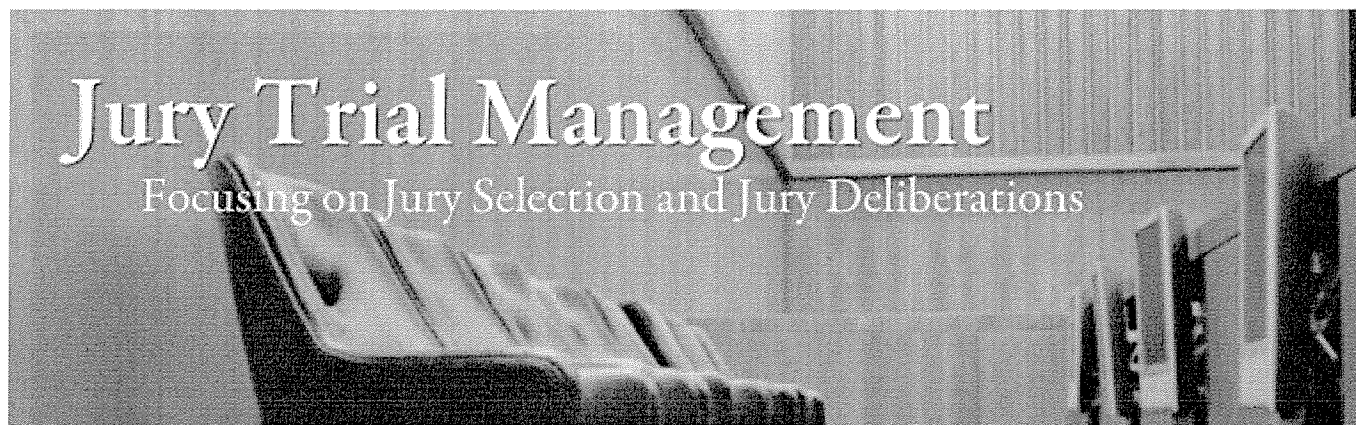



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Jury Trial Management For the 21st Century

Presenting judicial education programs
Focusing on Jury Selection
And Jury Deliberations



*"Improving justice through leadership and service to
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Funded by:
The State Justice Institute
&
The International Academy of Trial Lawyers Foundation

Introduction

Through grants from the State Justice Institute (“SJI”) and the International Academy of Trial Lawyers Foundation (“IATLF”), this “Jury Trial Management for the 21st Century” curriculum was prepared to assist judicial educators to develop and present programs that ultimately improve the management of jury trials in their home jurisdictions.

The production of this curriculum stems from the increasing interest by the legal community, researchers, the media, and the broader public in judicial management of jury trials. While the over-all rate of jury trials has declined as a percentage of case filings, the frequency of empirical jury-trial research, promulgation of best practices, and media attention to jury trials has grown substantially in the last decade. From the “OJ” cases to former Illinois Governor George Ryan’s lengthy jury trial, we are repeatedly reminded that media reporters and their audiences care deeply about jury trials.

The organized bar has become more focused on jury trial management also. The American Bar Association in 2005 published aspirational “gold standards” for the conduct of jury trials. Bringing together the latest empirical research and jurisprudence on jury trials, the ABA’s *Principles for Juries & Jury Trials* called upon American courts and trial lawyers to take specific steps to improve jury trials during the next decade. Complementing the ABA’s effort, the National Center for State Courts (“NCSC”) completed the *State of the States Survey of Jury Improvement Efforts*, a three-year study tracking how jury trials are managed and conducted in all state courts. Upon its release in 2007, the *State of the States Survey* provided bench and bar policy makers with a baseline of information by which to measure whether and how their own state courts seek to make use of modern jury trial practices.

During the three-year data collection process leading up to the release of the *State of the States Survey* findings, bench and bar leaders in Arkansas, California, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New York, Ohio, Pennsylvania, Texas, Virginia, Washington, West Virginia, and Wisconsin asked NCSC staff to present findings from the survey. From these engagements, two recurring areas of interest to judges emerged: (1) improving the efficiency and effectiveness of jury selection, and (2) managing or preventing troubled jury deliberations due to, for example, juror confusion, misconduct or apparent deadlock.

Regarding jury selection, the perennial challenge is to elicit meaningful information about prospective jurors’ abilities to maintain fairness and impartiality, and to obtain that information with reasonable efficiency. The parties and their lawyers want to learn as much as possible about the attitudes and life experiences of each would-be juror in order to discern who might be unfit to serve. But at times, lawyers obtain so little information that jury selection becomes a hunch game. The trial judge, with dozens or hundreds of cases on his or her docket, wants to administer justice in a timely and efficient manner so that other cases can be given prompt attention. Speed can be a top goal for some judges. Others, however, share the lawyers’ thirst for juror information so they can rule intelligently on motions to strike for cause. Still other judges feel obliged to carry out on

their own initiative the difficult tasks required under *Batson v. Kentucky* and its progeny to guard against race and gender discrimination during the exercise of peremptory strikes. These competing professional interests are seldom resolved to anyone's satisfaction. Consequently judges and lawyers alike believe there is great need for improvements in jury selection methods and *Batson* challenges.

The *State of the Sates Survey* also showed there is a thirst for practical ways to help judges respond to troubles encountered by deliberating juries. The six-month criminal trial of former Illinois Governor Ryan and the corporate fraud prosecution against senior executives at Symbol Technologies in New York City present vivid case studies of the challenges facing a trial judge when juror misconduct, confusion or deadlock befalls a deliberating jury.

The following curriculum-sets respond to those needs and concerns. One set of courses aims at improving the management of the jury selection portion of a trial. The other group of teaching lessons concentrates on developing methods to help deliberating juries who encounter trouble reaching a verdict, have difficulty understanding their role, endure misbehavior in their own ranks, or face other problems.

Acknowledgments

Funding from SJI and IATLF enabled the NCSC and the National Judicial College ["NJC"] to engage Judge Gregory E. Mize (Superior Court of the District of Columbia & judicial fellow, National Center for State Courts) as project director. In turn, an advisory committee of nationally recognized jury trial experts was convened to brainstorm about the appropriate content for the "Jury Trial Management for the 21st Century" curriculum. The committee was comprised of Judge B. Michael Dann (Ret.) (Superior Court, Maricopa County, AZ), Professor Shari Diamond (Northwestern University Law School & American Bar Foundation), Judge Richard J. Knowles (Ret.) (2nd Judicial District, Albuquerque, NM), Patricia Lee Refo, Esquire (Snell & Wilmer, LLP & former Chair, A.B.A. Section of Litigation), and Judge Barry Schneider (Ret.) (Superior Court, Maricopa County, AZ). This all-star working group met for two days in December 2008 at the NJC. Under the leadership of William Brunson, director of special projects at the NJC, and Judge Mize, the advisory committee identified a universe of problems, issues and challenges facing trial courts during the jury selection and jury deliberation stages of a trial. The working group also reached consensus on learning objectives and activities in the subject topics. After their in-person meeting, the team refined and organized the fruits of their brainstorming into the curriculum and resources contained here. Judge Mize thereafter took on the responsibility of principal program author.

Additional recognition and thanks are owed to Paula Hannaford-Agor, director of NCSC's Center for Jury Studies, and to G. Thomas Munsterman, director emeritus of the Center, for giving invaluable input during the curriculum development process.

Noteworthy too, several of the modules were “road tested” at bench and bar conferences. At the 2009 annual conference of the Nevada District Judges Association, Judge Mize assembled a distinguished faculty from Nevada to deliver a three-hour program utilizing these Managing Jury Selection Effectively modules: Module #2, “Ruling on For-Cause & Peremptory Challenges” and Module #4, “Respecting Juror Privacy & More.” At the 2009 National Jury Summit of the American Board of Trial Advocates, faculty from the east and west coasts presented a centerpiece program that combined elements from Jury Selection Module #3, “Judge & Lawyer Collaboration” and Module #6, “Promoting Judge-as-Educator Role.” Feedback from both program audiences yielded valuable refinements to all of the Jury Selection modules.

Using the Curriculum

The designers of this curriculum assumed that the principal users would be trial judges who have already presided over at least a few jury trials. The curriculum is not a primer on jury trials for those recently appointed or elected to a trial bench. For new jurists, the most likely educational resources will be bench books and orientation courses produced by individual court systems.

Each curriculum set contains five or six teaching modules that can be used in a variety of combinations by users. Depending on the amount of available programming time, the enclosed array of modules affords judicial educators the flexibility to link a series of modules into hourly, half-day, or whole-day programs hosted by judicial or bench-bar education conferences.

The “Managing Jury Selection Effectively” curriculum contains six, 60- or 90-minute modules: (1) “Obtaining Crucial Information from Prospective Jurors,” (2) “Ruling on For-Cause and Peremptory Challenges,” (3) “Judge & Lawyer Collaboration during Jury Selection,” (4) “Respecting Juror Privacy & More during Jury Selection,” (5) “Time Management,” and (6) “Promoting Judge-as-Educator during Jury Selection.”

The “Helping Troubled Deliberating Juries” set of courses contains five, one-hour modules: (1) “Improving the Deliberative Process,” (2) “Helping Jurors Overcome Jargon,” (3) “Responding to Deliberating Juries Having Questions or Reporting an Impasse,” (4) “Responding to Misconduct/Mishaps in Deliberations,” and (5) “Respecting Juror Privacy & Responding to Their Stress.”

Each module provides learning objectives and learning activities aimed at suggesting to judges how they might improve their management of the jury-centered portions of a trial – jury selection and deliberations. There is an emphasis on role-playing and audience participation in order to promote group dialogue centering on realistic challenges that arise repeatedly in courtrooms and jury rooms across the country.

The participant materials are designed to be audience-centered. That is, they are to be used by the participants *during* the educational session. The curriculum materials also contain extensive bibliographies. If the participants choose to continue studying these topical areas, which is a significant goal of the curriculum, the bibliographies will serve them well. The materials also contain one or more hypotheticals for use during each module.

PowerPoint slides are also included for use during the presentation. Some slides contain speaker notes that provide either background information or insights into how a faculty member might use each slide.

To support the curriculum, the NCSC and the NJC will endeavor to maintain a rolling roster of experienced jurists, empirical researchers, respected veteran trial lawyers, trial consultants, and articulate former jurors who are willing to serve as faculty for upcoming programs that utilize this curriculum. It is envisioned that these faculty members would complement faculty based in the host jurisdiction – together constituting a talented orchestra ready to present information-rich and locally relevant programming.

To ensure that program materials are acquired and shared in the intended manner and quality, all components of this curriculum are in PDF format. However, the producers encourage the materials to be used widely and in a fashion that best fits particular judicial audiences. Thus, educators interested in obtaining any program materials in an amendable Word format should contact Judge Gregory E. Mize, judicial fellow, Center for Jury Studies, National Center for State Courts, at 703-841-6932 (gmize@ncsc.org) or Paula Hannaford-Agor, director, NCSC's Center for Jury Studies, at 757-259-1556 (phannaford@ncsc.org). These interested users should be mindful of the copyright terms shown below. For educators who make modifications to the curriculum, please contact Judge Mize at the contact sites shown above and William Brunson, director of special projects, the NJC, at (800) 255-8343 to share the content of the modifications and any consequent successes.

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HELPING TROUBLED DELIBERATING JURIES

Module #3: Responding to Deliberating Juries Having Questions Or Reporting an Impasse **[1.5 hours]**

Learning Objectives:

After this session, the participants will be able to:

1. State the proper role of trial counsel and the judge in fashioning a proper response to juror questions;
2. List pre-deliberation trial practices that can minimize juror questions during deliberations;
3. Create a checklist of factors relevant to determining whether juror questions should be answered;
4. List several methods, in addition to the classic *Allen* charge, for responding to juries claiming to be at impasse or deadlocked;
5. Describe the common reasons for jury impasse and deadlock;
6. Describe the merits and demerits of the hung jury phenomenon; and
7. Create a checklist of factors relevant to ruling on a motion for a mistrial due to jury deadlock.

Learning Activities:

1. **Opening and mini-lecture:** The lead instructor begins by stating the current jurisprudence to guide a trial judge when responding to a deliberating jury note raising a question about the law, the evidence, or a mixture of both. The instructor explains the goals and format for an upcoming role-play exercise using a sampling of notes from deliberating jurors who pose questions to their trial judge. The role-play exercises will demonstrate a range of possible judicial responses to jury questions. (10 minutes)
2. **Role-play exercise (re: Jury Questions):** Two or more instructors take turns playing the roles of lawyers and trial judge responding to deliberating jury notes. These jury communications raise a variety of issues including: (1) problems with a legal concept, (2) trouble with an evidentiary question, and (3) a dilemma with respect to a mixed issue of law and fact.

One judicial role-player seeks the advice of trial counsel and then resorts to a more traditional approach to such jury notes. Specifically, if the question concerns only a legal issue or concept, the judge prefers to refer the jury to the previous pattern jury instruction on the subject legal point; if the question implicates an evidentiary question, the judge prefers not to answer the question, reminds the jury that all the evidence is in and no additional evidence will be presented, and encourages the jury to keep on trying to reach consensus.

In a contrasting second role-play, the judicial role-player is not averse to responding to questions that implicate factual issues. She/he, also seeking the

- advice of the trial lawyers, is willing to respond to questions that implicate evidentiary facts by authorizing limited reopening of evidence, additional closing arguments by counsel, and bringing relevant exhibits into the deliberation room – all with appropriate legal instructions. (10 minutes).
3. **Group discussion:** The lead instructor asks the participants to divide into smaller discussion groups to address and report on the following issues: (1) what are the legal and practical challenges facing a trial judge when responding to deliberating-jury questions, (2) to what degree, if any, should a trial judge be an educator to a deliberating jury, (3) what courtroom practices instituted during the evidence-presentation portion of a trial might have a preventive affect of jury confusion during deliberations, and (4) which judicial methods does the group favor or disfavor – with explanation. (25 minutes)
 4. **Interim mini-lecture:** The lead instructor begins by stating the current, core orthodoxies describing the role of the trial judge when responding to a jury note claiming that the jury is at an impasse in its deliberations. The instructor then reads a variety of typical jury notes claiming deadlock. These notes will serve as laboratory models for undertaking role-play exercises demonstrating a range of possible judicial responses to juries at impasse. (5 minutes)
 5. **Role-play exercise (re: Jury at impasse):** Two or more instructors, playing the role of trial judge, take turns responding to jury notes that indicate an impasse. One judicial role-player seeks the advice of trial counsel and then consistently resorts to a more traditional approach to such jury notes. In the face of a jury claiming deadlock, she/he encourages the jury to keep on trying to reach consensus and, after additional notes claiming impasse, giving an *Allen*-type charge to the jury. The other judicial role-player, after seeking the advice of the trial lawyers and assessing relevant factors, eventually suggests utilizing the Arizona model of responding to juries at impasse by asking jury members whether they would like to elaborate on what divides them and, if so, asking them to suggest how the court and counsel might assist them in overcoming the source of their impasse. With respect to the note seeking advice about how to deliberate, the judicial role-players again diverge in their responses – one taking a “hands off” approach, the other acting like a coach who suggests to the jury several examples of deliberative methods which empirical studies have shown have a tendency to enhance group cooperation. (15 minutes).
 6. **Group discussion:** The lead instructor asks the participants to divide into smaller discussion groups to address and report on the following issues: (1) what are the legal and practical challenges facing a trial judge when using each of the responsive methods, (2) to what degree, if any, should a trial judge be an educator to a deliberating jury, (3) to what degree, if any, should a trial judge and counsel participate in communications with deliberating juries, (4) to what degree, if any, should a judge take steps to avoid a hung jury, and (5) which responsive methodology does the group favor or disfavor – with explanation. (20 minutes)
 7. **Closing:** The instructor states the latest jurisprudence, best practice suggestions, and top resources on this subject, including Principles 15D & 16 of the ABA

Principles for Juries & Jury Trials and the American Judicature Society's *Behind Closed Doors: A Guide for Jury Deliberations*. (5 minutes)

Materials:

1. For use during class: hypothetical jury notes; Principles 15D & 16 of the ABA *Principles for Juries & Jury Trials*; Arizona Rule of Civil Procedure 39(h), and Arizona Rule of Criminal Procedure 22.4; and the American Judicature Society's *Behind Closed Doors: A Guide for Jury Deliberations*.
2. Reference materials
 - a. Annotated bibliography. Local instructor will add any state-specific reference materials that would be helpful for the participants (e.g., bench books, case law, statutes, court rules, pattern jury instructions, etc.)
 - b. Sample jury instructions on how to communicate to the judge by means of a signed note from the deliberations room, offer-of-assistance in response to jury questions or report of deadlock, proper use of trial exhibits, proper consideration of re-opened evidence, role of closing arguments, etc.

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RESPONDING-TO-JURY-QUESTIONS EXERCISE **(For use in Module #3)**

Introduction:

This exercise is designed to: (1) help us gain a better understanding of the different types of questions that deliberating juries send to the court for response, and (2) sharpen our judicial skills in responding effectively to questions raised in final deliberations.

Faculty will dramatize several possible responses to a variety of jury notes posing questions to the trial judge. Each dramatization is accompanied by a description of the nature of the case pending before the deliberating jury.

#1

In a possession-with-intent-to-distribute cocaine case against three co-defendants, Mr. X was the co-defendant arrested while being the sole rear passenger in a 4-door sedan. After the car was subjected to a routine traffic stop, a half-kilo package of powder cocaine was found in the console separating the front bucket seats. After 2 hours of deliberations, the jury sends a note saying, “We do not know what you meant in your instruction about ‘constructive possession,’ please clarify.”

#2

In the same case described in #1, the jury sends a note 30 minutes later, at 4:30 p.m. [the court recesses regularly at 5 p.m. each day], asking, “Is Mr. X left- or right-handed?”

#3

In the same case as #1, the jury sends a note at the beginning of the next morning’s deliberation, stating, “There were no fingerprints taken off of the glove compartment console. Can we still find Mr. X guilty of ‘constructive’ possession?”

#4

In the same case, the jury sends a note at noon of the second day of deliberations, “We are at a standstill with respect to a verdict on Mr. X. We have not been able to make any progress. What do we do next?”

#5

In a fraud and forgery prosecution trial, a veteran court-appointed criminal defense lawyer, Shola Ayeni, is accused of falsifying reimbursement vouchers to the court. The presentation of evidence in the case lasted 4 days. The jury sent this note after 6 hours of deliberations: “What is the lesser count against Mr. Ayeni? Why was the handwriting expert called to testify? Do the defense and prosecutor agree that Mr. Ayeni’s signatures in the witness voucher record books are authentic?”

JURY-AT-IMPASSE EXERCISE (For use in Module #3)

Introduction:

This exercise is designed to: (1) help us gain a better understanding of various factors that contribute to jury impasse or deadlock, and (2) sharpen our judicial skills in addressing juries that claim they are deadlocked in their final deliberations.

Faculty will dramatize several possible responses to a variety of possible jury notes claiming deadlock. Each dramatization is accompanied by a description of the nature of the case presented to the deliberating jury.

#1

In a garden-variety possession to distribute heroin case in a large urban court, the jury heard 1 day of testimony from 3 prosecution witnesses and 1 defense witness. After 2 hours of deliberations, the jury sends its first note to the judge saying, "We are deadlocked. There is no way this group is gonna budge. Can we go home now?" In response, the prosecutor urges the court to tell the jury, "Take more time. There is no hurry. Keep trying to do your best to reach agreement." Defense counsel moves for a mistrial. What should the judge do?

#2

In the same trial as #1 above, the jury deliberates for another 3 hours. The bailiff brings to the judge a note signed by the jury foreperson and one other juror stating, "We are shouting at each other. One of the other jurors will not change her mind. She just sits there pouting. It is hopeless. Please let us get out of here." What should the judge do?

#3

In a complex, 60-count, fraud prosecution of several mortgage originators and lenders, the jury hears evidence from the government and 6 co-defendants over the course of 7 weeks. Both the prosecution and defense present several days of testimony from accounting experts. The trial judge took 2 hours to deliver her final instructions to the jury. Closing arguments spanned 2 days. One hour after jury deliberations began, the court received this note from a juror, "Oh my, this is confusing. We don't know where to begin. We are stuck in mud. What should I do?"

Responding Effectively -- Deliberating Juries With Questions or Claiming to be at Impasse

Practical Guidance:
A.B.A. Principles for
Juries & Jury Trials

“Deliberating jurors should be offered assistance when apparent impasse is reported.”

I. Problems with legal concepts.

II. Questions about evidence.

III. Mixed issues of law & fact.

What to do in response?

- **Consult with trial counsel.**
- **Repeat earlier instruction?**
- **Re-open the evidence?**
- **Further argument from parties?**
- **Seek clarification from jury?**
- **Arizona instruction?**
- **Do nothing more?**

Avoid a hung jury?

- Merits?
- Costs?
- Doing justice.

Why do Juries Hang?

- **Weak, competing evidence**
- **Case complexity**
- **Dysfunctional deliberation process**
- **Police credibility**
- **Views about fairness of the law**