Damages, David Ball, (2011)
9 On Damages, David Ball, (2011)
10 Cincinnati Enquirer, March 30, 1996.
11 On Damages, David Ball, (2011)
13 Id. at 102.
15 Rules of the Road, Rick Friedman & Patrick Malone (2006)
PERSUADING THE JURY: WHAT WORKS AND DOESN’T WORK in
OPENING STATEMENTS AND DIRECT EXAMINATION

OSB - Litigation Institute Retreat – Skamania Lodge - March 2, 2019

Direct Examination: Keeping in Touch to Make an Impression

By Charese Rohny

Every case depends on a successful direct examination. We imagine examination of our
witnesses unfolding like finely engineered banker boxes packed with facts and legal elements.
What happens more often, though, is the witness is nervous, has forgotten the big picture, and is
trying to “help” with out-of-sequence information that makes no sense or seems irrelevant to the
jurors. We sometimes read our prepared questions and miss listening and following the witness.
Or we follow our witness, don’t use our prepared outline enough, and improvise in a manner that
veers completely off track. We have all had moments of ending up with a pile of messy,
unconnected cardboard pieces.

Every question asked should elicit an interesting and important response. Direct
examination at trial is not a deposition.

Direct examination is the time for the trier of fact to observe the witness and hear their
story. It sets the stage for our theory of the case. It allows the trier of fact to connect with our
client and our story of the facts. In order to do that effectively, we need to be organized and to
keep it interesting and persuasive.

We hear all the time regarding direct examination “Prepare, prepare, prepare” or
“Simplify, simplify, simplify” or “Just the facts, Ma’am” or “Control your witness.” All that is
absolutely true; but the most basic thing to keep in mind is that a trial is not just a battle of facts
or logic; it is instead a trial is a battle of impressions.

Big questions for direct examination derive from how best to make a winning impression.
We want to be the credible source of the good, the bad, and the ugly. We strive to convey that
our case is the source of the truth and our witnesses are not hiding anything. For each witness,
ask yourself:

• What is the impression I want to make?
• What themes make that impression?
• Are my questions important to my theme? and,
• How can I make the examination most interesting?

Most of us remember the key facts we need to elicit to prove the legal elements. Where we often fail is in avoiding dull moments. Ask only what is important and interesting.

1. Preparation.

Preparing for direction examination comes in many forms. Get the facts. All of the facts. Only then will you have the interesting ones, and not just those that are wooden elements. Be prepared for what could happen on cross examination, and craft the story you want the jury to hear. Prepare a detailed timeline and update it throughout your case. Determine the important facts, and then use your questioning on direct examination to structure your presentation of the order of proof, so the jurors can easily connect the dots, well before you do it in closing argument.

The devil is in the details, especially with preparation of foundational questions. Those should always be prepared ahead of time. Utilizing methods to streamline admissibility issues so you can seamlessly tell your story is key goal of preparation.

Preparation produces epiphanies of insight, big and small. A less direct, but still effective, product of preparation is identifying what we have in common with our witnesses. From moments like those, we can build an organic, natural, and connecting story.

2. Don’t bore your jury.

Our job is to help the witness be interesting and to help them connect to the jury. As in day to day life, first impressions are critical. Capture the interest of the jury in the first few minutes, right out of the gate. Perhaps we are at point in history where attention spans may have shrunk to shorter than that of that of a goldfish. Or perhaps those studies are fishy and are attention spans are the same as ever, but humans simply crave more relevance. Whether the human attention span is shorter than ever or not, in order to hold the attention of a juror’s brain, we must to manage stimuli and re-engage it. We must move the jurors’ brains from whatever else the juror is focusing on instead to being alert in listening to our evidence, and the story we are telling.

Keep your witnesses interesting and focused on important facts. Keep your questions short, and make sure your witness does the same for their answers.

3. Tell the jury why each witness is important, establish their credibility, and highlight the great facts.

Begin with a key question that creates interest. Examples:
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TO LAY WITNESS: “Mr. Sandman, you were an eyewitness to the two people fighting. At the end of your examination, you will be able to tell us who swung the first punch. Now, before we get to that, let me ask you…."

TO EXPERT WITNESS: “Dr. Spearhead, at the end of your examination, you will be able to tell us your opinion as to the cause of death of Veronica Jones. But before we get to that, let’s discuss some of your background and training…."

Establish the witness’ credibility. Examples of how to do that:

- How do we know that the witness knows what they say they know?
- Is there any history between the witness and the defendant/plaintiff?
- Does the witness have any interest in the outcome of the trial?
- If this was the only testimony the jury heard from that witness, what questions might the jury have about the testimony?

We don’t want to be redundant, but we do want to help that juror whose mind was wondering. So, be persuasive through repetition for your great facts selectively:

Q: As he approached you, did you notice anything unusual?
A: Yes, he had a gun.
Q: What was he doing with the gun?
A: Pointing it at me.
Q: As he was pointing the gun at you, was he saying anything?

An objection by opposing counsel on this will only serve to highlight it further.

Highlight your critical evidence with repetition, an old fashioned foam board, a modern technological visual aid, a pause in a manner that draws attention, or another effective way that makes it memorable for the jury.

4. Control your witness.

Control sounds a bit mechanical; we want to help guide the testimony and the narrative in a conversational manner to share the intended story. A way to do this is the use of headlines. The basics to any story as we know are:

- What happened?
- Why did it happen?
- How did it affect your client?
- Why does that mean your client should win?

One goal is to present the trier of fact with the legal elements, but more importantly to present your theme, which is the moral persuader of your case. You know not to lead on direct
examination, in part because it is inappropriate but also because it shifts the focus back to you and not your witness. Guide the witness in a natural, organized and persuasive manner.

5. **Telling the story.**

Do not script your witness, but do thoroughly prepare them on the topics needed for your story. Capture and ask about the basics for your case.

As a plaintiff, it is essential to tell the liability story as it builds for damage. For example in an employment race discrimination case the topics for the liability story may include having the witness share:

- The day you heard the words you were hired.
- How you enjoyed your job.
- What was it like the first day you were called the “N-word” in the workplace at Bad Corp.
- The day you heard the words “You are fired.”

Presenting evidence on damages after this flows more easily. The specifics of which would serve for another article. The key points here: keep your non-economic damages witnesses brief, and the testimony for your economic damages witness simple.

6. **Bringing your witness to life through inoculation.**

As with characters in a story, our witnesses have flaws. However, some flaws bring characters to life. Portrayal of the human experience tells us something significant about ourselves. It is the struggle of human experience to know oneself which forms our journey. Writers touch a part of this level of self-reflection and connect with their readers. So too do trial lawyers on direct examination—we create connection between the witnesses and the jurors. Face the weaknesses of your case on direct. At the same time, throughout trial highlight each way in which our facts and witnesses are more reliable than the opponent’s facts.

One strategic opportunity to do this is through inoculating the jury on direct to what our weaknesses are. Minimize the sting before cross examination occurs. Consider doing a mini-cross during your direct – be candid. Whatever method we choose to present those weaknesses, we should not ignore them.

Capturing the true essence of our witness during direct makes them real. It underscores their humanness, their credibility despite their flaws, and hopefully guts cross examination.

7. **Simplify.**

The length of our questions and words we choose should be short. Many cases are indeed complex. Think of your evidence in terms of buckets of topics. This guides preparation
and helps eliminate certain questions from each bucket, so as to not present the testimony in a complicated or redundant manner. We know how to simplify. Often, it is what requires the most preparation.

8. Be spontaneous.

Effective direct examination stories are those with moments of opportunistic spontaneity. When you are prepared with all the facts, know where briar patches lie, and feel confident in your examination, you can seize a moment when something unexpected, human, and connecting happens. Don’t miss an opportunity to take a risk and be spontaneous. The better you know your witnesses, the more likely it will happen and work to your advantage.

9. Know yourself.

We each have strengths and weaknesses in how we communicate. Be aware of both as you consider how the interaction with your witness will go. It is as important to knowing your story as it is to knowing yourself.

*If you know the enemy and know yourself,*
*You need not fear the result of a hundred battles.*
*If you know yourself but not the enemy,*
*for every victory gained you will also suffer a defeat.*
*If you know neither the enemy nor yourself,*
*you will succumb in every battle.*

There is a primary element that sets up the internal value system of the themes of each case. These themes are expressed through direct testimony, circumstantial evidence, and struggles we hope a jury will resolve in favor of our clients. To get to those core values and to evoke meaning from witness testimony, we need to understand where there is commonality with jurors between our own witnesses and that of our opponents. Be willing to go inwards, to experience that journey, and then share it so as to make those important connections with the jurors.

A natural story structure is one that reflects the true nature of the human experience. If we refuse to look inward to know either ourselves or our story, we risk that nothing of any value will come of our efforts. Through careful preparation and an understanding of your witness, yourself and the jurors, your direct examination can make the impression you want to make, connect with the jury and persuade them that your story is the true one.
Some statistics say that the average attention span is down from 12 seconds in the year 2000 to eight seconds now. That is less than the nine-second attention span of an average goldfish. This is disputed and the science disputable.