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INTERIM REPORT OF THE COMMISSION ON THE JURY TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

June, 2004

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Interim Report of the Commission on the Jury

I. INTRODUCTION (by the Chair)

Each year, more than two million New Yorkers are summoned to participate in jury service. In responding to this call, citizens play a vital role in our democracy by participating directly in our system of justice, making decisions that significantly affect the lives of all of us. By law, every person in our State who is a citizen and state resident, at least 18 years of age, not a convicted felon and can understand and communicate in the English language, has a responsibility to participate in our jury system. For over two centuries, New Yorkers have discharged that obligation and, in so doing, have helped to preserve and promote our democracy for future generations. All citizens who report for duty and make themselves available for jury service deserve our thanks for the sacrifices they make, whether or not they actually sit on a case. They play an important role in our justice system simply by participating.

Just as it is the responsibility of citizens to report for jury service, so too it is the obligation of our court system to ensure that their time is well used. For over a decade, the State's Chief Judge, Judith S. Kaye, has made improvement of the jury process a high priority. At the same time, the Chief Judge has continually exhorted those involved in the jury system – lawyers, judges and administrators – to look for ways to improve the system, always asking, “Why can't we do better?”

In her State of the Judiciary Address in January 2003, the Chief Judge challenged us to answer the question, “How can we better utilize the time of our citizens who came into our courts to serve on juries?” In the face of considerable evidence that those citizens who actually serve on a jury and hear a case find the experience highly rewarding, why is it she asked, that so many prospective jurors – most of them qualified by law for jury service – never reach that point

in the process? In April 2003, the Chief Judge appointed the members of our Commission and charged us with finding the answers to these questions and with making proposals and recommendations aimed at increasing the level of juror satisfaction – a goal that benefits not only each citizen, but the justice system as a whole.

The members of the Commission on the Jury, twenty-nine people of diverse background and experience from different parts of our State, have spent the last year reading, listening, questioning and debating. As we searched for the answers to the questions put to us, the Commission found that there is no “smoking gun,” but rather a number of circumstances, by their confluence, serve to conspire to reduce the opportunity for New Yorkers to hear actual cases and make the experience for those who do serve a frustrating one. In an attempt to identify these “conspirators,” the Commission came to learn that legal, institutional and cultural factors all play a significant role in reducing the opportunity for service and discouraging potential jurors from serving.

This picture did not emerge immediately. During the course of its work, the Commission held seven public hearings throughout New York State, listening to the testimony of over 120 witnesses, each of them telling us, from his or her own perspective, the way the jury system has been conducted, should be conducted, or should not be conducted. Judges and attorneys spoke from their perspectives; non-judicial personnel who administer the system – from jury commissioners to clerks – gave us their view; and, most important, we were fortunate in obtaining the views of many citizens who had been called for jury service and either had served, or had not served, on a jury. We were privileged to have the opportunity to hear their views and are grateful for their voluntary participation in our effort.

So as we undertook our work throughout the year, we accumulated – like dots on a canvas – hundreds of bits of evidence. It was only as the canvas began to fill up that we found ourselves able to “connect the dots,” to see a clearer picture emerge of how the jury system is functioning, where problems still exist, and how improvement might take place.

Yet in performing our work, we were confronted with a number of obstacles. We learned that there is no unanimity of opinion as to where problems lie in the jury system, how severe they are, who or what is responsible for them, and how they should be addressed. Moreover, to the extent a consensus formed as to the existence of a problem and the appropriate solution, we were all cognizant of the fact that the State’s resources are finite and that it would take considerable thought and creativity to bring about improvement that would not unduly strain those resources.

We were also sometimes discouraged – but also encouraged – to find that many of the causes of dissatisfaction and frustration of those who participate in the jury process are matters not caused by lack of funds. We believe there are cultural factors that inhere in the system which stand in the way of efficient use of juror’s time and which need to be addressed. We identify these factors throughout our report.

During the course of our public hearings, we also became keenly aware of the differences in custom and practice in different parts of the State. In formulating our recommendations, we were respectful of these differences, and we sought not to recommend change simply for the sake of change. Similarly, we recognized that local administrators need to have a degree of flexibility to implement their jury system and that creative solutions should not be discouraged.

The members of the Commission were also aware of the tension between the ideal and the achievable. Yet we did not want the perfect to become the enemy of the good, and we hope we have achieved a reasonable balance between the two.

Finally, as the title of our report indicates, we have determined that, in our view, significant follow-up work remains after consideration is given to our conclusions and recommendations. We believe that the general principles we have identified, and for which we have made concrete recommendations for implementation, suggest the need to obtain additional information from officials in each county of the State and from others, to allow us to evaluate further the validity of our conclusions and to suggest specific changes consistent with our recommendations.

We could not possibly have undertaken a project of this magnitude without the skilled and informed assistance of many people. The Commission was able to obtain testimony and scholarly information from those who, as part of their profession, study the jury system. Within our court system, we received invaluable assistance from the Office of Court Administration. In particular, we wish to acknowledge the help of Chief Administrative Judge Jonathan Lippman, who was at all times available to respond to our questions for information and who ensured that all persons within our vast court system would understand the importance of responding to the Commission's requests for information. We also received constant and invaluable assistance from Wendy Smith Deer (Associate Counsel to the Chief Administrative Judge), Anthony Manisero (Chief Management Analyst), Elissa Krauss (Research Coordinator) and Chester ("Chip") Mount (Director of Research and Technology), whose experience in the operations of the jury system were so important in informing our inquiries and deliberations.

Finally, I would like to thank my partners at Piper Rudnick, who have provided gracious and limitless support for our project, and my associate, Carolyn Dizon, who devoted long hours to our hearings and other substantive and administrative aspects of our work.

New York City
June, 2004

Mark C. Zauderer
Chair,
The Commission on the Jury

II. SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

A. Reduce Unnecessary Juror Waiting Time

There is no circumstance that is more a cause of frustration and disillusionment among jurors than having to “hurry up and wait.” Waiting occurs at every stage of jury service. The Commission believes that that one of the highest priorities should be reducing juror waiting time, and it recommends:

- Requiring that court calendar parts start on time and that lawyers be required to report timely for calendar call.
- Procedures to ensure that meaningful settlement conferences occur in advance of trial.
- Requiring attorneys to appear promptly when directed to begin *voir dire* and to stay in the *voir dire* room through the completion of *voir dire*.
- Improving communication between court administrators and the commissioners of jurors.
- Requiring that, to the extent possible, all motions and conferences with the court relating to a pending trial be held at times when the jury is not waiting.
- Requesting that the Department of Corrections report, as promptly as possible, any delay in transporting incarcerated defendants to the courthouse, so that judges on trial may minimize any inconvenience to waiting jurors.
- In counties where feasible, staggering juror reporting times and permitting jurors to be on “2-hour” call either by beeper or by cellular phone.
- Having judges encourage litigants in civil cases to consent to a Participating Alternate System where all jurors (including alternates) deliberate and vote.

B. Improve Communication with Jurors

The frustration jurors experience is aggravated by frequent lapses in communication. Jurors can better tolerate the inconveniences that are inherent in jury service if they are shown the simple courtesy of being apprised of what is happening at each stage of the process. The court system should improve its communication with jurors, and accordingly the Commission recommends:

- Expanding the current information and education campaign targeted at all citizens, emphasizing both the importance and responsibility of jury service.
- Improving the summons that contains certain standardized information and regional information relevant to a specific locale.
- Providing jurors with materials in advance of their report date, advising them of any predictable circumstances that may cause inconvenience or delay and providing helpful information about their “downtime.”
- Informing jurors, to the degree permissible, why they are waiting.
- Informing jurors, in a meaningful way, that their service is important even if they are not chosen for a jury or if the case for which they were chosen settles.
- Providing all judges with suggested uniform comments to thank jurors in situations in which cases either settle or conclude with a verdict.
- Continued investigation of issues relating to disqualification or excusal of jurors due to inability to “communicate in and understand” the English language.

C. Improve Juror Yield Through Better Tailoring the Number of Citizens Called to the Number Actually Needed

Overcalling the number of jurors needed for jury selection necessarily reduces juror utilization. Not only does the practice generate “extra” jurors who are never reached or questioned by an attorney, but it contributes directly to juror dissatisfaction, because these jurors

feel as though they never participated meaningfully in the justice process and that their time is wasted. The Commission needs to gain a better understanding of this problem of overcalling in order to correct it, and therefore recommends:

- Administrative Judges should review panel sizes in consultation with the County Commissioner of Jurors and report their observations and conclusions. Specific areas to be considered are whether: (a) judges are overcalling simply to avoid the possibility of having to call a second panel; and (b) lawyers are overestimating the length of trial.
- The Office of Court Administration (“OCA”) should develop recommendations based on this information to assist all counties in better tailoring the number of citizens called to the number of jurors actually needed.

D. Involvement of Judicial Officers In Civil *Voir Dire*

The time has come for every juror in New York to identify with a judicial officer overseeing the *voir dire* process. New York is the only State that does not require a judicial officer to supervise *voir dire* in a civil case. Although some members of the Commission favor and would encourage it (and some judges perform this function as a matter of personal practice), the Commission does not recommend mandating that a judge be required to be physically present at all times during civil *voir dire*, in light of the current state of staffing and the facilities available in the courts, as a rule currently in place (22 NYCRR §202.33) requires that a judicial officer at least have some involvement in the jury selection process. However, it is not being universally followed. To ensure an efficient *voir dire* and an appropriate level of dignity to the process, the Commission recommends requiring meaningful compliance with Rule 202.33. In addition, the Commission recommends new guidelines and requirements for judicial officers participating in civil *voir dire*, including requiring that every civil jury to be selected shall have a judicial officer assigned to that case, and who, while not required to be present at all times, must carry out the following functions:

- Introduce the prospective jurors to the lawyers and the case;
- Make rulings relevant to the jury selection process;
- Be immediately available to resolve disputes between attorneys;
- Explain to the prospective jurors the importance of their service, even if they are not selected for that case;
- Resolve disputes about whether perspective jurors can judge fairly and fulfill the obligations of jury service and make such determinations in accordance with appropriate procedures, including interviews of the panel members;
- If not present, address immediately issues of requested excusals and challenges;
- Ensure that attorneys do not leave the *voir dire* room except for designated breaks;
- Wear robes at all times when meeting with prospective jurors; and
- Personally thank the jurors excused or dismissed from further service.

In addition, if a judicial hearing officer (“JHO”) is overseeing *voir dire* but a trial judge is assigned to the case, the judge should be available to meet with the JHO, attorneys and prospective jurors at appropriate intervals.

E. Education on *Voir Dire* for all Judicial Officers

Simply ensuring that a judicial officer participates in every civil *voir dire* is not enough. Jurors deserve to interact with judicial officers who uniformly compose themselves in a dignified manner; are cordial to jurors; are skilled in explaining ground rules for the conduct of an efficient and respectful *voir dire*; and are capable of resolving disputes or issues that may arise in the process. To ensure consistency in the quality of this process, the Commission recommends education on *voir dire* for all judicial officials. The curriculum should be based on input from both members of the Judiciary and the Bar, and should include instruction and dialogue on:

- The important responsibility the judiciary bears in representing the dignity of the judicial system;

- The importance of jury service;
- Demonstrating respect for jurors by minimizing juror waiting;
- The administration of rules relating to excusals (peremptories, challenges for cause, and monitoring consent excusals); and
- Methods of questioning prospective jurors to ascertain bias or prejudice and to avoid elimination of prospective jurors based on stereotyping or profession, or, as a result of unfocused questioning, inappropriate elimination of jurors who could be fair or impartial.

F. Mandatory Settlement Conferences In Advance of Jury Selection

Jurors should not be used as settlement tools. The Commission finds that when lawyers deliberately delay realistic settlement negotiations until after they see “the whites of the jurors’ eyes,” they are abusing the process, showing little respect for the jurors’ time and unnecessarily burdening the court system. To minimize this practice, the Commission recommends:

- Implementing the use of a “Part 1” Judge (as is currently used in Albany County) in all counties. The “Part 1” Judge is a judge trained in assisting the parties in achieving a rational settlement. A mandatory (or several mandatory) settlement conference(s) must take place before the parties are permitted to pick a jury.
- Requiring records to be maintained of when parties settle during or after the *voir dire* process, but before opening statements. These records should then be analyzed by OCA and the results reported to the Commission, to identify which counties are not sufficiently utilizing settlement conferences.
- Amending 22 NYCRR § 202.26(e), which currently provides that where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations or are accompanied by a person empowered to act on behalf of the party represented will be permitted to appear at a pretrial conference.

This Rule should be modified to make clear that a court may require an attorney, if the attorney does not have settlement authority, to bring or have available by telephone a person with such authority, specifically including third party payors such as insurance carriers.

- Creating a mechanism through which Judiciary Law § 2601 (which addresses unfair claims settlement practices and penalties) can be enforced. Currently, the law is not meaningful because there is no process in place to enforce it and because the maximum fine that can be imposed is not sizable enough to be a sufficient deterrent.

G. Investigate Issues Surrounding Use of Consent Excusals under CPLR § 4108

Every citizen who meets the qualifications to be a juror has the right to serve as a juror, although not necessary on any particular case. Any practice that can be used to prevent a juror from serving should be scrutinized. The Commission did not have sufficient evidence available to it to determine how consent excusals, which are explicitly authorized by CPLR § 4108, are being used. The Commission recommends that:

- OCA should continue to gather from each county quantitative and qualitative data (using Form UCS 114 and other forms, if necessary) about how many jurors are being excused on consent, whether these jurors are eventually sitting on other cases, and if the same jurors are excused on consent in every *voir dire*.
- OCA should then report to the Commission this information to assess the impact consent excusals have on, *inter alia*, juror yield, reasons for excusals (if such data can be obtained), and “recycling” of excused jurors.
- The Commission will thereafter examine the data and determine if any recommendation should be made relating to consent excusals.

H. Expand the Use of Juror Questionnaires to Facilitate More Efficient Oral Questioning During *Voir Dire*

Information that attorneys require from prospective jurors should be gathered in the most efficient and respectful way possible. Jurors are particularly resentful if they are forced to sit through hours of seemingly irrelevant or repetitive questions. Moreover, jurors often consider the information that attorneys seek to be private or embarrassing. In consideration of the jurors’ time and privacy, the Commission recommends:

- Creating expanded, more meaningful written questionnaires for civil cases.
- Providing questionnaires to the jurors earlier in the process in civil cases (and in criminal cases, if the trial judge has decided to use questionnaires).
- Permitting attorneys sufficient time to review the questionnaires before *voir dire* in civil cases (and in criminal cases, if questionnaires are used by the judge), by having the judge communicate to the clerk at the juror assembly room whether the judge or attorneys in the case desire to review the questionnaires in advance of the jurors being brought in for *voir dire*.
- In civil cases, advising on the questionnaires that any item the juror does not wish to discuss in the presence of other jurors, due to its sensitive nature, be identified, so that the juror will have the opportunity to discuss that issue in private (and in criminal cases, with only the judge, counsel, the defendant and the court reporter present).

I. Provide Services and Better Amenities to Jurors

Jury service, although a privilege and a duty, is also often a burden. The court system, in appreciation of jurors' service, should do everything feasible to make jurors' lives more comfortable. To achieve this goal, the Commission makes the following recommendations:

- Where feasible, providing services such as mammograms, prostate cancer screening, blood pressure screening and Department of Motor Vehicle services. Jury Commissioners for each county should report to the Commission where such services are being offered successfully and the requirements relating to expense and necessary facilities. However, jurors should not be subjected to pressure to avail themselves of such services.
- Offering internet access in every facility where practical. Jury Commissioners for each county should assess and report to the Commission the feasibility and costs of offering such services and what facilities are needed.
- Exploring with local government and transportation authorities the feasibility of providing free juror parking and public transportation passes for jurors.

J. Making Jury Service More Desirable

We are best served by jurors who, rather than seeking to avoid service, view it positively and even are eager to answer the call. To achieve this goal, in addition to enhancing the amenities and services available to jurors, the Commission recommends:

- Extending the period of time before being called for jury service for citizens who have actually served on a trial (defined for these purposes as actually having been picked for a jury panel, as opposed to being excused and not chosen for any panel).
- Adopting a sliding scale for the length of time between successive calls to jury service (i.e., the longer the trial, the longer the interval).
- Enhancing communication with employers regarding their rights and responsibilities to their employees who participate in jury service.

K. Consider Juror Privacy Concerns

Juror privacy is a concern of both potential jurors and the judicial system. Particularly in light of media attention to jurors in recent high-profile cases, it is important that jurors do not fear that the press will bring scrutiny to their personal lives that may have an impact on their willingness to serve, their candor in revealing personal information, and their ability to deliberate free of apprehension. The Commission intends to undertake additional research on this issue and make further recommendations.

III. THE SCOPE OF THE WORK OF THE COMMISSION

The Chief Judge's State of the Judiciary address in January 2003, followed by a press release in April announcing the membership of the Commission, provided the starting point for our work.¹ Central to this latest phase of the Chief Judge's continuing jury reform efforts was

¹ "Chief Judge's Appointment of New Commission Marks Start of Second Phase of Jury Reform in New York," OCA Press Release, April 9, 2003, www.jurycommission.com/press1.pdf.

her observation that, “It is disconcerting to learn that so many New Yorkers reporting for jury service never have the opportunity to participate in a jury at all, but for one reason or another, are dismissed at the *voir dire* stage.” The Chief Judge alluded to the fact that, as our research bears out, people who actually serve on a jury generally report a high degree of satisfaction, as contrasted with those who participate in the process and are excused from service, often without even seeing a judicial official. This situation not only fosters cynicism about jury service and the legal process generally, but it serves to obscure the fact that jury service is both a responsibility and a privilege of citizenship. Moreover, as the Chief Judge observed, calling hundreds of thousands of citizens to jury service each year – most of whom never serve on a case – results in a significant waste of money for the State, and it imposes both a personal and financial burden on those who are called.

As part of its research, the Commission held seven public hearings from June 2003 through November 2003 in the counties of New York, Nassau, Albany, Onondaga, Erie, Bronx and Kings.² The hearings were widely advertised, with notices published in various periodicals and posted in courthouses statewide. The Commission reached out to all stakeholders in the jury system, including Bar associations, the business community, the court system and former jurors. Letters were sent and telephone calls were made to over 3000 jurors who had served during the past three years to solicit their views about their experiences. Ultimately, over 120 witnesses testified at these hearings, including lawyers, judges, jury commissioners, court personnel, experts, academics, and, most importantly, former jurors.

² Complete transcripts are available at www.jurycommission.com.

The Commission also created a website at www.jurycommission.com, which is directly linked to the New York State Courts web page, to gain the attention of people who had previously been called as jurors or who might want to have their views known. Through this website, citizens were advised of the formation of the Commission and the scope of its work, could read transcripts from past hearings and register to speak at future hearings, and could submit observations and recommendations to the Commission. The Commission also reviewed many scholarly materials and reports of other groups interested in the jury process, as well as statistics on juror utilization in the 62 counties in New York State. A list of the materials made available to members of the Commission is attached as Appendix A.

IV. HISTORY OF JURY REFORM

The Commission's work needs to be placed in context with what has already been achieved. Modern jury reform in the State began in September 1993, with the Chief Judge's formation of a 30-member, broad-based task force, *The Jury Project* which was chaired by now U.S. District Judge Colleen McMahon. With so many New Yorkers summoned annually – many of them highly dissatisfied with their experience – the Jury Project was an important effort and produced a report that became a blueprint for significant reforms.

In the decade since that report, judges and administrators in the court system, with the cooperation of the executive and legislative branches, the Bar and others, have worked hard to institute many of the Jury Project's recommendations. This section briefly reviews the Jury Project's suggestions and the accomplishments already achieved.

Source Lists. The Jury Project concluded that New York was well on its way to maximizing the inclusiveness of jury pools by the use of multiple "source lists," that is, the lists

from which jurors are chosen.³ However, the long list of automatic jury exemptions in the Judiciary Law⁴ created substantial inequity, deprived the State of the service of approximately one million citizens, and was a cause of resentment for millions more. At the recommendation of the Jury Project, all automatic exemptions and disqualifications were abolished in 1995. In addition, the court system's practice of using Permanent Qualified Lists was ended.⁵ These two accomplishments alone resulted in the availability of many more jurors with fresh perspectives. In turn, individuals could be summoned less frequently and the composition of juries became more reflective of the community.

Juror Response and Enforcement. Individuals often need to defer their jury service. While deferrals had long been routinely granted, policies varied widely from county to county. Some counties allowed only one or two automatic deferrals; others permitted five or six. Recognizing that such inconsistent practices did not foster public respect for the system, OCA standardized deferral practices to balance juror convenience, fairness and the needs of the court system.

The Jury Project also concluded that the failure of many New Yorkers to return questionnaires or respond to summonses negatively impacted on both the availability of jurors and possibly even the representativeness of venires.⁶ As a result, New York's 62 counties now

³ The Jury Project, Report to the Chief Judge of the State of New York, March 31, 1994, at 3-21.

⁴ Jud. L. §§ 511, 512 (Repealed. L. 1995, c. 86, §§ 4, 5, eff. Jan. 1, 1996).

⁵ Counties compiled lists of qualified jurors roughly equivalent to the number needed for a jury summoning cycle, with new names added only when a person on the list died, moved or became disqualified.

⁶ A "venire" is the group of citizens from whom a jury is chosen in a particular case. See Jury Project at 42.

employ high-tech procedures to follow-up with citizens who do not respond. Aggressive local efforts to secure responses have also proven successful.

Terms and Frequency of Service. Prior to 1993, terms of service varied widely across the State, ranging from two weeks to “one day or one trial” (i.e., a juror would be released after one day of service unless selected for a jury or involved in an ongoing jury selection proceeding). Presently, the court system generally adheres to the goal of one day or one trial. Of the 62 counties statewide, 60 have now achieved this goal. The two remaining counties (New York and Bronx) have substantially reduced the terms to two days or one trial.

Statewide, the standard for frequency of service is uniform. Jurors serving 10 days or fewer may be summoned again after four years; those serving more than 10 days (those who hear longer, more involved trials) are deemed disqualified for eight years.⁷ An exception to this rule obtained in the Town and Village Justice Courts, where service did not count toward the periodic exclusion from re-summoning, and those serving there were often called again for service in another court in the county. In 1998, the Judiciary Law was amended to award credit for jury service in these Courts.⁸

⁷ See generally, Jud. L. § 524; 22 NYCRR §§ 128.8 (a) - 128.9(b).

Section 128.8(a) provides in pertinent part that, “the duration of a juror’s service shall be computed by counting the first day on which the juror is required to appear and each consecutive day thereafter, excluding days in which the court is not in session, until the juror is released from service. The commissioner of jurors may release a trial juror from service at any time, except that a trial juror who has been sworn or selected to sit on a panel in a proceeding may be released before the proceeding is terminated only by a judge or justice.”

Section 128.9 of the Rules, entitled “Frequency of Service,” states in pertinent part that “[a] person who has served on a trial jury or grand jury in any court of record within the state, including service as set forth in section 128.8 of this Part or service in a federal court, is disqualified from further jury service, pursuant to section 524 of the Judiciary Law, for four years ... For purposes of this subdivision, jury service shall include service in the court and telephone standby service” (22 NYCRR § 128.9 (b)). See also *People v. Wynter*, 95 N.Y.2d 504 (2000) (citizen ineligible for future jury service for at least four years subsequent to last day of prior jury service).

⁸ Jud. L. § 524 (a).

Jury Selection. As the Commission learned through its own fact-finding, the most common citizen complaints involved time wasted during the jury selection process, primarily in civil cases. Many jurors told similar stories to the Jury Project in 1994: *voir dire*s that dragged on for days or weeks without judicial supervision; boring and repetitive questions by attorneys; frequent, unexplained delays and interruptions; and settlement of cases immediately after jurors endured the tedious, time-consuming process.⁹

The Jury Project concluded, “Something is wrong with civil jury selection in New York, and something can and should be done to improve it.”¹⁰ As a result of the Jury Project’s recommendation, a Civil *Voir Dire* Study was conducted in 1994 by 55 judges in four court locations over a four-month period.¹¹ Following the completion of the project and a public comment period, the Administrative Board of the Courts adopted new rules on the conduct of *voir dire* in civil cases, drawing on the data compiled by the study as well as the public comments received.¹² These rules, effective in 1996, sought to enhance the efficiency and dignity of the selection process, by:

- Instituting mandatory settlement conferences immediately before jury selection to discourage use of jurors as a “settlement tool”; and
- Requiring participation of a judge at the commencement of *voir dire* and throughout selection, at the judge’s discretion.

These rules initially had a demonstrable impact on the length of civil *voir dire*, with the Statewide average length of civil jury selection dropping nearly 50 percent in four years.

⁹ Jury Project at 50.

¹⁰ Jury Project at 51.

¹¹ Details of this pilot project and study can be found in New York State Unified Court System, Report on The Civil *Voir Dire* Study, Hon. Judith S. Kaye and Hon. E. Leo Milonas, June 1995.

¹² See generally, 22 NYCRR § 202.33.

However, it appears that the average length of selection has plateaued¹³ and that, as discussed later in this report, many significant problems remain.

Lawyer-jurors who began to serve in greater numbers after elimination of occupational exemptions echoed the concerns and frustrations of lay jurors, complaining of two- and three-day *voir dire*s for cases that could be tried in a single day and of lawyers who needlessly prolonged the process through insensitivity or sheer incompetence. In response, Chief Judge Kaye appointed a committee of lawyers to examine ways to enhance the jury process. Based on a random mail survey of New York lawyers and judges¹⁴ and additional fact gathering, the Committee of Lawyers to Enhance the Jury Process recommended in its 1999 Report that:

- Judicial oversight of *voir dire* be increased.
- Judges scrutinize the use of consent excusals to identify and eliminate any abuse.
- The practice of “jury stacking” be abolished.¹⁵

Peremptory challenges¹⁶ have also been closely scrutinized over the last several years.

The Jury Project found that the number allowed in civil cases under New York’s statute¹⁷ exceeded nationally recommended standards, lengthened the *voir dire* process, increased the

¹³ Civil Voir Dire Process Executive Summary, OCA Department of Research and Technology, 2d Quarter 2003, September 19, 2003. See also Jury Reform in New York State: A Progress Report on a Continuing Initiative, OCA, October 1996 at pp. 10-11; Jury Reform in New York State: A Second Progress Report on a Continuing Initiative, OCA, March 1998, at pp. 10-11.

¹⁴ The survey was sent to 5,255 lawyers and judges; 42 % replied. Further details regarding the committee and its work can be found in its 1999 report. Report to the Chief Judge and Chief Administrative Judge, Committee of Lawyers to Enhance the Jury Process, January 1999.

¹⁵ Jury stacking is the practice of sending out more civil cases for jury selection than there are judges available to try them. Once selected, a panel is told to return to hear the case at some point in the future, often two or three weeks later. See Jury Project at 81-83.

¹⁶ Peremptory Challenges are challenges made during *voir dire* to excuse a potential juror from a panel without any given reason.

¹⁷ CPLR § 4109 (Amended L. 1996, c. 655, § 1) (Three per party, plus on additional for each alternate juror). See also Jury Project at 70.

number of individuals required to be summoned, and increased the possibility that challenges could be used to exclude prospective jurors on the basis of race or some other impermissible reason.

In 1996, the number of peremptories in civil cases was reduced from three per party to three per side, with one challenge allowed for every two alternates. This statutory amendment also authorized judges to increase the number of peremptories per side when deemed appropriate, and in cases in which a side has two or more parties, to allocate the side's combined total challenges among those parties.¹⁸

New York permits an unusually high number of peremptory challenges in criminal cases.¹⁹ The Jury Project, in recommending reductions in the number of peremptories, found this to be the “one noteworthy exception” in concluding that the system for jury selection in criminal cases works well. To date, the number of peremptories remains unchanged. As is discussed later, there was a sharp difference of opinion within this Commission as to whether reductions should be recommended for criminal cases.

Jury Stacking. Concluding that the practice of jury “stacking” was a “disaster for both jurors and litigants,”²⁰ the Jury Project recommended it be abolished. In response, the Chief Administrative Judge promulgated the “five-day rule,” which authorizes the disbanding of any jury panel if the trial is not commenced within five days of the panel's selection.²¹ Courts also

¹⁸ CPLR § 4109.

¹⁹ CPL § 270.25 (Each party receives twenty for Class A felonies, fifteen for Class B and Class C felonies, ten for Class D and Class E felonies). See also Jury Project at 64-70.

²⁰ Jury Project at 81.

²¹ 22 NYCRR § 128.8(a).

adhere to the long-standing practice of having no more than one jury on trial, one being selected and one “waiting to pick” for each available judge in an effort to avoid “stacking.”

Communication with Jurors. Good communication with jurors is critical to New York’s ongoing jury system reform. Educating and informing jurors about jury service makes their experience more meaningful, while juror feedback helps the court system monitor and evaluate its own performance. The Jury Project recognized, as does this Commission, that the best information about the actual functioning of the jury system comes from jurors themselves.

The first exposure a juror has to jury service is the receipt of the qualification questionnaire and the jury summons. Substantial strides have been made in updating and streamlining. For example, an antiquated multi-part summons complete with carbon inserts was replaced with a clear, readable, laser-printed mailer that incorporates a scannable juror identification badge. Both of these forms continue to be works in progress.

Promoting understanding of the jury system and the importance of the juror’s role is a critical element of jury reform. A concerted effort has been undertaken to increase and improve the education of the public about the jury system and service. Achievements include:

- Juror Appreciation Week;
- Production of a juror orientation video;
- Distribution of a Juror’s Handbook (which answers frequently asked questions, defines trial and jury-related terms, and includes a statement of juror rights and responsibilities);
- Publication of a juror newsletter, “Jury Pool News” (to inform jurors about recent developments in jury serve and generally acquaint them with court operations);
- Creation of a juror website (www.nyjuror.gov) to provide valuable information about jury service, which receives between 25,000 and 30,000 visits per month;

- Creation of a toll-free juror hotline for comments, inquiries and complaints; and
- The launch of an internet site providing all the information available in print.

New York frequently benefits from partnerships with nonprofit groups interested in jury improvement. The Citizens Jury Project, launched in 1994 in cooperation with the Vera Institute, provides information and assistance to jurors and is a fertile resource for juror comments and suggestions. Cooperation between the Citizens Jury Project and the court system continues today and has brought about substantial changes to the administration of the jury system.

Other improvements. Two of the most notable recent reforms include the increase in juror fees from \$15 to \$40 per day and the elimination of automatic sequestration of deliberating juries, which was previously mandated by law in every criminal case. In addition, for jurors' convenience, many Commissioners' of Jurors offices have extended hours and expanded toll-free telephone line services and voice-mail services. The Jury Project also made several findings and recommendations with respect to juror facilities, training of nonjudicial employees charged with Jury service duties, and maintaining a proper balance between a party's right to know about prospective jurors and juror privacy, many of which were implemented.

V. WHERE HAVE ALL THE JURORS GONE?

There is no question that the vast majority of New Yorkers called for jury service do not end up sitting on a trial. In this section, the Commission explores both the institutional and cultural reasons that account for the large "drop-off" or, in the term used by professionals who study the jury system, the low "jury yield" that prevails in our courts.

The jury system in New York is administered locally in each of the state's 62 counties by the County Commissioner of Jurors.²² Commissioners are responsible for the day-to-day operations of the jury system, including:

- Qualification and Summoning of jurors;
- Service: Attendance, Orientation, Panel Selection, and Payroll; and
- Compliance matters.

OCA supports local efforts in many ways, including administration and maintenance of a statewide automated Jury Management System, assistance with Source List compilation, production and distribution of forms, providing informational and other materials, and overseeing training for Commissioners and their staffs.

Source Lists. The Judiciary Law provides that all litigants shall have the right to a jury “selected at random from a fair cross-section of the community in the county . . . wherein the court convenes; and that all eligible citizens shall have the opportunity to serve” on a jury.²³ It also provides that the sources of names for potential jurors shall include voter registration lists, licensed operators and registered owners of motor vehicles, state and local taxpayers, and others.²⁴

OCA supports the Commissioners by administering the source list process. Each year, OCA compiles information from the voter registration, driver's license, state income tax, Department of Labor and Department of Family Assistance lists, as well as an Automated Jury

²² Jud. L. § 502.

²³ Jud. L. § 500. See generally, U.S. Const. Amend. VI; Taylor v Louisiana, 419 U.S. 522 (1975); NY Const., Art. I, § 1; Civil Rights Law § 13.

²⁴ Jud. L. § 506.

File²⁵ to create a single source list. Before duplicate names are eliminated, the combined size of the list is approximately 29,276,000.²⁶ The list is standardized, addresses are corrected, and duplicates, deceased persons, non-residents and those known to be under 18 years of age are eliminated. The result of this process is the prospective list, approximately 5,980,000, the source from which all Commissioners obtain names through a random selection process of jurors in their locality. See Appendix B (diagram illustrating source list process).

Qualification. Pursuant to the Judiciary Law, jurors are qualified for service by their local Commissioner based on information provided on the juror's confidential qualification questionnaire.²⁷ In order to qualify as a juror a person must:

1. Be a citizen of the United States, and a resident of the county.
2. Be not less than eighteen years of age.
3. Not have been convicted of a felony.
4. Be able to understand and communicate in the English language.²⁸

Based on need, each local Commissioner requests qualification questionnaires, which OCA mails directly to jurors. Statewide, approximately 4 million questionnaires are mailed annually. Of those receiving the questionnaires, between 25% and 50% qualify for service, depending on the county. See Appendix C (chart on response and qualifications rates in certain counties). Disqualification of the remaining 50% to 75% occurs for many reasons, e.g., the

²⁵ The UCS Automated Jury File includes the names of persons eligible to be called for jury service under the statute, but who have either recently served and are statutorily barred from being called again for a prescribed period of time or have been permanently disqualified. (See Qualification and Service sections, infra.)

²⁶ In the year 2003, the distribution was: Voter 9,792,256; Driver 10,724,092; Tax 8,090,969; Labor 382,711; Human Resources 285,652. OCA Office of Court Research, March 9, 2004.

²⁷ Jud. L. §§ 509; 513.

²⁸ Jud. L. § 510.

recipient is a non-citizen, a convicted felon, unable to understand and communicate in the English language, a non-resident, not yet 18 years of age or disqualified for recent service (either in the last 4 or 8 years). Some questionnaires are returned to the court as undelivered.

Jurors who respond can do so in a variety of ways, including by telephone and through the state's jury internet site. Responding jurors are generally determined to be qualified or disqualified.²⁹ OCA then updates the records in the automated Jury System accordingly. See Appendix D (diagram illustrating qualification process).

Summoning. Commissioners call jurors in their county by service of a summons specifying the place and time that the individual is expected to report.³⁰ Each Commissioner orders summonses from the automated qualified list created by compilation and review of the returned qualification questionnaires. Based on their experience, Commissioners project the number of jurors they will likely use in the upcoming three weeks, based on the court's calendar and the nature of the cases. Unlike the questionnaires, the summonses are printed and mailed directly from the local Commissioners' offices. The state court system, through the local Commissioners, sends approximately 2 million summons for jury service annually.

Upon receipt of the summons, a juror who responds will either postpone service, be excused or disqualified, report and serve, or report but not serve if he or she is not needed. Approximately 40% of those individuals sent summonses – 800,000 potential jurors – are ultimately available to serve. See Appendix E (chart on summoning rates in certain counties). The remaining 60% – 1,200,000 potential jurors – are unavailable to serve for myriad reasons,

²⁹ Follow up notices are sent to those jurors who fail to respond and, eventually, may be subject to discipline (i.e., summoned to appear at a compliance hearing. See generally, Jud. L. § 527).

³⁰ Jud. L. § 516.

including excusals, postponements, and disqualifications which either were not identified when the individual was originally qualified, or the particular circumstance did not exist at the time the determination of qualification was made.³¹ Some potential jurors are not “captured” by the system due to their failure to respond.

All jurors who, for any reason, do not satisfy their jury service requirement will be re-summoned at a later date, unless permanently disqualified. As with those who do not respond to the questionnaires, those who do not respond to the summons will be sent additional summonses and may be subject to discipline after a compliance hearing.³² See Appendix F (diagram illustrating summoning process).

An option now available to jurors is to fulfill their service obligation by being “on-call.” When a juror is on-call, the summons directs the juror to check the status of his or her service on the automated jury system via the internet or by telephone. The Commissioner determines how many potential jurors will be needed each day and requests that number of jurors to report by posting a range of jury numbers on the automated system. The jurors call each night to determine if their “number is up” and therefore must report. If a juror participates in the on-call system for the required time period but is never asked to report – that is, the juror’s number is never posted on the automated system – that person is credited with good service and entitled to

³¹ Exclusions from jury service may occur for one of four reasons: (1) A juror may not be qualified under the law (Jud. L. § 510) and this fact was not determined from the information on the juror’s qualification questionnaire; (2) a juror may be exempt from service, e.g., they have served within the past four or eight years, depending on the particular circumstance; (3) a commissioner or the court excused a juror upon application of the juror pursuant to the provisions of Jud. L. § 517 [c]; and (4) a juror may postpone or defer jury service pursuant to the provisions of Section 517 of the Judiciary Law. Upon timely application (which can be by telephone), each juror is allowed one postponement or deferral if he or she has not been previously postponed or excused and the postponement or deferral is to a date certain not more than six months from the date of the application. (Jud. L. § 517 [a][1, 2]).

³² See generally, Jud. L. § 527.

the four-year exemption. Approximately 200,000 (or 25%) of the total number of potential jurors available to serve (800,000, or 40% of total summonses sent) who participate in this on-call practice are not required to report to the courthouse.

Service. The Judiciary Law expressly provides that all eligible citizens have an obligation to serve on a jury when summoned, unless excused.³³ The law further provides protections for jurors from retaliation by employers for their absence from work and for juror compensation.³⁴

Terms of service vary between counties in the City of New York and all other counties. In New York City, jurors serve one, two or three days or one trial.³⁵ Jurors in all other counties serve one week in the on-call status and under the one day/one trial guidelines.³⁶ Statewide, the standard for frequency of service is uniform: jurors serving 10 days or less are subject to being summoned again after four years; those jurors serving more than 10 days are deemed disqualified for eight years.

Annually, approximately 600,000 potential jurors actually cross the threshold of the State's courthouse doors for jury service. Upon arrival, these citizens report to the Juror Assembly Area or directly to a courtroom in counties that do not have an assembly room. Generally, this dedicated space is sufficient to accommodate all jurors summoned that day and is equipped with basic amenities such as seating, water coolers, rest rooms and a desk staffed by court personnel. While at jury assembly, the jury commissioner's staff will take attendance,

³³ Jud. L. § 500.

³⁴ Jud. L. § 519.

³⁵ See Jud. L. § 525(d).

³⁶ Id.

conduct further qualification and language screening, answer juror questions, entertain juror requests for excusals, postponements and deferrals and conduct juror orientation.

In some, but not all counties, orientation begins with a greeting by a judge and includes a discussion of the jurors' service and their importance. Jurors view a short film describing the history and process of jury service, what they should expect during their tenure, and reiterating the value of their service. Jurors also receive information on payment of the juror fee and the term and frequency of service. See Appendix G (diagram illustrating functions of jury assembly area).

When a case is ready for trial and a jury must be selected,³⁷ a panel will be randomly chosen from those jurors waiting in the jury assembly. Panel size guidelines adopted by the Chief Administrator of the Courts in 1990 continue as the only written criteria for maximum initial panel sizes statewide, although over the past 14 years, particularly for criminal juries, these guidelines are often exceeded. The size of the panel is determined by a number of factors, including the nature of the case (civil or criminal, and in the latter case, the degree of the charge), whether the court is within or outside the City of New York, and other variables related to the length and complexity of the trial.

Once the panel is randomly selected, the jurors report to a location determined by the jury staff (a courtroom or empanelling room), where the jury selection process is commenced. See Appendix I (chart of number of *voir dire*s commenced in and outside of New York City in 2002). If an excessive number of jurors has been empanelled for a *voir dire*, many may never even be reached for questioning, which results in juror underutilization.

³⁷ See Appendix H (diagrams illustrating scheduling of criminal and civil trials, applicable to cases that are not assigned for all purposes to a particular judge).

By statute, a *voir dire* in a criminal case is conducted under the full supervision of a judge and the mechanics of that process are largely prescribed.³⁸ The relevant statute provides, in part, that the court shall place twelve members of the jury panel in the jury box for questioning after they are sworn, that the court shall commence the questioning and then shall allow each party, beginning with the People, to question the jurors.³⁹ The protections offered in Article 270, in large measure, exist to protect the constitutional rights of the defendant.⁴⁰ See Appendix J (flowchart of criminal *voir dire* process).

Unlike criminal cases, it is not the general practice in civil cases in New York to have the judge conduct the *voir dire* – or even be present throughout the entire process.⁴¹ See Appendix K (flowchart of civil *voir dire* process). Indeed, the mechanics of the conduct of *voir dire* in civil matters is largely unaddressed by statute.⁴² While judicial officers are required under the Rules of the Chief Administrator to “preside at the commencement of the *voir dire* and open the *voir dire* proceeding,” it is within the judicial officer’s discretion whether he or she remains to preside over part or all of the remainder of the process.⁴³ The statutory silence on this issue and differing perceptions of the success or failure of the current attorney-conducted civil *voir dire* system generated extensive testimony before the Commission on the wisdom of this practice.

As a result of *voir dire*, a juror is either included as a member of the jury or excused. If excused, in larger counties, the juror usually is asked to return to jury assembly for possible

³⁸ CPL § 270 *et seq.*

³⁹ Id. at § 270.15 (1).

⁴⁰ See generally, NY Const. Art. VI, § 18(a).

⁴¹ A party may make an application for the judge to be present. CPLR § 4107.

⁴² See generally, CPLR Article 41 – Trial by a Jury.

⁴³ 22 NYCRR § 202.33(e).

inclusion in a second (or third) *voir dire* panel. In smaller and medium sized counties, jurors may be given credit for service and excused after participating in a single *voir dire* panel.

The “82% Problem”

The Chief Judge, in her 2003 State of the Judiciary Address, noted that 82% of New Yorkers who are called for jury service – 494,000 out of 600,000⁴⁴ – do not sit on a trial. The Commission looked at this statistic and learned that the actual number who do not “sit” on a trial would be either higher or lower, depending upon the benchmark used for defining when a juror is deemed to have “sat” on a trial. In arriving at the 82% figure, OCA, which compiled the relevant data, focused on the last year preceding the commencement of our work, 2002, and defined “sitting” on a case slightly differently for criminal and civil cases. In criminal matters, jurors were included among those who had “sat” as jurors if they had reached the point of participating in a *voir dire* and had been sworn in (even though they had not yet heard opening statements or testimony).⁴⁵ In civil cases, jurors were deemed to have “sat” only if they were sworn in and actually heard opening statements or some testimony at the trial. Using this methodology, the 82% figure was arrived at, taking into account on a weighted basis both criminal and civil cases.

If one were to consistently include in the percentage of citizens who are not defined as having “sat” on a case those who never actually heard an opening statement or testimony (as was done in civil cases), the 82.3% figure would increase to 82.5% (because excluded from having “sat” would be a small number of jurors in criminal cases who, while sworn in, never heard

⁴⁴ 494,000 divided by 600,000 is 82.3%. See Appendix L (chart showing calculation of 82%).

⁴⁵ In criminal cases, the number of sworn jurors who do not actually sit is relatively small. At that stage, guilty pleas – which abort the trial – terminate only a small percentage of cases. By contrast, in civil cases, settlement after jurors are sworn, but before testimony begins, are commonplace.

testimony because the matter ended in a plea before the start of testimony). On the other hand, if one were to adopt a definition of “sat” in civil cases in the way it is defined for criminal cases (a juror has “sat” if he or she has been sworn, even if a case later settles before testimony is heard), then the statistic for those who have not “sat” would be slightly lower (77%).

What is apparent is that, however calculated, the number of citizens who walk through the door of our courthouses and who are qualified by law for jury service – and who do not actually “sit” – is extremely high. The Commission believes it has identified – although it can not quantify the contribution of each to the percentage of those who do not serve – the factors that account for the drop-off.

First, many jurors who show up for jury service seek deferrals or excusals at the courthouse prior to being sent to a panel due to personal hardships (e.g., primary care-giver for dependents, illness, or irreconcilable scheduling conflicts). Others may be excused because they cannot “understand and communicate in the English language.”⁴⁶ Another category of jurors who make up the 82% are those who, due to overcalling, are never sent to a panel.⁴⁷ Even after being sent to a panel, a significant number of jurors are excused from that panel (but not necessarily from jury service) through peremptory challenges, consent excusals, and challenges for cause. In addition, there are often a number of jurors who, although chosen for the venire, are never reached or questioned during the *voir dire*.⁴⁸ Finally, in civil cases, there may be jurors

⁴⁶ This may occur upon a determination by a clerk before the juror is sent to a *voir dire* or by a judge during the *voir dire*.

⁴⁷ An OCA pilot study revealed that 10-15% of jurors who actually report are never chosen for a venire or reached during a *voir dire* process. OCA Study, Office of Court Research, March 9, 2004.

⁴⁸ See id.

who are dismissed after having been sworn for a case because the case settles after the completion of *voir dire*, but before the trial commences.⁴⁹

OCA statistics gathered to illustrate the “drop-off” in a typical criminal case present a good “snapshot” of the issue. In the first three months of 2004, on average, a panel of 77 jurors was convened to seat a jury of 14 persons (including alternates) for Class B and Class C felonies. (Even greater numbers are needed for Class A felonies; the statute provides for 20 peremptories per side for Class A felonies, 15 for Class B and C felonies and 10 for Class D and E felonies). On average, 16 of these jurors are excused for cause or on consent;⁵⁰ and 21 more are “excused.”⁵¹ Nineteen (19) persons are excused through the exercise of peremptory challenges; and 7 are never reached (i.e., as it turns out, were “overcalled”).

These statistics, while useful, can not be viewed as precise. On the one hand, they do not take into account the numbers of jurors who subsequently “drop off” after being processed as jurors (and qualified) for reasons such as personal hardships or language difficulties. On the other hand, these statistics can mask a certain amount of “recycling,” as some who are not chosen during one *voir dire* may be subsequently chosen to serve on another trial.

Although precise statistical data can not tell us by just what percentage each reason for excusal contributes to the overall “drop-off,” the fact is that, however one looks at it, most legally qualified New Yorkers do not end up hearing a trial. In addition to needlessly burdening citizens, the process of calling so many jurors who do not actually sit produces a significant waste of taxpayer money. The administrative process of maintaining and updating the source list

⁴⁹ Some loss occurs in criminal cases after the panel is sworn as the result of pleas. However, it is far less significant than in civil cases, which often settle after jury selection.

⁵⁰ OCA statistics do not separate these two categories.

⁵¹ Again, OCA data compilations do not provide a breakdown.

costs approximately \$210,000; the qualification process costs approximately \$7.68 million; and summoning of jurors costs approximately \$7.048 million. An additional \$28 million is spent on juror fees and the attendant administration costs. In total, the jury system costs approximately \$42.9 million per year. Calling many thousands of New Yorkers each year who end up not sitting on trials results in unnecessary expense to the State in terms of increased administrative costs and juror pay.

Many Other Factors Affect “Juror Yield”

While it was central to our mission to undertake a review of the processes that lead to the low “yield” of jurors who serve on a trial, it soon became evident to us that the mechanics of jury selection alone can not fully explain this phenomenon. During the course of its work, the Commission heard evidence of negative attitudes toward jury service. Just what impact this has on juror yield is impossible to determine. Judges and lawyers, while skilled at ferreting out information that would disqualify a juror for “cause” or prompt exercise of a peremptory challenge, are not mind-readers. No lawyer wants to seat a juror who expresses resentment about the prospect of serving. Dissatisfaction produces negative juror attitudes, which, in turn, leads to an unnecessary (and unquantifiable) elimination of many prospective jurors, either because they doggedly seek excusal or, in some cases, feign partiality, so as to be excused.⁵²

Some judges and lawyers contribute to this situation by their own inattentiveness to the legitimate needs of the jurors to be informed at each step of the process and to have their time well used. While many judges and lawyers conscientiously attend to jurors’ legitimate needs,

⁵² Not only is it the task of the judges and lawyers to ensure that each juror can be fair and impartial, but the law requires that in a criminal case, the prospective juror must be unequivocal in assuring the Court of his or her ability to be fair.

others are seemingly indifferent to them. For example, the Commission was advised of such circumstances as judges not calling calendars on time, lawyers not appearing in the calendar part on time, and lawyers leaving the *voir dire* room in the middle of jury selection to attend to other matters.⁵³

Another feature that is virtually unique to New York – and particularly prevalent in the downstate areas – is the practice of “jury stacking.” Essentially, this is the process of picking more juries than there are judges actually available at the moment or expected to be available to try a case. This practice was thoroughly examined and criticized in the Jury Project Report.⁵⁴ When questioned about it, many judges and lawyers upstate offered the view that it is highly objectionable and would not be tolerated in their locales. Yet the practice has been vigorously defended by some court administrators and lawyers, particularly in the New York City metropolitan area, who argue that not picking a jury until the judge is ready to try a case (or about to become ready) would lead to great inefficiency. In their view, holding up jury selection until a judge is actually ready to try a case would return the system to an era when long delays would follow the filing of a note of issue, with trials not occurring until several years later.

Yet another cultural issue that concerned us is the reflexive acceptance of the practice of using juries to achieve settlement of cases. The Commission heard testimony that some parties,

⁵³ The Board of Justices of the First District, New York County, in its August 1, 2003 letter to the Commission urged:

We propose that the justice instruct counsel and the panel (as well as having a standing rule known to jury personnel and the judicial hearing officers) that once selection commences, counsel must remain in the jury selection room between 10 AM and 1 PM and again from 2 PM until 4 PM, except for a) an emergency bathroom break, b) a 10 minute morning and afternoon break and c) meeting with the [j]justice. This should prevent the abuse that now occurs with some lawyers disappearing for lengthy stretches without any reason given.

⁵⁴ Jury Project at 81-83.

particularly those represented by insurance carriers, do not engage in serious settlement discussions until they see the whites of the jurors' eyes. In this scenario, only when the jury is picked does the insurance carrier give authority to the defendant's lawyer to settle the case. Others testified that this is a wasteful practice and one that should not be tolerated. Indeed, several practitioners testified that any lawyer who told a judge at a final settlement conference that the parties were far apart, and then settled the case the next day when the jury was picked, would be roundly criticized. The Commission agrees that this situation must be addressed, as discussed in more detail below.

VI. THE COMMISSION'S RECOMMENDATIONS

A. Reduce Unnecessary Juror Waiting Time

An unfortunate reality of jury service is that citizens summoned for service spend a large portion of their day waiting. While the Commission found that there are often longer delays in New York City than other parts of the state, jurors in all counties undeniably spend a vast amount of time waiting for attorneys and judges.⁵⁵ The long periods of waiting are demoralizing for the jurors. Delays are by far the most common complaint that the Commission heard from citizens about their jury service and are the main reason for juror dissatisfaction.

Many former jurors told the Commission how disheartening and frustrating it was to spend hours on end waiting for something to happen. For example:

[I]t [was] like rush here, rush there, and wherever you got to, you ended up sitting there for a few hours. . . . [W]hen you get to wherever you're going and you get to the window and they say, go

⁵⁵

In 1981, a Legal Aid Society study found that the largest time-consumer for jurors was not *voir dire*, but rather "down time" occasioned by late starts, long lunches, early adjournments, and other problems associated with assembling a large body of people. Legal Aid Society, "Jury Selection in New York State: How Long Does It Really Take?" (1981).

have a seat and we'll get to you. Then three hours later they say, 'you come back tomorrow.' * * * And I mean, both the judge and the attorneys were explaining to us how . . . we're playing a very important part, but it is still hard to remember you're playing a very important part when you're sitting there waiting for somebody to come back to you.

I had made great efforts to arrive at 8:45, and it seems as though even on an average day I would not be needed until much later, with the first hour being dedicated to waiting, pamphlet taking, a small video, a few announcements etc. From about 10:30–11:30 several small groups of people were asked to come forward for jury duty. At 11:30 we were all dismissed for lunch until 2. I returned at 2 and waited. At about 3 we were all sent home with a form declaring that we completed our duty and were exempt for 4 years.

I was there [at jury service] for three days. On the third day... my name was [finally] called.

Jurors who were eventually selected for trial and sat for a case felt no differently; they, too, told the Commission about how they spent the majority of their time waiting:

In seven weeks, every day that we were there, more or less, eight hours, we didn't hear more than four hours on any day of testimony or evidence.

Another former juror wrote to recount her recent experience and frustration with jury service in Supreme Court in December, 2003, describing the process as “abysmal.” She spent most of her first two days in the jury room, which she claims “never registered below 89° Fahrenheit,” before she was finally selected for a *voir dire* and ultimately selected to sit on a civil case. She was then directed to report the next morning by 10:00 a.m. for the beginning of the trial. The next day, after reporting on time, she was left waiting and not told until 12:30 p.m. that the judge was not ready to begin; nor could the judge set a time or date for the trial to start. The jurors were told to go to lunch. When they returned, the jurors were sent with a court officer to a courthouse in another building, where they waited until 3:30 p.m. in a “boiling jury deliberation room.” The former juror wrote:

From 3:30 to 5:00 p.m., we heard the outlines of the case and opening statements from the plaintiff's attorney and the two defendants' attorneys and were sent home and told to report the next day, Thursday, December 18, at 2:15 p.m. (because [the judge] had to hear motions in the morning). We waited over two hours while the attorneys discussed points of law with the judge and then heard about three hours of testimony. We were told to report Friday, December 19, at 9:30 a.m. and waited two hours until [the judge] was ready. And so it went, until Monday afternoon when the lawyers made their closing statements and we deliberated and reached a verdict.

Based on her experience, this juror then questioned:

Why should the people of New York be imbued with respect for our judicial system when it has so little respect for us, and for our time? I may have been the only one with a tiny company (only one other employee) but I'm sure that the process was as distressing to them as it was to me. It is our brains and our hearts and our lives' experiences that the system should want, not our wasted time.

The level of frustration and dissatisfaction that jurors felt from their long periods of waiting cannot be overstated. "I expected to spend a lot of time waiting, so I brought along something to read," one attorney who had been summoned for jury duty reported to the Commission. "Many others around me also had reading material. There were others, however, who appeared impatient and apparently nothing was happening except a whole lot of waiting." Another former juror told the Commission that jury service is "an exercise in stressful boredom, and we know even rats when bored will do anything to escape."

Perhaps worse than the jurors' actual experiences is that jurors *expect* jury duty to be a waste of their time. Clearly, based on years of experience, jurors believe that their time will not be used efficiently when they arrive at the courthouse.

The Commission believes that these negative expectations come with an unintended benefit: any reduction in waiting time will bring about a large, indeed a *disproportionate*, improvement in juror satisfaction. For example, the Commission heard from at least two former

jurors who were surprised how little waiting time they experienced and were, overall, satisfied with their experience.⁵⁶

There are many reasons why jurors are kept waiting. Some delays will always be part of the jury system, and juror utilization can never be perfect. No commissioner of jurors could ever summon the perfect number of jurors for any given day, since cases often settle on the eve of trial and critical last-minute motions are filed. Moreover, no judge could ever impose a schedule on the litigants such that jurors would be hearing evidence or deliberating during every minute of their court time. Indeed, jurors are sometimes the cause of the delays because one late juror holds up the entire proceeding.

Waiting for a case to be ready for trial

On most days, more jurors are summoned for jury duty than are actually needed, since so many cases that appear to be “ready for trial” either settle or are postponed before jury selection. Upstate counties with lower case volume clearly have more success predicting the number of jurors needed on any given day, while the high-volume New York City and other urban counties must operate on some amount of guesswork. “The number of jurors called is not a science, it is an art,” the Commissioner of Jurors for Kings County told the Commission, noting that there were nearly eighty judges in Kings County who could have cases on for trial on any given day. But in any county, if litigants want jurors available when their case goes to trial, then more jurors than necessary will be called each day. This means some jurors inevitably will be left in the waiting room.

⁵⁶ “I was there less . . . than three hours.”; “[M]y assumption was that I would just sit there, spend the day. Then I was called. I was really happy, at least the process was moving along.”

In addition, the Commission found that the culture of the legal practice, particularly in New York City, was an underlying reason for many delays, because lawyers and judges are not cognizant or respectful of juror's time. For instance, the Commission found that sometimes jurors were ready for *voir dire* panels before 9:30 a.m., but courts were not calling cases for trial until much later in the morning. Worse yet, some courts did not even open their doors until about 10:00 a.m., and the lawyers were often unavailable when the case was finally called to calendar. Had the lawyers and courts all been prepared earlier in the day, and all committed to starting the case promptly, jurors could have been spared some waiting time and, in addition, overcalling of jurors could have been reduced.

The brinkmanship associated with the settlement of cases also has a tremendous adverse impact on juror waiting time. Cases that are "ready" for trial do not go straight to jury selection; instead, the litigants and courts attempt to settle the cases "one last time." Meanwhile, jurors sit in the waiting room while the attorneys negotiate. If cases could be settled before the parties report to the courthouse in "trial ready" status, jurors would not be forced to wait as long before being called to a panel.

To address these issues, the Commission makes several recommendations. First, a mechanism should be implemented to ensure that calendars start on time and lawyers appear for calendar call on time. Cases that are on the calendar for jury selection should be called promptly. The indulgent culture that exists now in many courtrooms, where lateness is tolerated, must change in order to minimize juror waiting time. Rule 202.69 of the Rules of the Chief Judge authorizes sanctions of lawyers for lateness and unexcused unavailability. (22 NYCRR § 202.69) The Commission recommends that judges enforce these rules to sanction multiple unexcused latenesses.

Second, there should be improved communication between court administrators and the commissioners of jurors in each county. The administrative judges (not just the individual trial judges) control when jurors are called to a *voir dire*. They have the ability to assign (or reassign) cases to different judges based on the number of trial-ready cases and juror availability. The administrative judges and court personnel should continually fine-tune the process of when jurors are called for *voir dire* and should coordinate this process with the commissioners of jurors and their staff. In this way, jurors who have reported for service will be better utilized and will spend less time waiting in the general assembly room.

Third, to alleviate waiting to be sent to a *voir dire*, in counties where it is feasible, jurors should be permitted to be on “2-hour” call either by beeper or by cell phone. Jury commissioners in every county should advise the Commission of the feasibility of this practice. To maximize juror time, some jurors can be on “stand by” notice if they agree to be available within two hours of when summoned. Any juror who failed to report within the specified time would run the risk of starting over the next morning and losing the day’s credit for service. This kind of call-in system may be more feasible in some counties than others. No rule change would be needed to implement such a program; the court rules already permit a telephone standby system,⁵⁷ and the courts in Dutchess, Putnam and Schenectady Counties already employ a call-in system. The Commission recommends that each county explore this procedure further and advise whether it would be a useful and beneficial tool to maximize juror time.

In counties where feasible, juror reporting times should be staggered (with morning and afternoon reporting). Because cases are called for jury selection throughout the day, jurors do

⁵⁷ See 22 NYCRR § 128.8(b).

not need to report to jury duty at the same time. The Commission recommends that each county explore whether staggering the reporting time of jurors would reduce the amount of juror waiting time.

Waiting during jury selection

Even when cases go to jury selection, the *voir dire* process itself is too often a drawn-out ordeal for the jurors. In many civil cases, jurors are herded into courtrooms or jury-selection rooms and then forced to wait while the attorneys review the questionnaires. Attorneys sometimes leave the room for no apparent reason and let the prospective jurors sit unattended.⁵⁸ In these cases, the jurors are not only needlessly forced to wait, but they wait in a location without the comforts of the jury assembly room, where they could freely make telephone calls, converse with each other, or use the restrooms.

Attorneys in civil cases can show respect for jurors is by not abandoning them while they are in the empanelling room. Lawyers should be required to stay with the panel through the completion of *voir dire* (except for formal breaks where jurors are also excused to discuss “for cause” challenges or consent excusals outside the presence of the panel, or when attorneys are seeking out a JHO to resolve a dispute).⁵⁹ It is simply inexcusable for attorneys to leave prospective jurors unattended in the jury-selection room while they attend to other matters. Once jurors are present for *voir dire*, they must have the undivided attention of the attorneys.

⁵⁸ See Board of Justices letter.

⁵⁹ Id.

Waiting during trial

Jurors who sit on a trial experience even more tedious waiting. Judges often tell jurors to report “promptly” in the morning, but when they comply, they end up waiting for an hour or more for the proceedings to start. In some cases, the delay is caused by judges who take the Bench late. As a result, the common trial experience for jurors entails a significant amount of waiting and little actual time in the courtroom. “After six days that I was involved in this process I heard just less than five hours of testimony,” one former juror told the Commission.

Jurors on trial also spend an inordinate amount of time waiting in the deliberation room while the attorneys and judge handle motions and other logistics. To reduce juror waiting during trial, all motions or other conferences with the court relating to an ongoing trial should be held, to the extent possible, at appointed times when the jury is not waiting. If it is not possible to do this before the usual time for commencing the day’s work or adjourning, the jurors may be asked to arrive later or be released earlier.

To reduce the waiting experienced during trial (as well as during *voir dire*) caused by parties engaging in settlement negotiations, the Commission recommends that procedures be implemented to require parties to hold meaningful settlement conferences in civil cases in advance of calendar call. Juror time is too often wasted while attorneys engage in settlement discussions that could have been held days or weeks earlier. As discussed in more detail below in Section VI (F), courts should implement procedures to prompt attorneys to focus on settlement before they appear for trial. Jurors should not be used as a vehicle for settlement.

Waiting for the delivery of incarcerated defendants

Many criminal cases involve defendants who are incarcerated at the time of trial. The Commission found that, in New York City, a significant amount of time was lost while jurors

waited for incarcerated defendants to be produced.

To be sure, moving prisoners in and out of courtrooms is a complicated and time-consuming process. The Department of Corrections delivers an average of 1,500 prisoners to 17 different New York City courts on any given day. To ensure that inmates arrive at court by 9:30 a.m., the Department awakens inmates at 5:00 a.m., gives them breakfast, and places them on buses by 6:00 a.m. An average of 43 buses make an average of 60 runs to deliver the inmates throughout the five boroughs. Delays can occur for any number of reasons: bus breakdowns, unexpected traffic delays, inmate fights, and illness. Nevertheless, according to the Department of Corrections, of the 332,510 inmates it transported in 2003, almost 90% were delivered to the courts by 9:30 a.m.⁶⁰

The Department of Corrections also makes special efforts to bring inmates who are on trial to court at an early hour. Each night, court clerks provide the Department with a list of prisoners who are on trial, and they are put on the first buses in the morning. Once prisoners reach the courts, further delays occur because prisoners must be escorted safely and securely through the court facility. Many courtrooms in older buildings do not have convenient holding cells near the courtrooms, which means that incarcerated defendants must be escorted by court officers through the public hallways from distant courthouse cells to the courtrooms. At all times, the court officers must ensure that prisoners are secure. Typically, the time from the request to bring the defendant to the courtroom to the arrival of the defendant is between ten and thirty minutes.⁶¹

⁶⁰ NYC Dept. of Corrections, Written Submission by Martin F. Horn, Commissioner, Dec. 16, 2003 (on file with Commission).

⁶¹ Id.

Additional delays often occur when a case is on trial, since jurors are not permitted to see the defendant in handcuffs or leg shackles. To avoid such a sighting, the jurors often must be assembled in the jury room and then wait while the defendant is brought to the courtroom. Waiting time is lengthened if any juror is late or if the defendant's production is delayed. To ameliorate this situation, jurors are sometimes told to come to the courthouse after the expected time of the defendant's arrival in the courtroom. Jurors are also sometimes told to wait in the central jury room, which is on a different floor, and then are called to come to the courtroom after the defendant is produced. However, this method also involves some waiting if the defendant's production is delayed or if a juror is late.

The delays associated with producing a defendant often lead to juror frustration because the jurors cannot be told that the defendant is incarcerated. Many judges offer general explanations that "delays" are inherent in the process, that all involved will make efforts to keep them to a minimum, and that the jurors should be on time so that delays can be reduced. Some judges who believe it is important to communicate with the jury about a delay do so on the record without the lawyers for either side present, so that it appears to the jury that it is not only the defendant who is missing. Under any scenario, these necessarily vague explanations often lead to juror frustration.

The Department of Corrections has recently made some promising improvements. As of October 1, 2003, the Department made available to Manhattan court personnel by 8:40 a.m. information about the status of prisoners needed for trial that day. Under the previous system, this information was not available until at least 9:30 a.m. Providing information to the courts earlier in the day allows the courts to plan their calendars and advise the jurors better. Continued improvements of this sort would further reduce waiting time for jurors.

The Commission commends the Department of Corrections and OCA in its efforts to improve communications between the agencies on the status of incarcerated defendants while they are in transport. While recognizing that limited information may be given to jurors and that some delays are unavoidable, the Commission nonetheless recommends that these agencies continue to improve the process of transporting incarcerated defendants to and through the courthouse, so that in those instances where delays occur, judges may minimize any inconvenience to waiting jurors (for example, by ordering refreshments or dismissing them for a short break).

Participating Designated Alternate System

Finally, the desirability of what the Commission has named a Participating Alternate System should be explored for civil cases. The Commission heard testimony that alternate jurors felt disappointment when they had invested their time in listening to all the evidence in a case and were unable to deliberate with the rest of the jurors and reach a verdict. To eliminate this source of dissatisfaction, the Commission recommends that judges encourage litigants to consent to a Participating Alternate System where all jurors (including alternates) would deliberate and vote. This system is consistent with existing court rules and is currently being used effectively in some courts on consent of the parties.

B. Improve Communication with Jurors

Educating New Yorkers before they are called about the importance of jury service is one of the most effective ways of improving juror attitudes. Jury commissioners charged with the responsibility of administering the jury system are limited by law to qualifying jurors at random from the community. Because jury service is random, jury commissioners cannot target geographical areas known to be occupied by minority groups to ensure diversity in the pool; the

jury commissioners' mandate is to provide a fair and representative cross section of the community in the venire, and in their efforts to do so use various lists to randomly send jury qualification questionnaires. While overlooking no segment of the community, court officials must take particular care to reach out to those segments of the community, such as minority and the economically disadvantaged, who may be intimidated by the prospect of jury service.

There is still more that can be done. Some jury commissioners and OCA are involved in projects such as public service announcements (e.g., the recent Court T.V.-funded public service announcement which is presently being shown on cable television statewide); programs presently being utilized in Erie County; jury kits for schools; OCA maintained jury website; and the employer/employee handbook, "Juror Service in New York State – A Guide for Employers and Employees." Expanding these programs can help counter negative attitudes toward jury service and actually stimulate service. In addition, computerized compliance enforcement procedures currently being utilized in New York and Kings Counties are being reduced to user-friendly formats for use in all counties. Some commissioners have implemented interactive voice response systems, so that jurors can easily make inquiries by telephone and receive and consistent information. These programs should be expanded so that every jury commissioner in each of the 62 counties of the State employs them.

Juror qualification questionnaires should be clear, simple and informative, since their purpose is merely to determine whether prospective jurors meet the few qualification standards outlined by statute. The questionnaire should make clear to the prospective juror that disability will not necessarily bar a juror from service. (Jurors with physical challenges can be accommodated in all counties, which have been made Americans with Disabilities Act compliant). Many jurisdictions already provide information on the summoning forms with

respect to telephone call-in procedures, how to obtain a first time postponement as of right or subsequent postponements for good reason, directions to the courthouse, website information, juror pay, and information on average length of jury service. This should be the rule in all counties.

Since September 11, 2001, security has been tightened at all courthouses in the State. Jurors should be informed about what to expect when arriving at the courthouse. They should be advised not to carry knives, other sharp instruments or weapons of any kind, cameras or other photographic equipment. Also, they should be told whether laptop computers can be accommodated in the assembly room, whether work carrels are available during inevitable waiting time, and advised to bring reading materials.

Jury commissioners in all 62 counties of the State show a juror orientation film (featuring Ed Bradley of CBS News 60 Minutes and Diane Sawyer of ABC, introduced by Chief Judge Kaye), which concisely explains each stage of the juror's service and educates jurors with historical background of trial by jury. Included are explanations as to why jurors might be waiting from time to time and what to expect during *voir dire* and the trial itself. This film is supplemented by a personal orientation delivered by the clerks in charge of the assembly rooms, which includes such vital information as location of rest rooms; the general estimates of lunch and discharge time; juror pay (how much and when to be expected); and an invitation to pose questions. Uniform orientation scripts should be prepared for jury room personnel and judicial officers, to be modified as necessary to account for local practice.

Often overlooked is explaining to the jurors during the course of the day why they may be waiting, especially while they are waiting alone in empanelling rooms and courtrooms; the value of their service if they are not chosen after a *voir dire*; and of the possibility that cases may

be settled after selection but before trial. Administrative judges should be urged to instruct the judges in their districts to be ever mindful of their need to address jurors on these subjects, to emphasize the importance of their service whether selected or not, and to keep them informed at every stage of the proceedings. Clerks also should be encouraged to make every effort to offer appropriate explanations to the jurors while in their charge.

Uniform Rules for the New York State Trial Courts Rule 128.11 (22 NYCRR § 128.11) suggest that a judge in robes greet the jurors when they check into the assembly room and provide them with an orientation about their responsibilities. Since the rule states that it should be enforced only “where practicable,” it is observed, particularly in urban counties, more in the breach than in practice. For example, in the civil branch of New York County Supreme Court, for some years the jurors were greeted by the administrative judge, who delivered an orientation to prospective jurors. This judge was cautioned by the clerks that this process was taking up too much time and interfering with the normal flow of assignment of jurors to empanelling rooms and courtrooms. The administrative judge then delegated the function to a JHO, who reportedly took even more time. Finally, the process lapsed entirely.

It is also critical for a judge to address the jurors beyond simply saying “thanks” at the end of the trial, or when they are discharged after settlement; this enhances positive juror attitudes toward the court system and leaves them with the impression that they are an integral part of the trial process, not merely pawns in that process. As discussed elsewhere in this report, OCA should incorporate suggested comments into an educational program of instruction for all judges and JHOs presiding over civil *voir dire*.

The State of New York has always been a “melting pot” for immigrants. Some who appear for jury service are unable to understand and communicate in the English language but

mistakenly qualify as jurors because an English-speaking member of their families completes the qualification questionnaire. Jury assembly room clerks routinely make announcements inviting those who cannot understand and communicate in the English language to report that fact immediately. In some jurisdictions, clerks themselves proficient in Spanish (the most common situation) or Chinese (frequently found in New York County) make the announcement in those languages. Of course, not every county has the benefit of clerks with such proficiency, and in those places, a written statement in various languages should be provided for distribution at the orientation.

In any close case of possible disqualification, a judge, not a clerk, should make the determination.⁶² However, to prevent a false claim of language insufficiency, all commissioners of jurors and their clerks routinely conduct a brief “*voir dire*” of the juror to determine whether in the opinion of the inquirer, the claim is legitimate. To improve the initial questioning, OCA should prepare a proposed method of questioning so that this process may be more uniformly applied.

C. Review Panel Size Guidelines

As may be seen in Section V, above, the numbers of citizens initially called by a Jury Commissioner has a significant impact on the juror utilization rate. The Commission found that there appears to be no uniform system among the counties for determining the number of people

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The Commission recognizes that the practice of unsupervised civil *voir dire* and consent excusals will cause a certain number of excusals (for perceived language deficiencies) of jurors who communicate well enough in English to qualify for service. However, it is the Court system’s responsibility to ensure that all citizens who meet the legal standard have an opportunity to serve, and that citizens are not excused at the outset by ignorance or design or by a false claim of language deficiency.

called or even a consistent rationale for determining the number.⁶³ In many instances, it appears the Jury Commissioners feel compelled to respond to requests by individual judges for a specific number of jurors without an independent determination of the actual need. The call is, no doubt, motivated in most cases by the judge's desire not to "run out of jurors" in the selection process. Also, appellate decisions have emphasized to judges the importance of ensuring an impartial jury through a more liberal grant of challenges for cause. Nonetheless, the methodology for determining the number called needs to have a rational basis and should be monitored, because overcalling results in a greater number of jurors not reached for questioning in the *voir dire* process. This situation wastes time, underutilizes jurors and, understandably, contributes to juror dissatisfaction and a sense of nonparticipation.

The appropriate size of a jury panel is determined by many factors, including specific judicial requests, whether the trial is civil or criminal, the number of parties, the projected length of trial, whether the *voir dire* will be supervised (in civil cases), pre-trial publicity, courtroom capacity, and the severity of the charges (in criminal cases). In addition, the size of the venire panel is affected by the anticipated or projected number of postponements, excuses, disqualifications and juror no-shows.

It was observed in Onondaga County that over a three-year period (2001-2003), some 4500 jurors were not reached or questioned in *voir dire* in Supreme Court (criminal and civil) cases. (This statistic does not include cases that were settled prior to *voir dire*, and to which, therefore, no venire panel was assigned.) Supreme Court civil cases accounted for the bulk of

⁶³ As noted earlier, guidelines for panel size were last promulgated in 1990, and they may underestimate the number of panel members needed. As discussed in this Section, to help ameliorate overcalling, new guidelines should be developed and adhered to.

the jurors neither reached nor questioned (42%). Even when both Supreme Court civil and criminal trials are combined, better than one-in-three jurors (36%) was not reached or questioned. See Appendix M (chart comparing number of jurors not reach or questioned in Onondaga County from 2001 through 2003).

In Onondaga County, the average panel size for county criminal trials is sixty nine (69) and for supreme court civil trials, thirty (30). While it is appropriate for some trials to have more jurors, the data noted above strongly suggests excessiveness in jury panel sizes. When such a significant number of jurors (4500) are not reached, effective juror utilization cannot be achieved; nor can juror satisfaction, when so many jurors called do not even participate in the *voir dire* process.

Based on these limited data from Onondaga County and the sentiment expressed over and over during the public hearings that too many jurors are called, the Commission recommends that Administrative Judges, with the commissioners of jurors in each county, gather data relating to juror panel size and juror utilization, so that an accurate picture can be drawn, county by county, of how jurors are actually being used. These data should include: (a) the counties' current practice of determining the number of total jurors called and individual panels; (b) the number of jurors who do not show up for jury service; (c) the number of jurors who are postponed, excused, or disqualified (before being sent to a *voir dire*); (d) the number of jurors excused during *voir dire*; and (e) the number of jurors who are never even questioned during *voir dire*. These figures should then be examined to identify correlations between number of jurors excused and the number of jurors never even questioned during *voir dire*, on the one hand, and on the other, factors such as specific judicial requests, whether the trial is civil or criminal, the number of parties, the projected length of trial, the actual length of trial, whether the *voir dire*

was supervised (in civil cases), pre-trial publicity, courtroom capacity, and the severity of the charges (in criminal cases). Particular issues that the administrative judges and the jury commissioners should consider are whether: (a) judges are overcalling simply to avoid the chance of having to call a second panel; and (b) lawyers are overestimating the length of trial.

These data and the observations of the administrative judges and the commissioners of jurors should then be further analyzed by OCA to assist all counties in better tailoring the number of citizens summoned to the number of jurors actually needed. OCA should also develop formulae or matrixes that can be used by each county to more accurately estimate the number of jurors needed for the venire panel and for individual panels based on a number of variables, with the understanding that such formulae or matrixes may be further adapted by the individual counties to suit their unique needs.⁶⁴

D. Involvement of Judicial Officers in Civil *Voir Dire*

A subject that generated great interest among those who testified and members of the Commission was the issue of judicial supervision of civil *voir dire*. New York is the only state that does not require a judicial officer to supervise jury selection in a civil case.⁶⁵ The CPLR provides only that “[o]n application of any party, a judge shall be present at the examination of

⁶⁴ By way of example, a juror “protocol” reducing the number of jurors initially called was instituted in Syracuse City Court in February, 2003. This protocol has had significant impact on panel size and has decreased the number of jurors not reached or questioned. See Appendix N (Onondaga County City Court Juror-Request Protocol).

⁶⁵ One hearing witness, who has surveyed *voir dire* procedures nationwide, testified:

“I can tell you unequivocally that New York is the only state in the country that has unsupervised *voir dire*. In fact, when I’ve gone out and spoken to other commissions such as yourselves in other states that are looking for national overview, most of them can’t even conceive of having unsupervised *voir dire*.” The courts in Philadelphia and Pittsburgh, Pennsylvania, however, also have unsupervised *voir dire*.

the jurors.”⁶⁶ In the absence of such an application, whether, when and how civil *voir dire* is supervised varies widely across the state.

Voir dire is the juror’s introduction to the jury trial system. Although this Commission did not encounter the widespread complaints about *voir dire* that met the 1994 Jury Project, the testimony often echoed the concern that too frequently, jurors can arrive at the courthouse, be assigned to a panel, go through *voir dire*, be excused, and never see a judge, judicial hearing officer, or courtroom. After spending a considerable amount of time waiting to enter a jury selection room, a juror in New York City is typically questioned in a small, windowless empanelling room, where only the lawyers, and not a judicial official, are present. In the event of a disagreement between the lawyers, the jurors are often left to sit by themselves while the lawyers seek judicial assistance in resolving the dispute. Given present practices – in which one JHO in New York City may supervise many jury selections in different locations – a panel being questioned may have to wait for some time until the officer can address the problem. Then, the lawyers make a presentation of sometimes differing versions of what occurred in the jury room, which is followed by an attempt by the judicial official to resolve the problem. This, too, can take a significant amount of time. The lawyers will then return to the jury room and, in some cases, find they have problems again that require the jurors to be left alone. To make matters worse, there are reported instances of lawyers leaving the jury room to attend to other court matters, a practice which the Commission recommends be stopped.

⁶⁶ CPLR 4107 (McKinney’s 2003). In criminal cases, by contrast, a judicial officer is required by statute to supervise all phases of jury selection. CPL §270.15-270.25 (McKinney’s 2003).

The absence of a judicial official deprives the citizen of an atmosphere that one associates with a judicial proceeding: a court room presided over by a judicial figure in robes.⁶⁷ That absence also leaves the potential jurors without instruction as to what they are permitted to do and not do during selection, a void that can sometimes lead to the loss of an entire panel if one juror or potential juror taints the rest.

Opinions as to whether there is any need for change are both deeply and widely held. While some have expressed the view that judges should not only attend all aspects of jury selection but should do all or most of the questioning of prospective jurors, others feel that the mere presence of a judge is undesirable and inhibits the inquiries necessary to determine juror biases.

Proponents of full supervision cite several advantages: (1) As jury selection is the potential juror's introduction to the trial, the presence of a judge from the outset is important to lend the requisite dignity to the process and to impress upon the jurors the important role they play in the justice system. (2) Having a judicial officer present would avoid delays caused by counsel having to leave the jurors to locate a judicial officer to rule on challenges for cause; and the judicial officer's presence during the questioning would eliminate disputes as to the content of the questions and juror responses that led to the challenge. (3) The presence of a judicial officer would ensure that juror questioning is not unduly intrusive or prolonged. (4) Requiring judicial supervision would eliminate the practice in some counties of conducting *voir dire* in cramped jury rooms or hallways and ensure that the questioning is done in a courtroom, again

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The Commission's view on judicial robing is discussed elsewhere in connection with judicial hearing officers. The tradition of wearing robes, while not mandated by law in New York State, is one of long standing and which is generally perceived to enhance the participant's feeling of dignity in the process in which they are participating. See Arthur J. Cooperman, Thoughts on Basic Black, N.Y.L.J., Dec. 24, 2003.

underscoring for the jurors the importance of the judicial process in which they are participating.

(5) Having a judge assigned to supervise *voir dire* in every case would provide additional opportunities to settle the case.

The Commission did not hear any substantial disagreement with the proposition that judges have a valuable role in the jury selection process. In fact, some judges, as a matter of standard practice, oversee the entire selection process from start to finish.

Others who testified or made submissions to the Commission opposed the standardization of a rule that would require a judge to be physically present at all aspects of civil *voir dire*, as is required in criminal cases. They argue: (1) Full supervision of *voir dire* in every case would overburden judges already carrying heavy loads and further restrict their time to attend to their other judicial duties, such as deciding motions and conferencing cases. (2) Requiring judges to shoulder this extra responsibility is not necessary in many areas of the state, where the average time for jury selection is four hours or less. (3) Full supervision can intimidate potential jurors and cause some to be less candid in their responses to questions, for fear of giving a “wrong” answer in front of the judge. (4) The trial attorneys, who know their cases better than the judges, should not be unduly restricted in the important job of ferreting out bias and prejudice through the *voir dire* process. (5) Requiring full judicial supervision for every jury selection would reduce the number of juries that can be picked each week and return some counties to long delays between filing of the note of issue and starting trial. (6) Many courthouses simply do not have enough court room space to permit jury selection in a courtroom in every case.

In some respects, the content and intensity of this debate were similar to the divergent views noted in the 1994 Jury Project report. Indeed, the opposing views were so strongly held in 1994 that the Jury Project was “unable to arrive at a consensus regarding whether *voir dire*

should be fully supervised.”⁶⁸ Given that lack of consensus, the Jury Project took two steps: First, it recommended a pilot project in which two districts, one in New York County and one in an urban/suburban upstate district, would require full judicial supervision of civil *voir dire*. The goal was “to permit comparisons between judges participating in the experiment and other judges within the county who have similar caseloads and who do not supervise their *voir dire*.”⁶⁹ Second, the Jury Project proposed a uniform rule for certain aspects of jury selection. The pilot program was conducted and a report issued. As a result of the report, a uniform rule was put in place (22 NYCRR § 202.33.).⁷⁰

Section 202.33 requires that a judge undertake the following for every jury selection: (1) meet with counsel before the selection starts to try to settle the action; (2) direct the method of jury selection to be used (either “White’s,” “Struck Method,” or “Strike and Replace Method”); (3) establish time limits for the questioning of prospective jurors; (4) preside at the commencement of *voir dire* and open the *voir dire* proceeding, “in order to ensure an efficient and dignified selection process”; and (5) in his or her discretion, preside over part of or all of the remainder of the *voir dire*.⁷¹

The implementation of those recommendations in some counties, together with efforts by the Bench and Bar in other counties to cure the problems highlighted by the Jury Project Report, has produced some progress toward making jury selection a more efficient and dignified process that is fair to the litigants and jurors. However, the testimony and submissions to this

⁶⁸ Jury Report at 54.

⁶⁹ Id.

⁷⁰ 22 NYCRR § 202.33 was adopted December 7, 1995, and became effective January 1, 1996.

⁷¹ 22 NYCRR §202.33(b)-(f). The entire text of section 202.33 is reproduced as Appendix O.

Commission persuaded the members that further steps can be taken to improve the system, while taking into account regional and local differences.

Perhaps the most surprising circumstance the Commission observed is that the requirements of Section 202.33 are simply not being followed in every county. In some locations, jurors never see a judicial official during their entire service, let alone at the *voir dire* stage. This occurs both upstate and downstate. The Commission finds it unfortunate that the minimal requirements of supervision that have been in place for a decade are not being uniformly followed.

In many upstate districts it is unusual for a panel to be sent for jury selection unless there is a judge ready, or expected soon to be ready, to try the case. By contrast, in New York City and in Nassau County, the practice is to pick more juries than there are judges available, because many cases settle during or shortly after jury selection, which may make judicial supervision more difficult. However, an administrative judge in Nassau County, as well as many practitioners, implored the Commission not to recommend elimination of that system because its implementation has greatly reduced the time from note of issue to trial. In their view, eliminating “jury stacking” would return civil practice to an era of long waits for trial.

The Commission believes that we should be moving forward, not backward, from the reasonable benchmarks laid down by the 1994 Jury Project. It is time to ensure that every juror who enters the selection process is able to identify with a judicial officer responsible for that process, and who in exercising that function communicates through word and demeanor the integrity of the judicial system.

Accordingly, the Commission recommends that counties comply with the requirements of section 202.33 of the Uniform Rules. The Commission strongly believes that, at a minimum,

a practice should be adopted that will ensure that every panel of citizens who is questioned in the *voir dire* process will identify with a specific judicial officer – either a judge or, if not available, a JHO – who is charged with overseeing that process.⁷²

In smaller cities and rural counties a judicial official – most often the judge who will try the case – greets the jury and gives any necessary instructions and guidance to the lawyers. Typically, the judge will then go about other duties but indicate that he or she is available should the parties need judicial assistance. When jurors are excused by the exercise of a challenge, many judges will then thank them and explain the value of their service even though they have been excused. To the extent practicable, this should be the model for every *voir dire* throughout the state.

The Commission considered the issue of requiring that a judge personally attend every aspect of jury selection, as is required in criminal cases. Indeed, many Commission members, as well as those who have testified or written to the Commission, believe that full judicial supervision is desirable if attainable, and that it is not a luxury, but an asset to the process.

Nevertheless, a majority of the Commission reached the conclusion that this should not be required. However, the Commission recommends that every civil jury to be selected have a judicial officer assigned to that case, and while not required to be present at all times, must carry out the following functions:

⁷² Trial judges themselves recognize the importance of their involvement in jury selection. The Board of Justices, while suggesting that mandatory, full judicial supervision would be undesirable, nonetheless advised the Commission, "We are cognizant that Section 202.31 (e) [of the] Uniform Rules for Trial Courts already requires that a justice, and indeed the trial justice, commence the *voir dire*. In reality, the time pressures on the justices in New York County have made most overlook the requirement or believe it can be satisfied with a greeting by the justice when jurors are first introduced to the case. We propose a new initiative by our Administrative Judge and the cooperation of the jury clerks to ensure compliance." (Board of Justices letter.)

- Introduce the prospective jurors to the lawyers and the case;
- Have the authority to make rulings relevant to the jury selection process;
- Be available at all times to resolve disputes between attorneys;
- Explain to the prospective jurors the importance of their service;
- Explain to the prospective jurors that even if they are not selected for that case, their service is important;
- Resolve disputes about whether prospective jurors can judge fairly and fulfill the obligations of jury service, and make such determinations in accordance with appropriate procedures, including interviews of panel members;
- If not present, address immediately attorneys' issues of requested excusals and challenges;
- Ensure that attorneys do not leave the *voir dire* room except for designated breaks;
- Wear robes at all times when meeting with prospective jurors; and
- When possible, will personally thank the jurors excused or dismissed from further service.

As suggested above, when a judge is not supervising the entire *voir dire*, a judge should be immediately available to rule on challenges and other matters raised during jury selection. Where case loads require it, JHOs should be made available to assist the judges in this work, so that no panel of jurors is left sitting while lawyers search for a judicial officer to make a ruling. The judicial officer should also be available frequently enough to ensure that lawyers do not leave the jury selection room except to the extent necessary to confer privately about jury selection issues, to ascertain that the *voir dire* is being conducted appropriately, and to ensure that the *voir dire* is not unnecessarily prolonged.

Finally, the Commission recommends that the judicial officer who introduces the *voir dire* process should appear in robes. The Commission heard testimony from many sources that confirm that judicial hearing officers often do not wear robes while performing their duties. The Commission believes that the judicial function of supervising *voir dire* is as much a dignified part of the judicial process as the trial itself, and that every judicial official should treat it as such. A judicial official who wears a robe communicates that seriousness and dignity to the juror.

E. Education on *Voir Dire* for all Judicial Officers

The Commission believes that judicial education goes hand in hand with the implementation of the enhanced and more uniform role envisioned for judicial officers supervising civil *voir dire*. During the course of its hearings, the Commission heard many complaints from lawyers that some judicial officials – in particular, judicial hearing officers – were insensitive to issues directly bearing on the jurors’ experience. While some of the complaints may be no more than natural disagreements with the conduct of civil *voir dire* resulting from different perspectives held by judges and lawyers, the complaints did appear to be legitimate: too frequently, judicial officials overlooked the need to take the time both to communicate important information to jurors and do so in a way that preserves and promotes the dignity of the process. Judges and lawyers are present in the court every day; it is their home away from home. Jurors, on the other hand, are rarely there, and they take their cues from judges about the significance of the proceeding in which they are participating. A judicial officer who does not wear a robe, or appears to be inattentive or minimally concerned about the ongoing proceedings, can leave jurors with negative feelings about their experience. Conversely, a judicial official who warmly greets the jurors and conveys the feeling that they are playing an important role in the process will significantly enhance the quality of their experience.

Each year, judges participate in continuing judicial education.⁷³ At the New York State Judicial Institute, judges receive updates on many current developments and have the opportunity to exchange views not only with members of the judiciary, but with members of the bar. The Commission believes that curriculum should be developed by the Institute – with the input of judges, lawyers and consulting experts outside the system – to incorporate the best available thinking on working with jurors. The curriculum should include instruction and dialogue on:

- The important responsibility the judiciary bears in representing the dignity of the judicial system;
- The importance of jury service;
- Demonstrating respect for jurors by minimizing juror waiting;
- The administration of rules relating to excusals (peremptories, challenges for cause, and monitoring consent excusals); and
- Methods of questioning prospective jurors to ascertain bias or prejudice, and to avoid elimination of prospective jurors based on:
(a) stereotyping or profession; or (b) unfocused questioning that inappropriately eliminates jurors who could be fair or impartial.

Even those judges (and there are many) who are already doing an excellent job of communicating with jurors and making their experience a positive one will benefit from participation in this dialogue. It will also provide an opportunity for these judges to make others aware of techniques that they have found particularly successful.

⁷³ 22 NYCRR § 17.3.

F. Mandatory Settlement Conferences Before a Jury is Picked

The Commission was presented with many of the same issues that confronted the 1994 Jury Project. Ten years ago, members of the Jury Project found that “roughly 40-50% of civil cases that make it to *voir dire* are settled before trial begins.”⁷⁴

Members of the 1994 Jury Project opined that “[u]sing jury selection as a settlement tool represents the single greatest abuse of jurors we have identified. It leads to massive overcalls of jurors who never adjudicate cases but who become unavailable for service for several years because they ‘served’ without ever hearing a witness.”⁷⁵ The members of the Commission, finding that this type of abuse persists, concur.

This Commission concludes, as did the 1994 Jury Project, that there is “a deeply ingrained practice on the part of many civil trial lawyers not to discuss settlement seriously until they are up against the wall of trial.”⁷⁶ As the Commission learned during the public hearings, “settlement discussions don’t begin until we see the whites of the jurors eyes.” One judge who testified explained: “It’s kind of a joke that we say in the courthouses, but that adage is completely accurate. It makes sense. Because it’s not until the case is put on the trial calendar that the trial lawyers will have to pay attention to it.” The same observation was reiterated at the same hearing by others.

The failure to engage in substantive settlement negotiations before *voir dire*, thus eliminating the realistic opportunity to resolve a claim before jurors are involved, greatly diminishes the optimum utilization of jurors and negatively influences jurors’ perceptions of the

⁷⁴ Jury Project at 73.

⁷⁵ Id.

⁷⁶ Id. at 74.

process. The question is not whether the judicial system is failing to provide a *pre-voir dire* settlement negotiations forum; the more elusive question is how to create a forum in which the greatest opportunity for resolution exists. The 1994 Jury Project recommended that *pre-voir dire* settlement conferences be mandatory and require the presence of principals and insurers. While this measure has never been enacted or implemented, the Commission believes that it should continue to be considered by OCA and the New York State Legislature.

The Commission proposes the adoption or implementation of measures to encourage settlements before jury selection, optimizing the efficiency of the jury system and enhancing the success of the settlement process. These include (a) mandatory *pre-voir dire* settlement conferences, (b) mandatory participation of a party-representative with settlement authority, (c) implementing the use of a “Part 1” Judge to manage the settlement process, (d) effective use of pre-note of issue conferences, (e) enforcement of participant cooperation in the settlement conferences, and (f) monitoring the results of these settlement conferences.

The Commission recommends mandatory utilization of the *pre-voir dire* settlement conference procedure in civil cases, as set forth in Rule 202.33(b) of the Uniform Rules for the New York State Trial Courts, as the basis for both long and short term improvement to the settlement process. Consistent use of this procedure should be monitored by OCA, as prescribed below.

The Commission also believes that the success of this procedure depends on the effective and early participation of parties with authority to settle, as well as the utilization of effective settlement techniques; and that earlier participation by insurance carriers is needed to promote *pre-voir dire* settlement. However, under current New York law, insurance carriers are not

compelled to attend such conferences, even though they are (at least arguably) real parties in interest.

In Saastomoinen v. Pagano, 183 Misc.2d. 781 (Sup. Ct. Nassau Co., 2000), the trial court directed a hearing to be held to compile a record identifying the nature and extent of the costs incurred by the County of Nassau and the costs and fees incurred by the plaintiff's counsel in connection with the unreasonable maintenance of a frivolous liability defense. Citing the Uniform Court Rule 22 NYCRR §1303.1(a) and §8303-a of the CPLR, and the obligation of all liability carriers in New York not to engage in unfair claim settlement practices as set forth in Insurance Law §2601(a)(4), the Court imposed a sanction against the Allstate Insurance Company in the sum of \$5,000.00 and costs in the sum of \$6,730.64.

On appeal, the Second Department reversed the imposition of the sanction, holding that CPLR § 8303-a as well as 22 NYCRR §130.1 are provisions in derogation of common law and therefore must be strictly construed. Saastomoinen, 278 A.D.2d 218 (2d Dept. 2000). Since Allstate, as an insurance company, is not a real party in interest, the Court held there was no authority to impose the sanction against Allstate.

However, the Saastomoinen case did not undermine the authority of the trial court to impose sanctions. The case only instructs that the sanction cannot be imposed against the carrier. If such a sanction is imposed directly against the named defendant instead of the insurance carrier, there is adequate authority within the statute and rule to do so. While it might seem unfair to impose sanctions on the named defendant, who may lack any control over the defense of the case and decision to engage in meaningful negotiations, it is the liability carrier in New York who is charged with the burden and duty to satisfy this monetary obligation, because

it is responsible for the cost of defense, including all court costs. This concurrent obligation is in addition to and not diminished by, the limits of liability.⁷⁷

To provide explicit authority for the court to ensure the meaningful participation of carriers, the Commission recommends the modification of 22 NYCRR § 202.33(b) as follows (proposed language is underscored and proposed deletions are struck out):

Pre-*voir dire* settlement conference. Where the court has directed that jury selection begin, the trial judge shall meet prior to the actual commencement of jury selection with counsel ~~who will be conducting the *voir dire*~~ fully familiar with the action and authorized to enter into binding stipulations, and who have knowledge of the case and the authority to make the highest offer or the lowest demand on behalf of their respective clients or parties. If any counsel does not possess such authority then counsel shall have available by immediate teleconference, a person with that authority. In such conference, the Court shall attempt to bring about a disposition of the action.

In addition, the Commission proposes an amendment of Rule 202.26(e) of the Uniform Court Rules governing pre-trial conferences as follows:

~~Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations~~ fully familiar with the action and authorized to enter into binding stipulations, and who have knowledge of the case and the authority to make the highest offer or the lowest demand on behalf of their respective clients or parties, must appear at a pretrial conference. If any counsel does not possess such authority then counsel shall have available by immediate teleconference, a person with that authority, or counsel shall be accompanied by a person empowered to act on behalf of the party represented. Only these persons will be permitted to appear at a pretrial conference.” (22 NYCRR §202.26(e).)

Consistent with these proposals, the Commission recommends that the following additional language be added, applicable to both 22 NYCRR §202.33(b) and §202.26(e):

⁷⁷ See Insurance Law §3420 and cases interpreting this provision.

Failure of counsel to conform to the requirements of this section may result in the Court's imposing sanctions and/or costs pursuant to Rules of the Chief Administrator §130-1 ("frivolous conduct") or §130-2 ("unjustified failure to attend a scheduled court appearance").

Correspondingly, the language of §130-2 should be modified to track the proposed changes in 22 NYCRR §202.33(b) and 22 NYCRR §202.26(e). A new sub-section should be added to 130-2.1(b), as an additional factor for the court's consideration in its determination regarding the imposition of sanctions or costs:

In determining whether an attorney's failure to appear at a scheduled court appearance was without good cause and in determining the measure of sanctions or costs to be imposed, the court shall consider all of the attendant circumstances, including but not limited to:

* * *

(9) whether, in any matter scheduled pursuant to 22 NYCRR §202.26(e) or 22 NYCRR §202.33(b), counsel lacks the authority required, or fails to provide, either in person or by teleconference, a person with that authority.

The Commission heard testimony that the "Part 1" Judge in Albany County, has been effective in settling pre-trial cases and recommends that each administrative judge be given the authority to appoint a Judge to conduct such pre-*voir dire* settlement discussions. The use of a "Part 1" Judge should not be considered a substitute for any settlement discussions that might be conducted by an initial assignment judge, but rather should be considered as an adjunct or addition to that effort.

One settlement paradigm contemplated by the Commission envisions the use of "justified position" negotiation, with parties required to formulate a rational basis for their negotiating stance based upon an analysis of the evidence. The Commission is informed that one Nassau County Supreme Court Judge (Justice Dana Winslow, a member of the Commission) who

oversees a medical malpractice conference part has obtained an agreement from major medical malpractice carriers either to take a justified “no pay” position or make their highest offer, which they agree to maintain through trial. Similarly, the plaintiff makes his or her lowest demand, also to be maintained through trial. A party is relieved of its commitment to an offer or demand only if there is a substantial and unexpected circumstance that arises after the case has left the conference part. According to the Judge, this procedure has been used in over a thousand cases with successful results, because of the parties’ agreement to proceed with a justified dialogue and with the recognition that verdicts and expenses are potentially significant if the case proceeds through a long trial. Through creative practices, with the impetus provided by the modification of existing rules ensuring earlier and more effective participation by all parties in the settlement process, the same result can be achieved on a more consistent and universal basis.

The conference process is a progressive one in which issues are discussed and narrowed at each appearance. Settlement should also be explored at each conference. Prior to the filing of a Note of Issue, a conference should be held in which the Court and counsel define the remaining issues in the case. Before *voir dire* commences, a final conference should take place to explore thoroughly the possibility of settlement.

The Commission also recommends the drafting of a Uniform Court Rule, in consultation with the Insurance Commissioner, that permits or requires trial or administrative judges to make determinations regarding the cooperation of an insurance carrier in the pre-*voir dire* conference settlement process. The Rule should provide that if a judge determines that a carrier has failed to participate in a pre-*voir dire* conference pursuant to amended Uniform Court Rules and Regulations §202.33(b) as proposed or §202.26(e), as proposed and its position has not been

sustained at trial, then that determination should be reported to the New York State Insurance Commissioner pursuant to Insurance Law § 2601. See Saastomoinen, 278 A.D.2d at 219.

In order to evaluate the use and effect of the pre-*voir dire* conference procedure, a reporting mechanism must be established.⁷⁸ Records should be maintained by the trial courts of the number of cases that settle prior to *voir dire*, during the *voir dire* process, or between *voir dire* and the commencement of opening statements. These records should then be analyzed by OCA in an effort to identify those counties that are not consistently or effectively using the pre-*voir dire* conference procedure.

G. Investigate Issues Surrounding “Consent Excusals” Under CPLR § 4108

CPLR § 4108 provides that a juror may be removed on consent of the parties. The notes to the consent provision of § 4108, added in 1962, state that its purpose was to include in the law what was actually occurring in some jurisdictions – that challenges for cause were being exercised outside the presence of a judge.

As discussed earlier, excusals by consent may impact on juror yield. Some members of the Commission strongly support maintenance of the existing rule, contending that it serves an important function in allowing lawyers, without having to spend time establishing cause, to eliminate from a particular case those persons perceived to be hostile, biased or otherwise unable to perform their task adequately. Others believe that the other statutory grounds in place for excusing jurors – peremptory and “for cause” challenges – adequately ensure the impartiality and suitability of remaining jurors without unduly infringing upon a juror’s constitutional right to serve.

⁷⁸ See ABA Standard 12: Monitoring the Jury System.

The Commission does not have sufficient data on this practice (or evidence as to how consent challenges are being used) to reach a conclusion. OCA has already begun to collect data on consent excusals to determine the number of jurors in the State who are excused on this basis each year. The Commission will defer any further consideration of this issue and recommendation, if any, until the data are collected and analyzed. It will also be useful to continue to collect these data if and when the procedures for judicial involvement in civil *voir dire*, as recommended in this Report, are implemented.

H. Expand the Use of Juror Questionnaires to Facilitate More Efficient Oral Questioning During *Voir Dire*

Oral questioning by the parties' attorneys or, in some venues, by the court, is the traditional method for acquiring information regarding the potential bias or prejudice of prospective jurors. While oral questioning is a critical component of jury selection, written questionnaires would expedite the jury selection process. Oral questioning too often results in a tedious and boring exercise that seeks the routine, basic information necessary to evaluate a juror's background and life experiences relevant to the case. To address complaints of the length and tedium of *voir dire*, some courts have imposed time limits on attorneys as a means of limiting the length of the jury selection process. However, time limits significantly reduce the amount of information that can be secured from prospective jurors, thereby increasing the possibility that biased jurors will not be identified. The expanded use of questionnaires will improve the attorneys' ability to question prospective jurors and select those jurors who are impartial.

Juror questionnaires would also enhance the efficiency of the jury selection process by dispensing with the need to ask jurors repeatedly for basic information about education, family status, employment history, lawsuit experience, prior jury experience, and knowledge of any of

the parties or witnesses; this takes up a substantial amount of the attorneys' time during oral *voir dire*. The use of questionnaires will also allow attorneys to be more case-specific during oral *voir dire*. Moreover, because jurors would be given time to fill out the forms, it would encourage not just accuracy, but also completeness, all in a setting of increased privacy.⁷⁹

Voir dire necessitates a public inquiry into life experiences, attitudes and other private matters that prospective jurors might find embarrassing or not want to make public. Some prospective jurors may either remain silent or give answers that are less than honest to *voir dire* questions they find too invasive.⁸⁰ Indeed, there is empirical evidence that "people are willing to be more candid and to reveal more personal information regarding sensitive questions on self-administered written questionnaires than they are in verbal, person to person interviews and in *voir dire*."⁸¹ Thus, the public nature of *voir dire* can reduce or entirely eliminate the parties' opportunity to gain the meaningful and honest information necessary to seat a fair and unbiased jury. Moreover, since actual or perceived insensitivity to juror privacy concerns is a frequent cause of dissatisfaction with jury service,⁸² for some jurors, the use of jury questionnaires would directly address a frequent citizen complaint about jury service. The use of a comprehensive standardized juror questionnaire strikes an appropriate balance between the needs of the litigants

⁷⁹ See Valerie P. Hans and Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the *Voir Dire* Process in Jury Selection located in Symposium: The Jury at a Crossroad: The American Experience, 78 Chi.-Kent L. Rev. 1179 (2003).

⁸⁰ R. Seltzer, M. Venuti and G. Lopes, Juror Honesty during the *Voir Dire*, 19 J. Crim. Just. 451 (1991).

⁸¹ Jan Mills Spaeth, Swearing with Crossed Fingers: Juror Honesty and *Voir Dire*, 37 Ariz. Atty. 38 (Jan. 2001).

⁸² See Paula L. Hannaford, Safeguarding Juror Privacy: A New Framework For Court Policies and Procedures, 85 Judicature 18 (Jul./Aug. 2001).

and those of the jury panel, while at the same time achieving the fundamental goal of providing litigants with a fair trial.⁸³

While the Commission strongly supports the expanded use of written questionnaires in civil cases, the Commission recognizes that the nature of a criminal case and the court's responsibility to ensure the selection of an unbiased jury may not justify the use of questionnaires in many cases.⁸⁴

However, while the trial court judge in a criminal matter must have full discretion to determine whether they are used, written questionnaires in criminal cases currently are used in 50 counties and in every death penalty case throughout the state.⁸⁵ The current statute appropriately leaves to the judge the discretion whether to use questionnaires. Whether the juror provides information orally or in writing, the Commission encourages the expanded use of questionnaires in criminal cases, thereby providing more information for the attorneys and allotting the attorneys more time for substantive questioning.

The Commission commends OCA for developing several standardized "case-type" questionnaires that not only elicit basic general information on jurors but also take account of juror suitability issues common to specific types of cases. Parties should be encouraged to modify these standard case-type questionnaires to address case-specific issues, and courts should work with the parties to modify the standard case-type questionnaires to address the nuances and

⁸³ See Seltzer, Venuti and Lopes, *Juror Honesty during the Voir Dire* 19 J. Crim Just. 451 (1991), see also Mary L. Rose, *Expectations of Privacy*, 85 *Judicature* 10, 12, 14-15 (Jul./Aug. 2001).

⁸⁴ CPL §270.15, which defines the procedure for jury selection in criminal cases, permits the use of questionnaires at the discretion of the trial judge. In completing jury questionnaires, courts generally use one of three acceptable options in criminal cases: oral answers to oral questions, written answers to written questions and oral answers to written questions.

⁸⁵ In fact, OCA has initiated a pilot project, utilizing a combined civil/criminal questionnaire. OCA reports that the response received to date is uniformly positive.

special issues of particular cases. A standardized procedure for party participation in formulating the questionnaires should be devised and encouraged. The courts should review the proposed questionnaire, as submitted by counsel to the court, and decide whether the submitted questionnaire will be utilized.

At the Commission's hearings, witnesses testified to the successful use of case-specific juror questionnaires in complex matters, including medical malpractice and product liability trials or on sensitive issues such as domestic violence. The parties in these cases drafted and designed questionnaires to elicit not simply basic background data, but also more detailed information about the prospective juror's opinions about issues relevant to the instant case.

For questionnaires to have value, the parties must be given time to review them prior to the commencement of oral questioning. Local jury commissioners, in cooperation with members of the local Bar, should develop procedures to make sure that the parties have the time necessary to use the juror questionnaires.

I. Enhanced Services and Better Amenities Will Reduce Juror Dissatisfaction

While no one would suggest that it is the function of the court system to entertain jurors, jurors can benefit – indeed they have already benefited – from the provision of services that make their experience more pleasant or more convenient. This is particularly so if services can be provided at no cost to the court system.

The Commission strongly supports the idea of providing conveniences for jurors, provided they are not subjected, subtly or otherwise, to any pressure to avail themselves of those services (e.g., if jurors are exposed to a blood drive, they should not be placed in a position of feeling pressure to participate by virtue of their jury service). During the course of its hearings,

the Commission received testimony about services that are already being provided and received suggestions for expansion of those services.

Some counties have been turning jurors' "down-time" to the jurors' advantage by providing opportunities for mammograms or prostate cancer screening and to participate in blood drives. Other counties provide the jurors the opportunity to conduct Department of Motor Vehicles business. The possibilities for services are endless, and the suggestions offered at the hearings were many. One former juror made suggestions to the Commission on "how to look at the jury in a bit of a different light" and to make "jury service more hospitable." In addition to offering Internet connections, which is discussed below, among other things suggested is the possibility of providing book and language clubs, voter registration, and work spaces. Services such as these will have no cost to the State.

The Internet

Internet access was a topic at many of the hearings. Albany County Chief Clerk Charles Diamond testified that Albany County discontinued offering Internet access because of lack of use. New York County Juror Commissioner Norman Goodman (a member of the Commission) suggested a possible reason for the difference in usage, pointing out that in New York County, the lawyers also take advantage of the Internet access. In contrast, in Albany County, lawyers' offices are so near the courthouse that they can quickly return to their offices to access the internet. Other counties are using or are considering adding this service. In Nassau County and most counties, the cost is borne by the user. OCA's technology department is currently performing a cost analysis to determine if this service can be offered for free. With expanded

Internet access, the courts must be careful to remind the jurors that they should not “surf the web” to research their cases, including the parties and attorneys.⁸⁶

Transportation

An important issue for jurors is transportation to the courthouse. Many jurors are coming to an unfamiliar location and do not know where to park. Moreover, parking is costly and may be inconvenient for those unfamiliar with the area. Some counties offer free or discounted parking and some, reserved spots.⁸⁷ Those amenities are important to jurors because there is no expense reimbursement in addition to the daily compensation, and the transportation inconvenience just adds to the jurors’ overall inconvenience and distaste for the experience.

Miscellaneous Amenities

In addition to the services discussed above, participants mentioned other improvements and amenities they believed would enhance jury service, such as:

- a smile and courteous professional approach by staff;
- appropriate climate control – jurors usually experience unheated, overheated, no-air-conditioned, or over-air-conditioned rooms (especially jury deliberation rooms);
- have coffee available;
- maintenance of lavatories;
- correct spelling on signs;
- comfortable furniture;
- large screen/digital televisions;

⁸⁶ See J. Redgrave, “Unplugging Jurors from the Internet,” 48 – JUL Fed. Law 19 (July 2001).

⁸⁷ See Appendix P (chart of whether free parking is provided, by county).

- proper lighting;
- paint;
- electrical outlets for laptops and electronic equipment; and
- reading materials.

The Commission heard testimony about advances already made in these areas and, most important, that some seemingly minor adjustments seem to make a big difference. For example, magazines and a magazine rack are provided in Nassau County.

The Commission recommends that jury commissioners in each county assess and report to the Commission on services that have been offered, how well-received those services are, and the feasibility of offering new services. With this information in hand, the Commission can better assess the possibilities for enhanced juror services.

J. Methods of Making Jury Service Desirable

Shorter Service and Sliding Scale Credit for Jury Service

The National Center for State Courts' Best Practices Institutes has recognized that the one-day/one-trial system is a "particularly effective practice."⁸⁸ This system has led to a decreased excusal rate, fiscal savings and improved employers' attitudes because of the likelihood of an employee's return after one day of service, increased system efficiency and increased juror satisfaction.⁸⁹ Currently, while this system is generally in effect in New York State, there are significant variances in a number of counties and attempts should be made to reduce, if not eliminate, this disparity.

⁸⁸ Victor E. Schwartz and Carey Silverman, "The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens," The State Factor (ALEC, April 2003) (The State Factor.)

⁸⁹ Id. at 3-4.

Another way to make jury service more appealing is to allow more time between instances of jury service for those who actually sit on a trial. Currently, if a juror is not selected to serve on a panel or serves on a panel for not more than 10 days, that juror is excused from future service for four years.⁹⁰ A person who serves on a panel for more than ten days is excused for eight years.⁹¹ Differentiation of the intervals between service should be considered so as to encourage participation in the jury process.

The Commission recommends that each Jury Commissioner report on the interval of time between instances of jury service, and whether the county takes into account whether the juror was actually questioned for a panel, heard any testimony, or merely checked a telephone system to learn that it was unnecessary to report. Consistent with the county's need, the Commission believes the jurors should receive more service credit for more participation.

Juror Compensation

The current jury fee in Supreme, County, District or City Courts in New York State is \$40.00 per day,⁹² which has been described as “measly.”⁹³ Employers do not have to pay jurors their regular wages for any day spent on jury service.⁹⁴ Thus, if a juror's daily wage is greater than \$40.00, the juror will suffer a financial loss by serving, without even taking account of out-of-pocket expenses such as parking.⁹⁵ Hardship excuses, which may result, reduce the

⁹⁰ Jury Service in New York State, A Guide for Employers & Employees (“The Guide”) at 4, 7.

⁹¹ Id.

⁹² Guide at 8.

⁹³ Victor E. Schwartz and Cary Silverman, “Fulfilling the Promise of the Jury System,” Litigation Management at 3 (Spring 2003).

⁹⁴ See The Guide at 11.

⁹⁵ Id.

representativeness of the jury pool.⁹⁶ Moreover, sometimes the fee does not even cover the cost of travel, parking and lunch.⁹⁷

Jury service also imposes an economic burden on “professionals who stand to lose a substantial sum,”⁹⁸ as well as a severe financial hardship on those who make more than \$40.00 per day but are at the minimum wage level.⁹⁹ Nevertheless, “[j]ury service is one of the obligations of citizenship, and its importance cannot be recognized in monetary terms.”¹⁰⁰ Even those professionals previously allowed automatic exemptions to jury service, such as physicians, ultimately supported the elimination of those exemptions and did not believe they were too valuable to take time off to serve.¹⁰¹

In light of the tensions between the financial burden to the individuals, the staggering burden to the states if fees are increased,¹⁰² and the need for a representative jury pool, various proposals have surfaced. In 1993, the ABA proposed a two-step juror compensation program which recognizes the burden of lengthy jury service by providing a higher fee after the first day.¹⁰³ In a more recent development, the Jury Patriotism Act proposes establishing a Lengthy Trial Fund. This proposal by the American Legislative Exchange Council (ALEC) would provide significantly higher compensation as the length of the trial increased.¹⁰⁴ A minimal fee

⁹⁶ See Commentary to ABA Standard 15.

⁹⁷ The State Factor at 4.

⁹⁸ Id. at 8.

⁹⁹ See Commentary to ABA Standard 15.

¹⁰⁰ Id.

¹⁰¹ The State Factor at 6.

¹⁰² Even though the daily juror fee is quite low, the overall cost for juror fees constitutes “a significant percentage of the court budget.” Commentary to ABA Standard IS.

¹⁰³ See ABA Standard 15.

¹⁰⁴ See id. at 5.

collected from attorneys filing civil cases would finance the Lengthy Trial Fund, which would be “self-sustaining” and not require any funds from the state.¹⁰⁵

The Commission lauds the efforts of both the ABA and ALEC and, in connection with its works, the Commission heard support for addressing juror compensation.¹⁰⁶ However, based on the recent significant increase in jury compensation to \$40.00 per day (the federal court standard throughout the country) and the State’s pressing budgetary issues, it does not recommend an increase in juror compensation at this time. It does, however, advocate exploring other creative options for increasing amenities for jurors outlined in this Report and by the ABA Standard 15.

Helping Employers Understand the Importance of Jury Service

All of our suggestions for making jury service more appealing to jurors should redound to their employers’ benefit as well. For example, a more representative jury is more representative of all segments of society, including employers.¹⁰⁷ While recognizing fiscal concerns, the Commission recommends that to supplement The Guide, OCA should undertake an educational campaign, with the cooperation of bar associations, trade groups, chambers of commerce and others, to publicize advances and enhancements to the court’s physical facilities, the improved efficiency of the process, increased satisfaction of jurors who have served and other “success” stories. Using satisfied former jurors in public service type announcements would be helpful. Court TV is another possible participant in this educational effort. Also, continued publicity of “celebrity” jurors, such as former President Clinton and former Mayor Giuliani (as well as the practice of celebrating “Celebrity Juror” day every year) projects a positive image of the jury

¹⁰⁵

Id.

¹⁰⁶

See DTLA Statement.

¹⁰⁷

The State Factor at 1.

system. It would also be useful to create a poster, similar to the EEOC-type posters that explain employees' rights, for employers to display in their lunch rooms.

K. Consider Juror Privacy Concerns

Juror candor is a necessary component of *voir dire*, and juror independence from outside influence is essential to fair deliberation.¹⁰⁸ In some circumstances, juror candor and independence may be negatively impacted by press inquiries and publicity. The mistrial in the prosecution of former Tyco International executives L. Dennis Kozlowski and Mark H. Swartz provides a recent example of the juror privacy concerns that may arise in high-profile cases and serves to underscore the need for the court system to be concerned about this issue.¹⁰⁹ The Commission has identified some of the remedies available to courts in order to address these concerns. However, the Commission has not reached conclusions on this issue and will undertake further consideration of the juror privacy concerns generated by high profile cases and the availability and effectiveness of judicial remedies to address them.

¹⁰⁸ Recent examples underscoring these points include: (1) U.S. District Judge Miriam Goldman Cederbaum's order barring the press from attending *voir dire* during the Martha Stewart prosecution out of concern that jurors would not be as forthcoming in the presence of the press; (2) Supreme Court Justice Michael Obus' declaration of a mistrial in the six-month trial of two former Tyco International executives after Juror No. 4 reported that she had received a letter pressuring her to convict the defendants; and (3) U.S. District Judge Richard Owen's order in the recent Quattrone retrial forbidding the press and others from revealing the names of jurors.

¹⁰⁹ Justice Obus declared a mistrial on April 2, 2004, after Juror No. 4 reported that she had received an anonymous letter pressuring her to vote to convict the defendants. Justice Obus had previously rejected a defense motion for mistrial on the ground that some newspapers had identified Juror No. 4 by name. Departing from the customary practice of news organizations to withhold jurors' names during trial, the Wall Street Journal revealed her identity in this instance on its website. The New York Post and numerous other news organizations soon followed suit.

Identifying Juror Privacy Concerns

A variety of juror privacy concerns may arise in civil or criminal trials, whether high-profile or not. As described earlier in this Report,¹¹⁰ jurors are often asked personal questions during *voir dire*, which some may be reluctant to answer publicly. In addition, some jurors may be concerned about the confidentiality of the information they report on written questionnaires. In the case of high-profile trials, jurors may be concerned about their identity being publicly disclosed and publicized by the media. Similarly, jurors may be concerned about press attention and public pressure both while serving on a jury in a high-profile trial and afterward. The impact of these concerns, individually or collectively, may have serious, negative effects on juror candor and independence.

Jurors have a solemn duty to focus on the facts and law presented to them in a case and to reach a verdict based upon their own assessment of the evidence, free from any outside influence.¹¹¹ When jurors become the targets of media attention – as occurred in the Tyco trial – it may well interfere with their ability to perform that duty. Thus, protecting the privacy of jurors to an appropriate degree protects the integrity of the jury system.

Statutory Remedies Currently Available

New York protects juror privacy by maintaining the confidentiality of juror questionnaires. Although copies of the questionnaires are distributed to counsel, the court must

¹¹⁰ See Section VI (H), "Expanded Use of Juror Questionnaires."

¹¹¹ See *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966); *In re Disclosure of Juror Names and Addresses*, 592 N.W.2d 798, 808 (Mich. Ct. App. 1999) ("Uninhibited and frank jury deliberations are essential to our system of justice. That frankness would be jeopardized if jurors refrained from speaking freely because they fear for their safety should their names and comments become public knowledge.")

maintain the confidentiality of the questionnaires in all other respects.¹¹² New York law also provides the trial court in criminal cases with discretion to control the *voir dire* process generally, and to limit public disclosure of jurors' addresses for good cause.¹¹³ In addition, New York law grants trial courts the discretion to sequester jurors.¹¹⁴

New York Civil Rights Law § 52 prohibits cameras in the courtroom and the televising of judicial proceedings. Although the law, enacted in 1952, was intended by the Legislature to protect witnesses and encourage candid and truthful testimony at trial by forbidding cameras in the courtroom,¹¹⁵ it also serves the purpose of protecting jurors from public disclosure.¹¹⁶

Additional Judicial Remedies: The Precedential Framework

These statutory remedies address some juror privacy concerns. But in certain circumstances, particularly high-profile trials, other concerns may arise that require additional remedies. Judicial precedent, however, is of limited guidance, because it most often addresses those particular procedures employed by trial judges in specific cases that are claimed not to be appropriate because they assertedly run afoul of constitutional principles or statutes. As a result,

¹¹² See New York Judiciary Law § 509(a); Newsday, Inc. v. Sise, 71 N.Y.2d 146, 151-52 (1987) (denying media's request for a copy of the jury questionnaires), cert. denied, 486 U.S. 1056 (1988); People v. Jennings, 299 A.D.2d 970 (4th Dept. 2002) (requiring Supreme Court to protect confidentiality of juror questionnaires).

¹¹³ See CPL §§ 270.15(1)(a)(c), (1-a).

¹¹⁴ See CPL § 310.10.

¹¹⁵ See Courtroom Television Network, LLC v. State of New York, 1 Misc. 3d 328, 375 (Sup. Ct. N.Y. Co., 2003).

¹¹⁶ However, the law is currently under constitutional attack by the Courtroom Television Network ("Court TV"). Court TV filed a declaratory judgment action in New York Supreme Court alleging that Civil Rights Law § 52 violates the First Amendment of the United States Constitution and Article I, Section 8 of the New York Constitution. On July 15, 2003, Supreme Court Justice Shirley Werner Kornreich denied Court TV's challenge. Courtroom Television Network, LLC, 1 Misc. 3d at 375. Justice Kornreich's decision has been appealed, and the First Department will hear the case during the June 2004 Term.

the Commission has been able to identify the legal framework for addressing juror privacy concerns, but not necessarily the entire range of remedies that may be available.

While courts have recognized a limited juror privacy interest,¹¹⁷ there is also a well-established presumption of openness in court proceedings. The privacy interests of jurors are subordinate to, and must be balanced against, (1) defendants' constitutional rights to a fair trial and an impartial jury and (2) the public's right of access to trial proceedings. When competing interests arise between Free Press and Fair Trial, courts balance these rights, and juror privacy interests often yield to superior Fair Trial or Free Press rights.

The First Amendment right to access is qualified. Accordingly, it may be possible for a court to withhold jurors' names from the press or enjoin the press from publishing the names where circumstances demonstrate that First Amendment values would not be abridged as much as Sixth Amendment values would be protected.¹¹⁸ When a court specifically finds that circumstances require the imposition of tailored restrictions in order to protect juror privacy, and thus the integrity of the judicial system, the court may enter an order that is narrowly tailored to achieve those ends.¹¹⁹

¹¹⁷ See Press-Enterprise Co. v. Superior Court of Ca., Riverside County, 464 U.S. 501 (1984).

¹¹⁸ In New York, it is rarely, if ever, permissible for the judge to withhold the identities of the jurors from the defendant. See People v. Perkins, 125 A.D.2d 816, 817 (3d Dept. 1986) (holding that defendant is entitled to disclosure of juror identities); New York v. Watts, 173 Misc. 2d 373, 377 (Sup. Ct. Richmond Co., 1997) (rejecting state's request to withhold the names of jurors from the defendant). Moreover, courts may not be permitted to withhold jurors' identities from the public either because CPL § 270.15(1)(a) requires the names of jurors to be drawn and called during jury selection. See Watts, 173 Misc. 2d at 375-77.

¹¹⁹ See Press-Enterprise, 464 U.S. at 510; Waller v. Georgia, 467 U.S. 39, 45 (1984) ("[T]he Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."); U.S. v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993); In re Disclosure, 592 N.E.2d at 801, 809 (instructing trial court to make specific findings regarding juror safety in order to determine appropriateness of an order denying the press post-verdict access to juror names and addresses, and noting: "This right of media access is qualified and may be restricted where particular circumstances indicate that justice is better served by closure than disclosure.").

Enjoining the press from publishing juror names during trial would protect jurors from publicity and ensuing public reaction, and thereby safeguard the trial process. This remedy would appear to be narrowly tailored, as the press itself recognizes the appropriateness of withholding juror names from publication during trial. However, depending on the circumstances of the case, an injunction on the press or some other judicially-created remedy designed to protect juror privacy in order to ensure a fair trial may not be constitutional. For example, during *voir dire* for the Martha Stewart trial, Judge Cederbaum did not enjoin the press, but granted the government's request to bar the media from attending the *voir dire* of potential jurors, which was held in the court's robing room, and released transcripts with the names of the jurors redacted. Ruling on the media's challenge to the order, the Second Circuit found it unconstitutional, holding that the district court should have (a) determined whether there was a substantial probability that the right to a fair trial would be prejudiced by allowing the press access to *voir dire*, and (b) adopted a narrowly tailored method of protecting the defendant's fair trial rights.¹²⁰

Issues for Further Consideration

There have been immediate reactions by the judiciary¹²¹ and the press to the Tyco mistrial. But the public reaction is less immediately apparent. For example, it is unclear whether

¹²⁰ ABC, Inc. v. Martha Stewart, 360 F.3d 90, 96, 106 (2d Cir. 2004).

¹²¹ Less than a week after the Tyco mistrial, the defense team for Frank P. Quattrone, the former Credit Suisse First Boston banker who was retried for obstruction of justice in federal court in New York and convicted, asked the court to withhold the names of jurors from the public for the duration of the trial. See Defendant Frank Quattrone's Opposition to Government's Motions *In Limine*, dated April 7, 2004. Quattrone's lawyers argued that as a result of the media coverage in Tyco, "[e]nsuring the venire members and seated jurors of anonymity will make it more likely that (1) individuals will be willing to serve on the jury; and (2) seated jurors will deliberate and vote their consciences, without fearing reprisals." *Id.* at 3. Judge Richard Owen declined the request for juror anonymity and instead issued an order prohibiting anyone from publishing the name or address of any juror or prospective juror during the trial.

the reporting of Juror No. 4's name and the intense media focus on the Stewart trial will have an effect on prospective jurors' willingness to serve, particularly in high profile cases, and whether the media coverage of the Tyco and Stewart trials will affect the ability of jurors to deliberate honestly.

New York courts are vested with the discretion to properly balance the juror privacy, fair trial, and free press issues relevant to each case. In cases with a higher degree of public interest and press attention, precedent has instructed that judicial discretion should be employed to protect jurors' privacy within constitutional limits. Because of the variety of possible remedies and the complexity of the law, the Commission believes that it would be useful for it to identify the most effective, constitutionally permissible remedies that provide effective protection for jurors in particular circumstances. In the next phase of its work, the Commission will invite academics, judges, lawyers and others to advise the Commission, and it may hold further hearings to inform itself further on this subject.

L. Peremptory Challenges in Criminal Cases

Whether New York should legislatively reduce the number of peremptories was a major focus of the Jury Project.¹²² As a result of that report, the legislature reduced the number of peremptory challenges in civil cases, from three per party to three per side. Peremptories in criminal cases, however, were left untouched.

¹²²

The 1994 Jury Project found that peremptory challenges was an area ripe for reform because of the potential for abuse. It concluded that an excessive number of peremptory challenges increases *voir dire* time, overburdens the already strained jury pool, and exacerbates Batson problems. (See *infra*, for a discussion of the Batson holding.) Although not recommending that peremptory challenges be eliminated altogether, the Jury Project recommended that the number of peremptory challenges be decreased from 3 per party to 3 per side in civil cases, and in criminal cases, reduced from 20 to 15 per side in Class A felonies, from 15 to 10 per side in Class B and C felonies, and from 10 to 7 per side in Class D and E Felonies. (See Jury Project at 64-70.) The recommendations relating to civil trials were adopted. Those relating to criminal trials were not.

An important issue for the Commission was whether any further change is warranted. There was no support for the view that peremptories in civil cases should be reduced. However, with respect to criminal cases, there was a substantial difference of opinion on the Commission and among those who testified at our hearings, and consensus was not reached. As a result, the Commission has decided to make no recommendation on this issue. However, the Commission felt that it would be useful to present the competing views on this issue in the event that circumstances warrant the Commission's revisiting this issue.

- **The View against Reduction of Peremptories in Criminal Cases**

In criminal cases, CPL § 270.25 permits each party 20 peremptory challenges in class A felonies, 15 peremptory challenges in class B or C felonies, 10 peremptory challenges in class D or E felonies and two peremptory challenges for each alternate juror.¹²³

Many judges testified in favor of reducing the number of peremptory challenges, characterizing them as excessive and ripe for reform. Proponents of a reduction argue the jury selection process would achieve improved efficiency and better utilization of jurors. However, no empirical evidence was available to support this hypothesis.

On the other hand, practitioners in criminal cases, both defense attorneys and prosecutors alike, strongly oppose any reduction of peremptory challenges.¹²⁴ In fact, both groups complain that judges so limit the time spent on jury selection that a substantial number of peremptory challenges are needed to make possible the selection of a fair and impartial jury. Recognizing the realities of the volume of cases and demands on the court system, judges typically limit *voir*

¹²³ For a historical review of peremptory challenges, see infra.

¹²⁴ Indeed, one District Attorney argued that the number of peremptory challenges be increased, particularly for lower level felonies.

dire to 20 minutes for each side during the first round of jury selection. The time is reduced to 15 minutes for subsequent rounds. In some jury selections, the judge seats as many as 21 members of the venire in the jury box. Consequently, each side, with a 20-minute time limit, has 56 seconds to question each juror. In subsequent rounds, each side has 43 seconds to determine whether a member of the venire harbors any bias that would prevent him or her from fairly determining the critical issue of guilt beyond a reasonable doubt. While this seems like a paltry amount of time, the integrity of the entire process has been protected by the number of peremptory challenges. Instead of complaining about the time limits, both defense attorneys and prosecutors simply strike the jurors that they do not have sufficient time to question.¹²⁵ Thus, the number of peremptory challenges is not frivolous or overindulgent, but rather absolutely necessary to protect the rights of the defendants, victims and the People of the State of New York.¹²⁶

Time limits have ensured that trials move forward as quickly as possible without impeding the selection of a fair and impartial jury. Both downstate and upstate, criminal juries usually are selected in less than a day, sometimes only half of a day.¹²⁷ Jury selection is not prolonging the length of trials.

The availability of peremptory challenges continues to be viewed by the participants in the criminal justice system, both prosecutors and defense attorneys, as an essential tool to

¹²⁵ It is difficult to imagine less time spent on jury selection. In fact, some suggested that the time limits currently set for jury selection are too severe.

¹²⁶ During most criminal *voir dire*s, the attorneys do not utilize all their peremptory challenges. One judge estimated that in the past 120 trials over which he presided, only between 5 to 10 % of the attorneys used all of their peremptory challenges.

¹²⁷ A New York City judge stated, "You can pick a jury on a B felony in anywhere between half a day to three quarters of a day and pick a fair jury. There is no reason to cut that down." An Albany defense attorney stated, "Jury selection begins on Monday morning, in almost every instance it ends on Monday afternoon and proof starts."

eliminate potential jurors whose biases would adversely affect their ability to be fair jurors.

Anyone who has been an active participant in the criminal justice system understands that not all

biases are addressed by Batson.¹²⁸ With the extremely short time allotted to both the defense and

the prosecution to screen for cause, latent biases are difficult, if not impossible, to uncover.

These biases may be class-related or may stem from a variety of other unacceptable

preconceptions that would affect the juror's ability to judge the evidence fairly; they may

manifest themselves, for example, in the willingness to accept or reject without question the

testimony of police officers or other public officials. The availability of peremptory challenges

is therefore essential to the process of seating a jury that is fair.

The Commission had to weigh fairness in the criminal justice system against possible efficiencies in juror utilization. Striking this balance requires a recognition that the concept of fairness encompasses the liberty interests of defendants, the protection of the public's interest in fair prosecutions, and the fundamental values recognized in our society as inherent in the concept of justice. Potential increases in efficient juror utilization cannot and must not outweigh these considerations of fairness.

And what are the potential efficiencies that a reduction in peremptory challenges might achieve? The efficiencies most often suggested are reducing jury trial delay by seating jurors more quickly, reducing the congestion in court calendars, and reducing the size of jury pools.

¹²⁸

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the equal protection clause prohibits a prosecutor in a criminal case brought against an African-American from exercising peremptory challenges to strike African-Americans from the panel on the basis of race. The Court explained that invidious discrimination in the jury selection process was unconstitutional discrimination against both the defendant and the excluded juror, and that selection processes that intentionally excluded jury members based on race undermine public confidence and the fairness of the justice system. In J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994), the Court extended the rationale under Batson to prohibit the use of peremptory challenges on the basis of gender. In Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), the Court extended Batson to civil cases.

There is no clear evidence that the number of peremptories in the average criminal case delays jury trials, congests court calendars or has an appreciable impact on the size of jury pools. Reduction in the number of peremptory challenges actually would require that more time be spent on jury selection and decrease juror utilization. Jurors are sophisticated enough to know what needs to be said to “get off” a jury and what needs to be said to stay on the jury. Potential jurors often make statements that would warrant challenges for cause and are then rehabilitated by either the judge or opposing counsel. Other potential jurors do not present a challenge for cause but appear to harbor a bias that would impact on their desirability as a juror. In either of these instances, one side simply exercises its peremptory challenge without consuming valuable court time flushing out the bias in an attempt to support a challenge for cause.

If peremptory challenges were reduced, the parties would be forced to question more closely the possibly biased juror in an effort to demonstrate the basis for a challenge for cause. Instead of speeding up the process, that questioning would prolong it. Rather than improving the experience of jury selection for citizens, questioning for potential bias would subject the person to greater public scrutiny and possible embarrassment. As the parties become more assertive on arguing challenges for cause, judges would be required to discharge the potential juror if counsel can articulate any showing of potential bias.¹²⁹ “Just as counsel can articulate seemingly neutral reasons for exercising peremptory challenges, counsel can be equally creative in fashioning reasons why jurors should be excluded for cause.”¹³⁰ Unlike the case with peremptory challenges, there is no limit to the number of challenges for cause. Thus, instead of improving

¹²⁹ People v. Johnson, 94 N.Y.2d 600, 614 (2000).

¹³⁰ Charles J. Hynes, Peremptory Challenges: Here Today, Here Tomorrow?, New York Law Journal, April 17, 2002, p.1.

juror utilization, a reduction in the number of peremptory challenges would increase the number of jurors discharged from service.

Protecting the rights of defendants and safeguarding the public's interest in fair prosecutions and in the integrity of the criminal justice system cannot and should not be compromised in the interest of potentially achieving more efficient juror utilization.

- **The View in Favor of Reduction of Peremptories in Criminal Cases**

While the Commission members have divergent views on the issue of peremptory challenges, those in favor of reduction are not proposing *elimination* of peremptory challenges in criminal cases, but rather only a subtle *reduction* in the excessive number of peremptory challenges. This is a reform which will go a long way towards ameliorating under-utilization of jurors without impairing the fairness and impartiality of criminal jury trials in New York. The proposal, set forth and discussed below, “continues our jury reform efforts begun ten years ago with The Jury Project,” which was the mandate of this Commission according to Chief Judge Judith S. Kaye.

Certainly, the peremptory challenge is deeply rooted in the Anglo-American legal system: At the common-law, a defendant had 35 such challenges in capital cases,¹³¹ and the prosecutor had an unlimited number. In 1305, the prosecution's peremptory challenge was eliminated by the Ordinance for Inquests.¹³² Then, in 1530, defense peremptory challenges were

¹³¹ Defense peremptory challenges were also apparently permitted, at common law, in non-capital cases (*Swain v. Alabama*, 380 U.S. 202, 212 n. 9 (1965); see also Note, *Georgia v. McCollum: Protecting Jurors From Race-Based Challenges But Forcing Criminal Defendants to Risk Biased Juries*, 24 *Pac. L.J.* 1887, 1899, n.80 (1993)).

¹³² 33 *Edw.* 1.

reduced to 20 in all felony cases, except high treason, which remained at 35.¹³³ Thereafter, the practice arose allowing a prosecutor to stand jurors aside – the functional equivalent of a peremptory challenge, a common law right which New York eliminated in 1786 (L. 1786, c. 41), leaving the People without peremptory challenges.

In 1801, the Legislature provided 35 peremptory challenges to “any person arraigned for treason or misprision of treason,”¹³⁴ and 20 peremptory challenges to “every person arraigned for any crime punishable with death, or with imprisonment for life.”¹³⁵ Defense peremptory challenges were expanded in 1828, when the threshold was lowered from life imprisonment to all cases punishable by imprisonment for ten years or more, as to which a defendant was also entitled to 20 challenges,¹³⁶ although this may not have actually occurred until 1830. There still were no prosecution peremptory challenges. The Legislature, in 1847, again expanded defense peremptory challenges, providing 5 challenges for felonies punishable by less than ten years; and 2 challenges for misdemeanors in courts of special sessions.¹³⁷ The People still had no right to exercise peremptory challenges.¹³⁸

¹³³ See generally, Pizzi & Hoffman, Note, Jury Selection Errors on Appeal, 38 American Crim. L.Rev. 1391, 1412 (2001); People v. Thompson, 79 A.D.2d 87, 98 n.15 (2d Dept., 1981); People v. McQuade, 110 N.Y. 284, 293 (1888); The President, Directors and Company of the Waterford and Whitehall Turnpike v. The People, 9 Barb. 161 (Sup. Ct. N.Y. Co., 1850); People v. Aichinson, 7 How. Prac. 241 (Sup. Ct. N.Y. Co., 1852).

¹³⁴ L.1801, c. 29.

¹³⁵ L.1801, c. 60.

¹³⁶ 2. RS. 734, § 9.

¹³⁷ L. 1847, c. 134. See Note On The Proper Practice for Impaneling a Jury, appended to Greenfield v. People, 74 N.Y. 277 (1878); People v. Keating, 16 N.Y. Supp. 748, 749 (Sup. Ct., 1891); Dull v. The People, 4 Denio 91 (Sup. Ct. N.Y. Co., 1847).

¹³⁸ An 1830 statute gave a prosecutor the same number of challenges as in a civil case; however it was not until 1847 that civil peremptory challenges were authorized. This led to a controversy as to whether prosecutors had become entitled to peremptory challenges. (The President, *supra*, held that they had become so entitled; People v. Aichinson, *supra*, held that they had not. See also People v. Thompson, *supra* 99, at n. 16 (collecting cases)).

It was not until 1858 that the Legislature expressly allowed peremptory challenges for the People: in capital case or case involving ten or more years imprisonment there were 5 challenges; and in cases punishable by less than ten years there were 3 challenges.¹³⁹ The unequal number of defense and prosecution challenges remained unchanged until 1872, when each side was given 35 challenges in capital cases.¹⁴⁰

Finally, in 1873, peremptory challenges were equalized between the defense and prosecution.¹⁴¹ Thirty (30) were permitted in capital cases (with 3 per alternate), 20 in cases punishable by imprisonment for life or for ten years or more (with 2 per alternate), and 5 in all other cases (with 1 per alternate). These remained the allowable number of defense and prosecution challenges until the Criminal Procedure Law became effective in 1971 and created the current scheme, which is tied to the Penal Law's classification of felonies and misdemeanors.

The number of peremptory challenges authorized in New York is among the highest in the country, with only New Jersey providing more challenges in non-capital or non-life cases, i.e., 20 defense challenges and 12 prosecution challenges in all felonies. No other state provides for more than 10 challenges for non-capital or non-life offenses, and most far fewer. In capital cases, only Connecticut allows more than New York (i.e., 25 challenges); eleven other jurisdictions (California, Delaware, Georgia, Illinois, Indiana, Maryland, New Hampshire, New Jersey, Pennsylvania, South Dakota, and the District of Colombia) authorize 20 challenges, as does New York. In "life" cases, only nine states allow over 10 challenges, ranging from 12 (Hawaii, Kansas, Louisiana, Michigan) to 15 (Connecticut, Minnesota (defense only- people

¹³⁹ L. 1858, c. 332.

¹⁴⁰ L. 1872, c. 475.

¹⁴¹ L. 1873, c. 427.

have 9), New Hampshire) to 20 (California, South Dakota). In the federal courts, the law allows 10 defense challenges and 6 prosecution challenges for all felonies. Moreover, the ABA Standards Relating to Jury Use and Management¹⁴² recommends 10 peremptory challenges in capital cases and 5 peremptory challenges for all other cases involving a sentence of over six months.

At the Commission hearings, opposition was expressed by both defense attorneys and district attorneys to any reduction in the number of peremptory challenges. Essentially, both sides argued that the current number of challenges was necessary to ensure fairness in a criminal trial, with one prosecutor supporting an increase in the number for “lower grade felonies.” Peremptory challenges are necessary, as one witness put it, in order to tell the defendant that a “fair jury” has been selected. The Criminal Justice Section of the New York County Lawyers’ Association submitted to the Commission a written *Report and Resolution* in opposition to any reduction of peremptory challenges, arguing that peremptory challenges are necessary to (1) eliminate the stealth juror; (2) eliminate jurors on the ideological or social fringe; and (3) eliminate jurors who are unable to pay attention or to maintain impartiality. Moreover, concern was expressed that any reduction in peremptory challenges would increase litigation over “for cause challenges,” with a resultant increase in jury selection time, and a corresponding increase on appellate courts, since defense attorneys would have to exhaust their challenges for appeal.¹⁴³

On the other hand, most of the judges who testified were in favor of a reduction in the number of allowable peremptory challenges, as were the witness representing the National

¹⁴² Committee on Jury Standards, 1993.

¹⁴³ CPL § 270.20 [2].

Center for State Courts and an academic jury expert.¹⁴⁴ Among the arguments advanced in favor of reduction of the number of peremptory challenges were that, notwithstanding the procedures to implement Batson, the exercise of peremptory challenges continue to suggest improper motivations; that New York ranks among the highest in the number of peremptory challenges; and that such a high number of peremptory challenges is simply unnecessary.

These viewpoints were similar to ones presented to The Jury Project, which proposed “modest reductions” in criminal peremptory challenges,¹⁴⁵ a recommendation which it concluded would not “risk making New York juries significantly less fair or impartial.” While the Report primarily focused on the discriminatory use of such challenges, it nevertheless estimated that the proposed reductions would result in a “ballpark” saving of approximately “90,000 juror days per year - 64,000 in the five boroughs of New York City alone.” These recommendations, reiterated in 2003 by the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge, were never adopted.

This debate in New York over the number of peremptory challenges is not new: In 1982 Professor (later Court of Appeals judge) Joseph W. Bellacosa wrote: “Historically, the controversy concerning peremptory challenges has been directed at the number allowed in relation to the category of crime charged. Some have argued, unsuccessfully to date, that the

¹⁴⁴ In fact, Justice Thurgood Marshall recommended the elimination of peremptory challenges in his concurring opinion in Batson (476 U.S. 79, 106-08, as did Judges Bellacosa, Wachtler and Titone in People v. Bolling, 79 N.Y.2d 317, 325 (1992).) Thereafter, in People v. Brown, 97 N.Y.2d 500, 509 (2002), Chief Judge Kaye wrote: “My nearly 16-year experience with Batson persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced.”

¹⁴⁵ Class A felonies: from 20 to 15 peremptories; Class B and C felonies: from 15 to 10 peremptories; Class D and E felonies: from 10 to 7 peremptories; Alternate jurors: from 2 peremptory challenges per alternate juror to 1 peremptory challenge per alternate juror.

generous number ought to be cut down a bit for some of the categories. The numbers remain generous”¹⁴⁶

It is evident that the “generous” number of permissible peremptory challenges although historical, is an arbitrarily selected number. Not only is there no empirical basis underlying New York’s levels of peremptory challenge, but it is obvious that “empirical research cannot establish with precision the number of peremptory challenges needed to cleanse a jury of bias.”¹⁴⁷

Inasmuch as there are no data on how these numbers were arrived upon, and there is no empirical information to explain the need for a particular number, we should be informed by the experience of other jurisdictions, which permit substantially fewer challenges than New York, including the American Bar Association Standards.¹⁴⁸

Since empirical evidence is lacking, and views seem to be based on anecdotal information, or what may be characterized as an informed intuition about the necessary number of challenges, it is useful to analyze the “appropriate” numbers, as the California’s Blue Ribbon Commission did in 1996¹⁴⁹ using probability tables, which would “show the likelihood a jury will contain a determined number of persons who share some characteristic with a defined percentage of the overall population.” Using such tables, and assuming that “25% of the jury

¹⁴⁶ Practice Commentary, McKinney’s Cons. Laws of New York, Book 11A, CPL § 270.25.

¹⁴⁷ Final Report of the Blue Ribbon Commission on Jury System Improvement (California), 47 Hastings Law Journal 1433, 1485 (1996).

¹⁴⁸ See also, Juries for the Year 2000 and Beyond, Proposals to Improve the Jury System in Washington, D.C., Council for Court Excellence District of Columbia Jury Project (1998) (recommending reduction to 3 peremptory challenges in felony cases).

¹⁴⁹ California did not adopt the Commission’s recommendation concerning the reduction of peremptory challenges.

pool has a closed mind, the likelihood of a jury containing six or more [such] persons is 5%, the likelihood of eight or more is 0.28%, and the likelihood of 10 or more is 0.004%.”¹⁵⁰

This analytical tool provides a principled basis for assessing the number of peremptory challenges reasonably necessary to eliminate a jury of persons who have hidden biases or are not open-minded, and who may pass the “for cause” scrutiny. Moreover, it demonstrates that allowing 10 challenges per side will more than adequately permit the parties to purge the jury pool of persons whom the parties intuitively believe harbor hidden biases or predilection.

It seems, therefore reasonable to recommend a reduction in Class B and Class C felonies to 10 challenges, leaving the same number for Class D and Class E felonies. This would leave the minimum in felony cases at 10, which is twice as many challenges as proposed in the ABA Standards, and more than is permitted in almost all other jurisdictions. In capital cases, the number should remain at 20. However, in all other Class A felonies, which involve terms of life imprisonment, the number should be reduced to 15 challenges. In multi-defendant cases, The Jury Project’s proposal should be adopted: one additional peremptory defense challenge for each additional defendant - to be exercised only by such additional defendant as prescribed in CPL 270.15(c)(2).

Finally, it seems obvious that the number of challenges for alternate jurors, under any analysis, is excessive. Currently, the statute authorizes 2 challenges per side per alternate. This is excess of what a party would be permitted with regard to a regular juror, e.g., using 20 challenges the ratio is 1.66, not 2.0; and it decreases – in a 15 challenge case the ratio is 1.25;

¹⁵⁰ See Appendix Q (chart from the Final Report of the Blue Ribbon Commission on Jury System Improvement entitled “Probability of Finding Persons on a Twelve-Person Jury Who Share a Characteristic”).

and in a 10 challenge case the ratio is 0.83. Reducing the number of challenges to an alternate to 1 would result in an acceptable ratio of 1.0. This was the recommendation of The Jury Project.

Accordingly, among the members of the Commission who believe peremptories in criminal cases should be reduced, it is proposed that the allowable number of peremptory challenges in criminal cases be as follows:

- | | | |
|------|-------------------------------------|---|
| i. | Class A felonies | |
| | Capital cases only | Remain at 20 per side |
| | Non-capital cases | Reduce from 20 to 15 per side |
| ii. | Class B and Class C felonies | Reduce from 15 to 10 per side |
| iii. | Class D and Class E felonies | Remain at 10 per side |
| iv. | Alternate jurors | Reduce from 2 per alternate to 1 per alternate |
| v. | Misdemeanor cases | no change (jurors and alternate jurors) |
| vi. | Multi-defendant cases | one additional peremptory defense challenge for each additional defendant - to be exercised only by such additional defendant as prescribed in CPL 270.15(c)(2) |

VII. CONCLUSION

All New Yorkers benefit from continuing efforts to improve our system of trial by jury. Identifying its shortcomings and focusing attention on ways to improve it are essential to ensuring that our jury system will continue to provide our citizenry with a system of justice worthy of their respect and confidence, and in which as many citizens as possible participate. The Commission hopes that its recommendations, if implemented, will play a constructive role in focusing efforts to achieve that goal, which is both worthy and attainable. With that hope, we respectfully submit our Interim Report.

Respectfully submitted,

The Commission on the Jury

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Separate View of Judge Phylis Skloot Bamberger on the Issue of Peremptory Challenges.

This report, in footnote 122, sets out the 1994 conclusions of the Jury Report recommending the reduction in the number of peremptory challenges in criminal cases. I was a member of the Project and fully supported the recommendation. I continue in that support and find additional reason for doing so in the Court of Appeals decision in People v. Arnold, 96 N.Y.2d 358 (2001), which holds that a potential juror must be discharged from jury duty unless that person can unequivocally state he or she can be fair and that even if the prospective juror asserts the status of fairness, the prospective juror can be excused by the judge after an evaluation of the prospective juror's credibility.