

THE JURY

PROJECT

REPORT TO THE
CHIEF JUDGE OF
THE STATE OF
NEW YORK

MARCH 31, 1994

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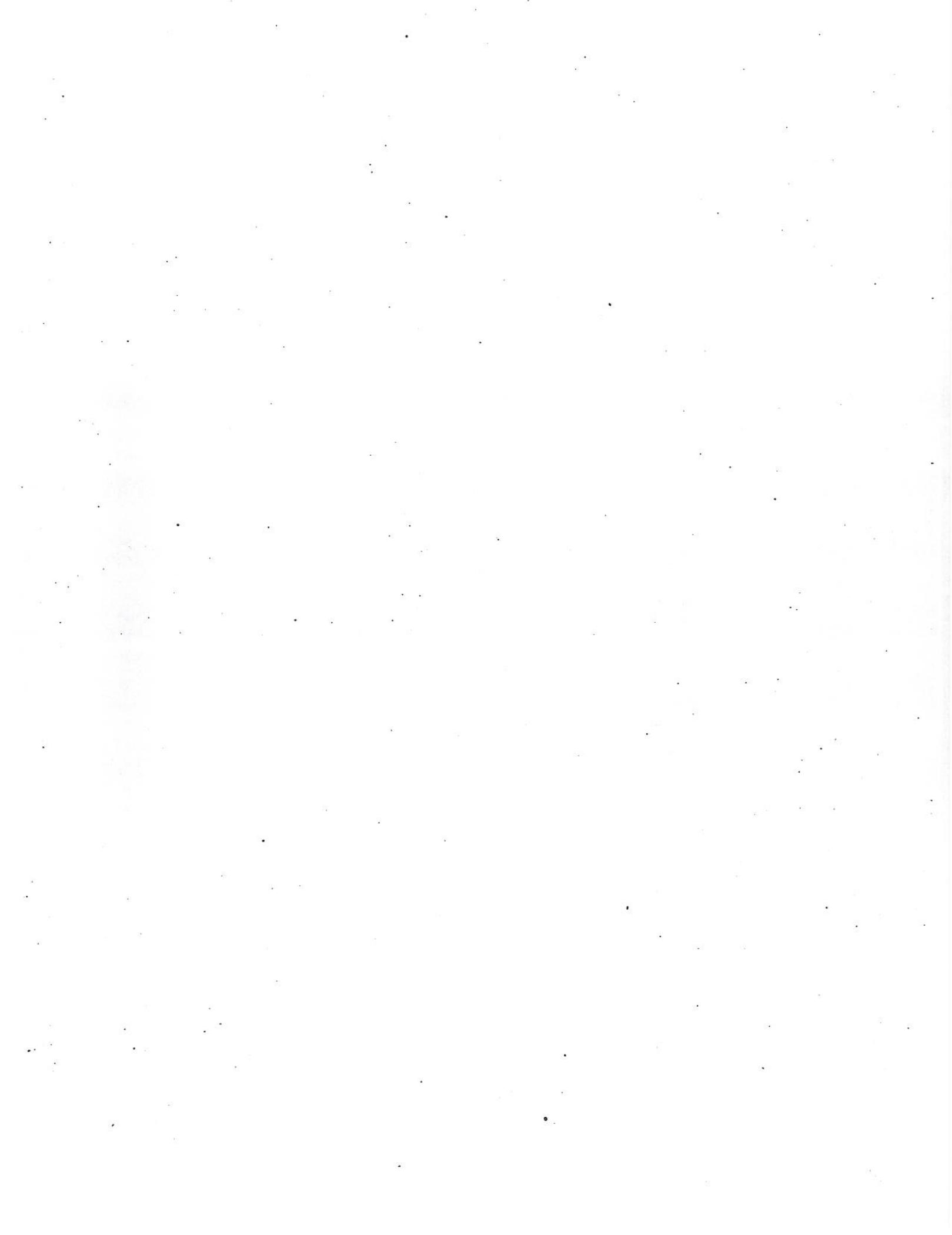
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PREFACE

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . .

*New York State Constitution
Art. 1, Sec. 2*

The Jury Project was formed during the summer of 1993 to review jury service in New York State. The panel of thirty judges, attorneys, jury commissioners, educators, journalists and business people was asked to think about how New York might attain three objectives: jury pools that are truly representative of the community; a jury system that operates efficiently and effectively; and jury service that is a positive experience for the citizens who are summoned to serve. We were charged with recommending rule changes, legislative proposals, and educational programs and materials.

That jury service reform was the first issue tackled during Judith S. Kaye's tenure as Chief Judge of the State of New York underscores the importance of trial by jury to our judicial system. It also demonstrates the Unified Court System's sensitivity to concerns about the equities and conditions of jury service that have been expressed in recent years by a variety of interested persons and groups, from the New York State Judicial Commission on Minorities to the Jury Commissioners' Association. But the Chief Judge's choice initially arose out of one of the recurring concerns that have bred so much dissatisfaction among jurors and potential jurors in

New York. Judge Kaye wondered why some people she knew were called for jury duty every two years, while so many of her other, equally eligible acquaintances were never summoned. That particular question – why me and not my neighbor? – has puzzled, bemused and annoyed generations of New Yorkers, who could think of no logical reason why the blessings and burdens of jury service did not seem to fall on all. From such acorns, long and multi-faceted reports grow.

The problems that will be discussed in this report are not new. But it is quite discouraging to realize how very old they are. In 1930, the Columbia Law Review published an article entitled "Proposed Legislation for Jury Reform in New York."¹ The article noted that a large proportion of the population, including "most of the more educated classes," was relieved from jury duty. It called for the elimination of all statutory exemptions (except for court officers) and a stricter standard for excuses.² It also pointed out that New York afforded criminal defendants more peremptory challenges than any other state in the Union, and endorsed sharp reductions.³

These old recommendations, still on the table, serve as a sobering reminder that we have not made overmuch progress in the last sixty-four years. New York has pioneered many improvements in juror management since 1930. But we have allowed other problems to become fixtures of our judicial system. The widespread belief that an effort like The Jury Project was long overdue lent a sense of urgency to our work.

The task facing The Jury Project was made immeasurably easier by the existence of the American Bar Association's Standards Relating to Juror Use and Management. The ABA

¹ "Proposed Legislation for Jury Reform in New York," 30 Colum. L. Rev. 721 (1930).

² Id. at 722.

³ See id. at 726.

Standards (as we call them) are the result of five years of painstaking work performed by two nationally representative panels of judges, lawyers and jury experts, aided by some of the country's leading scholars and research institutions.⁴ By serving as a comprehensive model juror-utilization system, the ABA Standards gave The Jury Project something tangible to shoot for. Equally important, they gave us something to shoot at. We made ample use of both opportunities. The Chair directed the task force and staff to presume that New York would embrace the ABA Standards as written, and to justify any deviations from those standards by referring to local impediments that were both unique and unremovable. The ABA Standards were our organizing principles, and in many instances we needed only to endorse them and to suggest specific ways in which they might be implemented.

However, there were indeed local impediments to the wholesale endorsement of the ABA Standards, and those impediments were both unique and unremovable. The principal one is New York City. Few people realize what an extraordinary consumer of judicial and jury resources New York City is. It is not the only large city in the United States, but the number of jury trial parts in the five boroughs -- 115 civil and 179 criminal -- far exceeds the number in comparable municipalities, like Boston, Philadelphia or Washington, D.C.⁵ Thanks largely to its importance to the business community, the City (and particularly New York County) is burdened

⁴ The ABA adopted the Standards in 1983, and revised the Standards' commentary and references in 1993. The Standards have been adopted by The Conference of State Court Administrators, The National Association of Trial Court Administrators, The National Association For Court Administration, The National Conference of State Trial Judges, The National Conference of Special Trial Judges, The National Conference of Special Court Judges, The National Conference of Metropolitan Courts, The National Bar Association, The National Conference of Federal Trial Judges, The Lawyer's Conference and The Appellate Judges' Conference. The National Center for State Courts provided support to the developers of the ABA Standards through grants from the State Justice Institute and the Law Enforcement Assistance Administration, Department of Justice.

⁵ Only Los Angeles and Chicago have over 200 trial courts of general jurisdiction, and neither has close to 300, as New York City does.

with a trial calendar that is totally out of proportion to its population (and, hence, to the pool of available jurors). 1.2 of the State's 1.8 million juror days are served in New York City, although just 40% of the State's population lives there. Budgetary realities mean that there are neither the judges nor the facilities to keep up with this crushing litigation load. And no other area in the State contains as high a proportion of persons who are either statutorily disqualified or exempt from serving as jurors. New York City's special problems of juror procurement, management and utilization are not insoluble, but it is easy to forgive frustrated local officials from concluding that they are, particularly in a time of revenue depletion and budget cutting. Some of the ABA Standards needed to be modified to take these extraordinary conditions into account.

It is equally easy to sympathize with upstate residents who fear that a system of uniform jury standards, structured to address the peculiar needs of the downstate metropolitan area, may leave them with new problems of their own. It is a truism (but one that bears repeating) that "downstate" and "upstate" are very different places, where law is practiced and the courts are run in very different ways. Whether recommending the adoption of the ABA Standards or devising our own solutions, The Jury Project tried to be sensitive to local differences and local needs. We confess to a bias for uniform procedures in what is supposed to be a unified court system equally accessible to all members of a statewide Bar. However, where we suggest adoption of a uniform rule (either the ABA's or one of our own), we justify that choice by pointing out that the rule, properly implemented, should not alter local practice in those counties where jury selection and utilization are operating efficiently.

It bears noting that the task force may disagree with some judges, jury commissioners, clerks and lawyers about how efficiently jury selection and jury operations are conducted in their counties. That is because we evaluated those processes by a new standard -- the juror's standard: "In the time I spent away from my regular activities, did I perform a valuable service for my

community?" Sitting on a jury, not sitting in the central jury room, is the hallmark of performing a valuable service for the community. While a juror's problems with inadequate pay, inhospitable facilities, physical discomfort and lost time are very real, those issues are often forgotten in the thrill and the responsibility of hearing evidence and reaching a verdict. By the same token, they are magnified if the juror never gets to try a case. Therefore, one of our goals was to maximize the number of summoned jurors who actually got to serve on a jury that tried a case. Many of our recommendations (including those that will seem most disruptive to those of us who spend significant amounts of time in the courts) are made with that end in mind.

Perhaps the most refreshing aspect of Chief Judge Kaye's mandate to The Jury Project was her charge that we be visionary, not dragged down by seeming practical impediments or prior failed efforts. Carrying out that charge was rather like not mentioning the elephant that is standing in the middle of the room. We admit that we rejected some potential remedies because politics — in the Legislature or among the organized Bar — is a reality. In our view, being visionary involves implementing the vision as well as having it.

On the other hand, we have not hesitated to recommend some measures that may prove controversial. Several of our proposals (like uniform rules for civil voir dire or reducing the number of peremptory challenges in criminal cases) have already drawn protests. Others have failed to pass muster before previous legislatures (for example, ending mandatory sequestration of juries in criminal cases or abolishing statutory exemptions from jury service). Whether the addition of our voices, arguments and findings will be enough to get these measures adopted, we cannot say. But our consensus (and often unanimous) belief is that their implementation is imperative, and that no competing considerations, political or otherwise, come close to outweighing their merits.

all the jurors of New York – that this report is dedicated. For their sakes, may our work bear fruit.

New York, New York
March 31, 1994

The Jury Project

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Note from the Chair

I would be remiss if I did not tender thanks to Chief Judge Kaye, Chief Administrative Judge Milonas and the Office of Court Administration for the extraordinary assistance offered by some extraordinary people on their staff: Mary deBourbon, who arranged our public hearings and handled our public relations, Nick Capra, the Director of Facilities, and Ann Marie Hewitt of the OCA Budget Office. Most especially, I thank Tony Manisero, Chip Mount, Ann Pfau and Marlene Nadel, who were de facto members of The Jury Project and whose in-depth knowledge of jury administration and willingness to track down the answer to any crazy question we came up with made our overwhelming task seem manageable.

Two outside consultants were particularly helpful in our work. First is G. Thomas Munsterman, Senior Staff Associate of the National Center for State Courts. Nobody knows more about jury management and jury reform than Tom does, and his insights, suggestions and historical perspective were invaluable to us. Second, Professor Nancy L. King of Vanderbilt Law School shared with us her comprehensive research on the legality of affirmative action in jury selection. Her generosity saved us considerable work, and her criticisms of our ideas were right on target.

Many bar groups and professional organizations shared thoughts and ideas with us, and I could not possibly thank them all. I am particularly grateful to The New York State Bar Association for facilitating constructive meetings with judges and practitioners from around the State. Judges, administrators and Jury Commissioners throughout the State gave generously of their time in meeting with us, writing to us and arranging tours of their facilities. We could not possibly have finished our work without their assistance. And the hundreds of jurors who called our hot line, wrote eloquent letters and testified at our public hearings probably performed the most valuable service of all.

David Kornblau, Roberta Kaplan and Paula Tuffin agreed to serve as counsel to The Jury Project before we knew where we were headed or how much work would be involved. They immersed themselves

in the work of the Project, ably assisted the three task force subcommittees that devised recommendations for the larger group to debate, and kept the project going when I had to absent myself for a four week trial. I am forever in their debt.

David, Roberta, Paula and I could not have participated in The Jury Project without the cooperation, understanding and support of my partners at Paul, Weiss, Rifkind, Wharton & Garrison. For 18 years, I have been proud to be part of an institution that believes public service by lawyers is not just an obligation, but an honor. I am grateful for the herculean efforts made by the firm's library, paraprofessionals and secretarial staff, and the research assistance received from associate Michael Bowen. Particular thanks go to Jean Cullen, my secretary, who acted as chief administrative officer for the project and who assembled the report with her amazing skill and unfailing good humor.

Finally, I thank the members of The Jury Project for service above and beyond the call of duty. Various acquaintances who have had experience with task forces warned me that counsel and our OCA staff would do all the work and everyone else would show up at the end to bless or curse it. Either they were too cynical or Chief Judge Kaye is unusually gifted in her ability to select people for this sort of endeavor. The members of The Jury Project worked hard. They met three times as a group and on dozens of other occasions in subcommittees. They held hearings and toured court facilities and talked to administrators, judges and jurors all over New York. They took on homework, did it and reported back. They formulated, debated and refined the recommendations in our report. Not every member of the task force agrees with every word or every suggestion in this document, but when the group could not act unanimously, a substantial majority of the members were able to forge a consensus view. It was a privilege to have worked with them; I hope to have the honor of doing so again.

Colleen McMahon

PART I

STANDARDS RELATING TO THE SUMMONING AND QUALIFICATION OF PROSPECTIVE JURORS

ABA STANDARD 1: OPPORTUNITY FOR JURY SERVICE

THE OPPORTUNITY FOR JURY SERVICE SHOULD NOT BE DENIED OR LIMITED ON THE BASIS OF RACE, NATIONAL ORIGIN, GENDER, AGE, RELIGIOUS BELIEF, INCOME, OCCUPATION, OR ANY OTHER FACTOR THAT DISCRIMINATES AGAINST A COGNIZABLE GROUP IN THE JURISDICTION.

Thankfully, the days when New York State denied any constitutionally protected group the opportunity to serve on a jury are behind us. However, they are not all that far behind us; New York excluded African-Americans from jury service until 1895, and women until 1937.^{1/}

The laudable principle that everyone who is capable of jury service should serve is now enshrined in the State's Judiciary Law, which provides:

It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes; and that all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state, and shall have an obligation to serve when summoned for that purpose, unless exempted, disqualified or excused.

N.Y. Jud. L. § 500. This statute incorporates a principle repeatedly emphasized by the United States Supreme Court -- that a defendant in an American court is constitutionally guaranteed the right to a jury

^{1/} See L. 1895, ch. 1402 § 3 (June 15, 1895) (banning disqualification of jurors based on race, creed or color); L. 1937, ch. 513 (Sep. 1, 1937) (eliminating male gender as qualification for jury service); see also *Gerry v. Volger*, 252 A.D. 217, 219 (4th Dep't. 1937) ("[T]hroughout our prior political history, public policy, expressed in various statutes governing the subject, had uniformly declared that women should be ineligible for jury service. In 1937 the Legislature reversed its position upon that subject by withdrawing sex as a qualifying factor."). For a history of jury exemptions in New York, see Phylis Skloot Bamberger, "Democratizing the Supreme Court: 300 Years of the Jury," N.Y. State Bar J. 30 (May/June 1991).

drawn from a "fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (invalidating state statute providing that women could not be selected for jury service unless they had previously filed a declaration indicating desire to serve); Batson v. Kentucky, 476 U.S. 79 (1986) (peremptory challenges may not be employed in racially discriminatory manner); see also People v. McCray, 57 N.Y.2d 542, 545 (1982), cert. denied, 461 U.S. 961 (1983); People v. Scott, 70 N.Y.2d 420, 421-23 (1987).

In an era where de jure discrimination is a thing of the past, we face two challenges. First, we must not engage in practices that either recreate or perpetuate the effects of past exclusionary practices. Second, we must do all in our power to convince those who were once denied the opportunity to serve that the justice system is taking every constitutionally possible step to assure their inclusion.

Our review of the processes and procedures by which New Yorkers are summoned to serve on juries reveals no deliberate bias. In fact, New York is in the forefront in its use of procedures recommended by the ABA Standards to maximize the inclusiveness of jury pools.

But our review of scholarly analysis and of practices elsewhere suggests that it may be possible to do even more to maximize the inclusiveness of local venues. And there is no question that the adoption of some or all of our recommendations would help to dispel the unfortunate but widely held view that certain cognizable classes of New Yorkers (notably members of the African-American and other minority communities) are either not welcome on juries or are actually being excluded from jury pools.^{2'}

^{2'} See, e.g., Report of the New York State Judicial Commission on Minorities 53-59 (April 1991) (hereinafter, "State Commission on Minorities Report").

ABA STANDARD 2: JURY SOURCE LIST

- (a) THE NAMES OF POTENTIAL JURORS SHOULD BE DRAWN FROM A JURY SOURCE LIST COMPILED FROM ONE OR MORE REGULARLY MAINTAINED LISTS OF PERSONS RESIDING IN THE COURT JURISDICTION.
- (b) THE JURY SOURCE LIST SHOULD BE REPRESENTATIVE AND SHOULD BE AS INCLUSIVE OF THE ADULT POPULATION IN THE JURISDICTION AS IS FEASIBLE.
- (c) THE COURT SHOULD PERIODICALLY REVIEW THE JURY SOURCE LIST FOR ITS REPRESENTATIVENESS AND INCLUSIVENESS OF THE ADULT POPULATION IN THE JURISDICTION.
- (d) SHOULD THE COURT DETERMINE THAT IMPROVEMENT IS NEEDED IN THE REPRESENTATIVENESS OR INCLUSIVENESS OF THE JURY SOURCE LIST, APPROPRIATE CORRECTIVE ACTION SHOULD BE TAKEN.

New York Recommendations

1. *Endorse Assembly Bill A. 9264, which would amend Section 506 of the Judiciary Law to add names of person who receive assistance from the Department of Social Services or benefits from New York State Unemployment Insurance to OCA's master jury source list.*
2. *Update OCA's master source list annually, using data from U.S. Postal Service forwarding lists; enhance timeliness with which Department of Motor Vehicles and Department of Taxation and Finance forward revised information to OCA.*
3. *Endorse Senate Bill S. 3730 insofar as it requires New York state resident taxpayers to identify all adult residents in their households on their income tax forms.*
4. *Add a voluntary question about a juror's racial/ethnic background to the jury questionnaire.*
5. *Abolish the practice of summoning jurors from permanent qualified lists.*
6. *Monitor questionnaires returned by Postal Service as undeliverable to see if a disproportionate number are coming from particular zip codes; if the answer to this question is yes, use weighted random sampling methods to draw the names for receipt of questionnaires.*
7. *Continue efforts by Jury Commissioners to recruit volunteers for jury service and enlist the aid of local Bar associations to help with education and outreach, particularly among minorities.*

4

1. Jury Source Lists

The first line of defense in the war against underinclusiveness is the use of source lists that are as inclusive as possible. Throughout the country, the most commonly used "source lists" are lists of registered voters. Since it is estimated that only 64% of eligible Americans register to vote,² taking names from that single source excludes about one potential juror in three. This is clearly insufficient.⁴

The ABA Committee on Jury Standards urges the use of multiple source lists that collectively cover 85% of eligible jurors. To achieve this goal, the ABA recommends that lists other than the registered voter roll be used; licensed drivers, persons counted in a local census, utility customers, newly naturalized citizens, persons with telephones, parents of children enrolled in public schools, property or motor vehicle owners, and even persons with hunting or fishing licenses are cited by the ABA as examples.

New York has long been a leader in the use of multiple source lists to maximize inclusiveness. Since the early 1980s, the Office of Court Administration ("OCA") has used three separate source lists to compile the state's master list of eligible jurors – voter registration rolls, drivers' licenses and state income tax rolls.³ OCA estimates that about 90% of eligible jurors appear on the state's computerized jury source list because of its multiple sourcing.⁵ This is an impressive statistic, one that substantially exceeds the ABA standard. In addition, New York is one of the few jurisdictions in the country that

² Bureau of the Census, U.S. Department of Commerce, *Statistical Abstracts of the United States*, 1989, Table 432 (1989).

⁴ The federal courts, as well as the states of Maryland, Ohio, and Rhode Island use voter registration lists exclusively, and thus far, reliance on voter registration records alone passes constitutional muster. See, e.g., *United States v. Garcia*, 991 F.2d 489, 491-92 (8th Cir. 1993); *Cunningham v. Zant*, 928 F.2d 1006, 1013 (11th Cir. 1991); *United States v. Guy*, 924 F.2d 702, 705-07 (7th Cir. 1991); *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991); *United States v. Cecil*, 836 F.2d 1431, 1444-55 (4th Cir.), cert. denied, 487 U.S. 1205 (1988). But see *People v. Harris*, 36 Cal.3d 36, 679 P.2d 433, cert. denied, 469 U.S. 965 (1984) (finding prima facie showing of discrimination where voter registration list was sole source of jury pool).

³ See N.Y. Jud. L. § 506; Rules of the Chief Administrator § 128.3.

⁵ See Interim Report of The Jury System Management Advisory Committee (1984).

allows individuals to volunteer to serve as jurors. See N.Y. Jud. L. § 506 (incorporating "persons who have volunteered to serve as jurors by filing with the commissioner their names and places of residence"). Thus, citizens whose names do not appear on any source list are not automatically excluded from jury service.

However, there is no question that the master source list could be improved. First, while little research has been done to see who is in the 10% of eligible jurors whose names do not make it onto the source list, it seems intuitively obvious that people who are least likely to be either taxpayers or licensed drivers are most likely to be those who live in lower-income areas, particularly lower-income urban areas.²⁷ The fact that a disproportionate share of those who are not registered to vote are either poor or are members of minority groups or both is well-documented.²⁸ Thus, while it is overwhelmingly likely that an adult will appear on at least one of these three lists, it is also overwhelmingly likely that the poor and minorities will be overrepresented among the adults whose names do not appear.

The solution would seem to be to add one or more additional source lists to the master list.

However, given the inclusiveness of the current list, the addition of data from most sources is not worth the effort and cost. To take one example: telephone or other utility subscriber lists are frequently mentioned as a possible source of new names. Approximately eighty different telephone and public utility companies currently operate in New York, with subscriber lists of varying quality and comprehensiveness. Subscribers appear on more than one list, and many subscribers are businesses or corporations rather than individuals. Most individuals who have telephone or utility service in their own

²⁷ See e.g., P. Edelman, "Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet," 81 *Geo.L.J.* 1697, 1703-09 (1993); R. Mincy, I. Sawhill & D. Wolf, "The Underclass: Definition & Measurement," 248 *Science* 450, 451 (1990).

²⁸ Census Bureau statistics, for example, demonstrate that African-Americans, Hispanics and low-income persons are substantially under-represented on voter registration lists. See C. Williams, Note, "Jury Source Representativeness and the Use of Voter Registration Lists," 65 *N.Y.U.L. Rev.* 590, 615 (June 1990) (finding that African-Americans, Hispanics, and individuals with annual incomes between \$5-10,000 were underrepresented on registration lists by 14%, 52% and 20.9%, respectively). See also D. Kairys, T. Kadane and J. Lehoczyk "Jury Representativeness: A Mandate for Multiple Source Lists," 65 *Cal.L.Rev.* 776, 803-11 (1977).

name are also drivers or taxpayers or voters; many are all three. And many whose names do not appear on utility subscriber lists -- for example, tenants whose gas and electricity are provided for by their landlords, or members of the approximately 5% of U.S. households that have no telephone²⁹ -- are the same people who are least likely to be registered voters, licensed drivers or taxpayers. Therefore, the yield of new names would probably be very low, while the prospect of producing a list with multiple entries for some individuals is correspondingly great.³⁰ Entries on telephone and other utility subscriber lists are also weighted heavily toward men, which could introduce an element of gender bias into the source list. In short, the game does not appear to be worth the candle.

Because we think that the sources most likely to yield new names are lists of persons who are receiving unemployment compensation and/or public assistance from the Department of Social Services, we endorse A. 9264, which would amend Judiciary Law Section 506 to provide these names to OCA for inclusion in the master source list. We urge the Legislature to pass this bill promptly and the Governor to sign it.³¹

Increasing the number of economically-distressed persons in the jury pools will add a large number of jurors for whom service could be an economic hardship. Many individuals who are

²⁹ According to the 1990 U.S. Census, almost 5 million of the country's 92 million housing units lack basic telephone service.

³⁰ OCA's Data Processing Unit currently devotes substantial time and expense to combining the three current lists for each of New York's 62 counties every year. Despite this effort, large numbers of duplicate names still remain in the system after the three lists are merged and then purged of obvious duplications. These duplicates occur when the computer program that combines the three lists is unable to recognize that two records are really the same because, for example, the name or address is spelled differently on different source lists. According to OCA, approximately 5%-10% of the names on the combined source lists are duplicates, resulting in considerable confusion when prospective jurors receive two (or more) jury questionnaires or summonses. Indeed, the problem of duplicates is so cumbersome that a task force of jury commissioners and OCA data processing staff was formed in 1991 to attempt to resolve it. Obviously, every new source list that is added to the master list increases the problem of duplication.

³¹ An earlier version of this bill, A.3056, passed both houses of the New York Legislature but was vetoed by the Governor. The bill was vetoed because of a possible conflict between A.3056 and the federal and state laws that require that the identities of persons receiving public assistance be kept confidential. We understand that this conflict has been resolved in the revised version of the bill.

summoned because they appear on the DDS or unemployment lists will either have to be excused for hardship or be given access to special and costly services (i.e., child care, transportation) in order to serve. In other words, adding these names brings with it an administrative cost that may not be outweighed by the number of newly summoned jurors who are actually able to serve. However, we are loath to weigh those costs against the benefit of adding members of underrepresented groups to the master list, particularly because we view reaching out to those who are not "part of the system" to be the overriding imperative.

2. Updating of Source Lists

We do not view the addition of those two source lists as a complete answer to the problem of inclusiveness. The OCA officials who compile the master juror source list believe that its single greatest problem is the amount of out-of-date or inaccurate information it contains. For example, the list of newly registered voters which OCA receives from the Boards of Elections contains names that may be five to eight years old. And because of New York's use of the permanent qualified list (see pp. 10-14 below), many counties in the State do not add the names of newly registered voters to their jury source lists on an annual or even biannual basis.

Two solutions suggest themselves. One is to update the master source list more frequently, using U.S. Postal Service forwarding lists to enhance its accuracy. We recommend that the list be updated in this manner annually; we understand that OCA officials are already actively pursuing this possibility with the Postal Service. Second, we recommend that efforts be made to enhance the timeliness with which data are forwarded to OCA from the Department of Motor Vehicles and the Department of Taxation and Finance. Lags in the transmission of data mean that some names and addresses are often out-of-date even before they reach the OCA's computers.

3. Senate Bill 3730

One pending effort to garner additional names for the source list is clearly worth adopting. Senate Bill 3730 would require New York State taxpayers to identify all adult residents in their households on their income tax forms, and would also require the Department of Taxation and Finance to forward that information to OCA. This measure would be particularly useful in correcting for possible sex bias in the use of existing taxpayer lists (assuming that at least some male heads of households in single wage earner families file in their own name), and for identifying non-wage earning adults (especially students). We urge its passage.

We do not, however, endorse the section of Senate Bill 3730 that would eliminate the use of voter registration lists as juror source data. The impetus behind the bill is understandable; apparently, many citizens decline to register to vote in the mistaken belief that it will keep them off the jury rolls. In our view, it would be far better to explain to the public that failure to register to vote is unlikely to get them out of jury service. (The League of Women Voters may be able to help in this regard). Dropping from the source list those citizens whose only contact with the master source list is through voter registration will simply result in the elimination of eligible jurors; that is a step we cannot condone.

4. Obtaining Data on Representativeness

The Sixth Amendment to the United States Constitution does not require that each and every jury be representative of the community from which it is drawn, but it does require that the venires from which juries are ultimately selected be representative of a fair cross section of the community. As Justice White said almost two decades ago in Taylor v. Louisiana, 419 U.S. 522, 528-30 (1975):

The unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. . . . [T]he jury plays a political function in the administration of the law and . . . the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice.

Making the master source list as inclusive as possible does not ensure that the venires from which petit juries are selected will be sufficiently representative to pass constitutional muster. Thus, we cannot

stop our inquiries or our efforts at that point. We must examine the procedure for selecting potential jurors from the source list to see if they yield jurors who are representative of a fair cross section of the community, particularly of historically underrepresented minority groups.

The Judiciary Law requires that selection at all phases of the process be done randomly.^{12'} Since names are being drawn from the master source list in a random manner, and since we are taking steps to maximize the number of eligible jurors whose names appear on the source list, it would seem that venires should contain an adequate number of representatives of cognizable minority groups.

But there is considerable anecdotal evidence to indicate that this is not so. The State Commission on Minorities, after listening to numerous witnesses at several public hearing/meetings and conducting a number of surveys, concluded: "Minorities are significantly underrepresented on many juries in the court system."^{13'} During our own public hearings, several witnesses identified the lack of minorities in local jury pools as an important factor affecting their perception of the fairness of the system. Press accounts in highly publicized cases underscore this perception.^{14'}

That such a perception exists at all means there is a problem. If the perception can be rebutted factually, it should be. If it cannot, then steps must be taken to correct the situation.

It is difficult to test the accuracy of the minority community's perception because New York (like most jurisdictions) long ago eliminated from jury questionnaires anything that would identify the race or ethnic heritage of jurors. Therefore, we recommend that space be provided on the jury qualification questionnaire for prospective jurors to identify their racial or ethnic origin (on a purely voluntary basis).

^{12'} See N.Y. Jud.L. § 507 ("The commissioner of jurors shall select the names of prospective jurors . . . at random . . ."); see also N.Y. Jud.L. §§ 500, 506, 508.

^{13'} State Commission on Minorities Report at 58.

^{14'} See, e.g., "Hoggs Case Puts Spotlight on White Juries," Albany Times Union (June 4, 1992); "Ferguson Lawyer Seeks Trial Shift; Claims Fair Nassau Jury Impossible," New York Newsday (Feb. 2, 1994).

The questionnaire should also explain why this information is being sought.^{12'} While the voluntary nature of the question means that the resulting data will be a less than perfect measure of how many minorities are receiving and responding to jury questionnaires, any data are better than what we have now, which is nothing.^{14'} We are mindful that questions of this sort were once used to keep individuals off juries, but since a number of prominent groups representing minority interests (including the Capital District Black Bar Association, the New York State Judicial Commission on Minorities and the Franklin H. Williams Judicial Commission on Minorities) have endorsed this proposal, we are comfortable in recommending it.

Even without the hard data that an optional identifying question would generate, we can make two recommendations for changes in the procedure used to select prospective jurors that are likely to improve whatever racial or ethnic inequities are lurking undetected in the current system. The first is abolition of the use of permanent qualified lists for summoning jurors. The second is monitoring the number of non-deliverable questionnaires in neighborhoods throughout the State and using weighted random sampling techniques to correct any observed disproportionality.

5. Permanent Qualified List

One of the questions most frequently asked by jurors is, "Why am I called for jury duty every four years (or in some counties, every two years) when my neighbor (spouse/sibling/co-worker) is never

^{12'} We suggest the following wording for the question:

State law permits us to ask you as a prospective juror to indicate your race. This information is sought solely to avoid discrimination in juror selection and has absolutely no bearing on qualification for jury service. By answering this question you help the state court check and observe the juror selection process so that discrimination cannot occur. In this way, the state court can fulfill the policy of the State of New York which is to provide jurors who are randomly selected from a fair cross-section of the community.

^{14'} A similar question appears on all federal jury questionnaires. According to the Administrative Office of the United States Courts, the rate of compliance by federal jurors in answering the question regarding race/ethnicity is quite high, even though 28 U.S.C. § 1869(h) provides as follows: "The [juror qualification] form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status . . . need not be furnished if the person finds it objectionable to do so . . ."

summoned?" One statistically sophisticated citizen who corresponded with The Jury Project -- and who has received a summons every two years since 1983 -- presented us with a carefully crafted analysis to convince us that true random selection from a list of drivers, voters and taxpayers could not possibly yield such a result.

He is correct. What he did not know was that in all but one of New York's 62 counties, jurors are summoned from a subset of the master source list, known as the "permanent qualified list."

The permanent qualified list is a device used only in New York. It is made possible by the two-step process followed throughout New York (except in Erie County) to obtain jurors. The first step is qualification. Names of potential jurors for each county are drawn at random from the master source list, and those individuals are sent questionnaires seeking information about their qualification to serve as jurors. Persons who return questionnaires, and who are neither statutorily disqualified nor statutorily exempt, are added to a list of qualified jurors for that county (the "permanent qualified list"). Persons whose names appear on the permanent qualified list are then randomly summoned to come to court and serve on juries.¹⁷

The appeal of the permanent qualified list is that it cuts down on the administrative cost of qualifying jurors. The size of each county's permanent qualified list approximates the number of jurors needed by the system for the next x number of years (2 years in certified Juror Shortage counties; 4 years elsewhere). Once a juror is qualified, the juror stays on the list until he or she dies, moves or becomes disqualified. Each year, only enough new names are drawn from the master source list to qualify those jurors needed to replace those who fall off the permanent qualified list for one of those three reasons.

¹⁷ See People v. Attica Brothers, 359 N.Y.S.2d 699, 702 (Sup. Ct. Erie Co. 1974) (describing use of permanent qualified list).

Persons who are disqualified or exempt can be put back onto the master source list from which new names are drawn, but when (if ever) their names are put back varies from county to county.^{12'}

Once a juror has been disqualified or exempted from service, the odds of staying out of the system are very good. An informal survey conducted by a long-time resident of Manhattan found that every woman he knew who at one point had claimed the full-time child care exemption (Jud. L. § 512(7)) never again received a jury questionnaire, although their children had been grown for many years. The majority of counties do not recirculate the names of individuals who have asserted occupational exemptions, which are treated as "permanent." Thus, a doctor or lawyer who claims an exemption at one point in time has an extremely good chance of never being called for jury service again, even if he/she changes jobs or retires.

The permanent qualified list system is manifestly unfair, especially in New York City and its surrounding communities, where the burden of litigation is out of proportion to the size of the population, causing a chronic shortage of jurors. The permanent qualified list means that the burden of jury service is not borne equally by all who are eligible to serve. It also helps to perpetuate any bias that was inherent in the jury selection system years ago and retards efforts to expand the inclusiveness of venirees (as opposed to source lists). Finally, it keeps the number of young people on jury rolls down, since they are pulled into service only as older people die, retire or move. In short, it contravenes the spirit, if not the letter, of the Judiciary Law's admonition that "all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state." Jud. L. § 500.

Six years ago, Erie County became the first jurisdiction in the state to summon potential jurors directly from the master source list, without first qualifying them. Citizens of Erie County who are called

^{12'} Erie County, for example, puts persons whose disqualifications or exemptions do not appear to be permanent (i.e., not the occupational exemptions for doctors, lawyers etc.) back into the pool after three years. Similarly, Sullivan County puts persons who do not appear to be permanently disqualified into the pool after 3-5 years. In Kings and Monroe Counties, individuals who receive the sole proprietor exemption receive another qualification questionnaire after two and four years, respectively; whereas those who claim the child care exemption do not receive questionnaires for another five years (or, in the case of Monroe County, the year the child in question turns 16, whichever is sooner).

to jury duty have no greater chance of being called for service a second or third time than do those who have never served. The Erie County experience proves that qualifying jurors directly from the master source list can work in New York. We therefore recommend that, within two years, the use of permanent qualified lists be abolished throughout New York State and that potential jurors be selected directly from the master source list.

Abolition of the permanent qualified list will expand the task of qualifying jurors, since every potential juror will have to be qualified (or requalified) every time he or she is called. Resources diverted to this task will inevitably be taken away from other tasks, and this creates a dilemma for jury commissioners. However, Erie County's successful implementation of this system proves that it can be done, even in a populous urban/suburban setting where the demand for jurors is significant. And abolition of the permanent qualified list will reduce other problems that jury commissioners face. For example, the master source list, for all its faults, is still "fresher" and more up-to-date than the permanent qualified list, especially in those counties that do not routinely send out notices to try to keep their records on qualified jurors up-to-date. Thus, use of a non-permanent source list should reduce the number of jury questionnaires that are returned as non-deliverable (see pp. 15-21 below).¹⁹ We do recommend that OCA work with the commissioners on the reallocation of assignments and resources in their offices to facilitate the conversion to a non-permanent source list system.

With this recommendation, the peculiar problems of New York City emerge. Bronx and New York Counties will each have unusual difficulty in converting to a non-permanent qualified list system.

Qualification of jurors is a particular problem in Bronx County. Juror yield²⁰ is 11%, probably the lowest in the country. An exceedingly high proportion of the population is non-English speaking or

¹⁹ The ratio of non-deliverables to questionnaires sent is approximately 16:100 in Erie County, where names are drawn from the master source list, and 20:100 in Monroe County, a comparable county that uses a permanent qualified list.

²⁰ The percentage of questionnaires sent that ultimately result in qualified jurors (subtracting the number of non-deliverable or non-responding questionnaires as well as disqualified or exempt jurors).

otherwise disqualified from serving on juries. Moreover, many individuals who are not native English speakers claim the language disqualification even though they speak English well enough to hear evidence and participate in deliberations. As a result, every juror who receives a qualification questionnaire in the Bronx must appear at the courthouse in person and submit to a qualification interview. If in-person qualification were not used in the Bronx, it is doubtful that there would be enough jurors to keep its 38 criminal and 15 civil trial parts up and running.

In New York County, the problem lies in the volume of qualifications that would have to be processed. The number of trial parts (between 110 and 125) in New York County means that approximately 60,000 jurors are needed each year, or 1,200 each week. Qualifying that number of jurors on an ongoing basis is obviously out of proportion to anything that is faced elsewhere, in or out of New York. Conversion to a shorter term of service, which we recommend elsewhere in this report (see pp. 23-26 below), will increase that burden, although some of our other recommendations, if adopted, should significantly reduce the number of jurors needed each week.

However, we do not believe that Bronx and New York Counties should be exempt from the requirement to abolish the permanent qualified list. On the contrary, we believe it is particularly important that the burden of jury service be distributed more equitably in New York City. The demand for jurors is so great in New York City that an individual whose name appears on the permanent qualified list will most probably be called for jury duty every two years. This is not right; it cannot continue. Furthermore, New York and Bronx Counties each contain substantial minority and young populations, and the abolition of the permanent qualified list is necessary to incorporate those groups into the system fully. However, recognizing the logistical complexity of instituting the non-permanent qualified list system, we recommend that OCA give these counties a longer period to phase in the new way of doing business. Within five years, the entire state should be off the permanent qualified list system.

6. Monitoring of Non-Deliverable Questionnaires

Even when the permanent qualified list is a thing of the past, there will still be impediments to inclusiveness. This is because everyone to whom a questionnaire is sent does not come in for jury service. A significant number of people never receive questionnaires, and a significant number of those who do receive them do not bother to return them. If a disproportionate number of those who do not receive or return questionnaires are members of historically underrepresented groups, the representativeness of the resulting venues will be skewed, no matter how the names are selected.

There is both circumstantial and direct evidence that members of minority groups are disproportionately represented among those who do not receive or do not return questionnaires, at least in some areas of the State. First, members of minority groups are overrepresented among the socio-economically disadvantaged, and persons who are socio-economically disadvantaged are more likely to move more frequently than those who are not similarly disadvantaged.²¹ When people move frequently, mail addressed to them is more likely to be returned as undeliverable. Second, anecdotal evidence (including testimony received by the State Commission on Minorities) reveals that, because minorities are suspicious that the system is biased against them, they are less likely to want to participate.²² They may, therefore, be less likely to return a questionnaire or summons that is received.

While direct evidence is in short supply, some exists. A ground-breaking study conducted recently by the Capital District Black Bar Association tends to confirm the first proposition.²³ The

²¹ See, e.g., H. Fukurai, E. Butler & R. Krooth, Race and the Jury: Racial Disenfranchisement and The Search For Justice 21-26 (New York 1993) (finding statistical correlation between residential mobility and minority/low-income populations).

²² A report from one jury commissioner underscores this aspect of the problem. In a minority outreach effort, the Commissioner contacted fifty-three African American churches in his county. He offered to come and speak on the importance of jury service and to conduct a juror registration drive among church members. Fifty-two churches did not respond to his offer at all. The fifty-third declined, saying that when the court system was fair to minorities the Commissioner could come and speak.

²³ The Capital District Black Bar Association, "How Far Have We Come Since the Magna Carta: Jury of One's Peers, Jury Panels, Minorities, and The Third and Fourth Judicial Districts," 25-30 (March 1993) (hereinafter "Capital District Report").

Association asked the jury commissioner of Albany County to keep track of how many questionnaires were returned as undeliverable from three zip codes – two known to contain minority neighborhoods, and one a predominantly white area.^{24'} The results were striking: undeliverables were significantly higher in the two minority neighborhoods than in the all-white neighborhood.^{25'} As the Association concluded:

[T]he rate at which the questionnaires are returned by the Post Office as non-deliverable (i.e., incorrect address) is, on the average, twice as great in the two minority zip codes as in the non-minority zip code. This is astounding! This suggests (since the address data sources are the same throughout the State) that the population in these areas is more transitory.^{26'}

Taking the Capital District Black Bar Association's findings as our starting point, The Jury Project asked OCA to extract data from six upstate counties,^{27'} Nassau County, and three boroughs in New York City (Manhattan, Brooklyn and Queens). The total number of jury questionnaires mailed to each zip code in each of the nine counties for a three-month period was compared to the number of questionnaires returned from the Post Office as non-deliverable.^{28'} This "percentage returned" was used as the measure of how many potential jurors did not receive questionnaires. It was compared to the percentage of minorities (African-American, Hispanic and others), and also to the percentage of individuals with incomes below the poverty level living in those zip codes.^{29'} The results were analyzed

^{24'} The three zip codes were 12202 (the "South End"), 12210 ("Arbor Hill"), and 12205 ("Colonie"). The percentage of Non-Hispanic whites in these three zip codes was 57.25%, 54.66% and 94.27%, respectively.

^{25'} Interestingly, the Capital District Black Bar Association further found that the rate of non-responses to the jury questionnaires actually delivered was "practically the same across the [three] zip codes." *Id.* at 28-29. This would tend to disprove the idea that minorities who actually receive questionnaires are less likely to return them than are white citizens.

^{26'} *Id.* at 29 (emphasis in original).

^{27'} Broome, Erie, Monroe, Rensselaer, Saratoga and Ulster.

^{28'} The three month period was from April 10 to July 22, 1993; zip codes where 100 or fewer questionnaires were mailed were eliminated as statistically insignificant.

^{29'} U.S. Department of Commerce, 1990 Census of Population and Housing.

using computer-driven regression analysis to test for correlation between numbers of minorities, numbers of low income residents, and percentage of questionnaires returned as undeliverable.^{20'}

The raw data appear to confirm the Capital District Black Bar Association's findings. In Rensselaer County, for example, the "percentage returned" increased with the size of the minority population – the zip code (12180) with the largest minority population (10.7%) having a "percentage returned" rate of 30.5%. The results for other counties were similar.

Even more striking, however, was the correlation between the percentage of the population between the poverty line in each county and the "percentage returned." In Erie County, for example, the two zip codes with the highest "percentage returned" each has more than 32% of their population with incomes below the poverty line.^{21'} Similarly, the zip code in Nassau County with a high "percentage returned" of 13.4% (11696) has a 34% minority population and 16.2% of its population living below the poverty line.^{22'}

Our regression analysis revealed a statistically significant correlation between the number of low income residents and the percentage of questionnaires returned in the Kings and Queens Counties and in the counties outside New York City, but not in New York County.^{23'} Not surprisingly, they also revealed a strong relationship between the number of low income residents in a particular zip code and

^{20'} We ran regression analyses using percentage returned as the dependant variable, and the percentage of low income residents and the percentage of minority residents as independent variables. Three regressions were run: one for the seven non-New York City counties for which we gathered data (Broome, Erie, Monroe, Nassau, Rensselaer, Saratoga and Ulster), one for Kings and Queens Counties, and one for New York County. We combined the seven non-New York City counties because there were too few observations in each county for the three month period to allow for meaningful analysis. (Nassau County has a large number of zip codes, but census data were not available for all of them). By expanding the number of months studied, one could increase the number of observations from each county and conduct meaningful county-by-county analysis.

^{21'} Zip codes 14213 (28.6%) and 14214 (25.2%).

^{22'} See also zip code 12428 in Ulster County with 28.1% returned, a 20.5% minority population and 20% below the poverty line.

^{23'} See Appendix D at 1; 6; 11.

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the number of minority residents in that zip code.²⁶ In the counties outside New York City, the relationship between the percentage of returned questionnaires from a particular zip code and the percentage of minority residents is so close to statistical significance that an analysis using several years of data, as opposed to several months, might well confirm the Capital District Black Bar Association's finding that a disproportionate number of minorities upstate are not receiving questionnaires.²⁶ However, there was a negative relationship between the percentage of minority residents and the percentage returned within zip codes in Brooklyn and Queens.²⁶ There was no significant relationship among any of the variables in Manhattan.²⁷

From this rudimentary analysis, we can draw a tentative conclusion. Throughout the State, a significant number of minority citizens are also low income citizens, and a significant number of low income citizens do not receive jury questionnaires. In at least some counties, a large number of people who do not receive their jury questionnaires are minorities. If this analysis were to hold up when run on data covering a longer period of time, it would tend to corroborate the minority community's belief that, in some counties, there are too few minorities in jury venires — not because they are not sent questionnaires, but because so many of those questionnaires are never delivered.

Informal efforts to redress a perceived lack of minorities reporting for jury service have been made by several jury commissioners. For example, one Jury Commissioner has tried for several years to compensate for the relatively low number of minority jurors she sees by sending more questionnaires into minority neighborhoods. It seems an obvious solution. However, it raises both constitutional and statutory questions that cannot go unexamined.

²⁶ *Id.*, at 4; 5; 9; 10.

²⁶ *Id.*, at 2; 3.

²⁶ *Id.*, at 7; 8.

²⁷ *Id.*, at 11.

After considerable research and consultation with experts, we are convinced that there is no constitutional or statutory impediment to sending additional questionnaires into areas that show a disproportionately high number of non-deliverable jury questionnaires, provided it is done using weighted random sampling techniques.

Weighted random sampling (also known as stratified or cluster sampling) is a technique that is designed to give a sample that is a true cross section of a large population community. Instead of drawing one random sample from the entire population, separate random samples are drawn from identifiable subsets of the population. These samples are then combined to form the pool. In circumstances where the representativeness of a random sample is important (for example, in survey research, where the accuracy of a prediction depends on canvassing the entire community to uncover all possible points of view), weighted random sampling is often the technique of choice.²⁷

Weighted random sampling by zip code from the master jury source list affords many advantages over other methods that could be devised to try to correct for the higher percentage of undeliverables in certain areas. First, it does not appear to be a race-conscious methodology, since additional names would be drawn from all zip-codes that showed high rates of "percentage returned," rather than on strictly racial or ethnic grounds. Second, even if the use of weighted random sampling to increase the number of deliverable questionnaires were deemed a race conscious methodology, we believe it would pass constitutional muster.²⁸ A defendant has a right under the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 2 and Article 6, Section 18 of the New York Constitution to have a jury drawn from a venire (not a master source list) that is representative of a fair

²⁷ See e.g., M. Finkelstein & B. Levin, Statistics for Lawyers 260 (1990) ("Stratified and cluster sampling are almost always needed when sampling a large natural population."); see also Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F.Supp. 670, 681 (S.D.N.Y. 1963) (describing weighted random sampling method used in survey comparing two different brands of cigarette lighters).

²⁸ See N. King, "Racial Jurymantering: Cancer or Cure? A Contemporary Review and Analysis of Affirmative Action in Jury Selection." 68 N.Y.U. L.Rev. 707 (1993).

cross section of the community.¹⁰⁷ Correcting any constitutional infirmity in a venire that is drawn under a strictly random system should therefore rise to the level of a compelling state interest. This means that even the use of race-conscious measures to achieve a constitutional imperative would be justified – provided, of course, that the measure chosen is the least restrictive corrective measure, and one that is race neutral on its face if possible. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 113 S. Ct. 2816, 2824-25 (1993) (affirmative action and other race-conscious methods of selection violate the Equal Protection Clause unless the government's use of race is "narrowly tailored" and "reasonably necessary" to advance a "compelling state interest"). Fortunately, zip codes are race neutral. Third, if proper statistical techniques are used, oversampling from particular areas will not run afoul of, or require any amendment to, the applicable provisions of the Judiciary Law, which (as noted above) mandate that individuals be chosen randomly at each step in the jury selection process.

We therefore recommend that OCA use appropriately designed weighted random sampling techniques to draw potential jurors' names from the master source list in any county where it can be shown that a disproportionate number of persons in zip codes with large minority populations are not receiving their jury questionnaires. The techniques for determining disproportionality should be carefully devised with trained consultants.

We emphasize that this technique should be used only where analysis of non-deliverables demonstrates that significant numbers of minority citizens may not be receiving the questionnaires that are being sent to them. Taking action to "correct" for a non-existent problem (i.e., simply sending twice as many questionnaires into all zip codes that contain minority neighborhoods because there is a perception that minorities are not being called for jury duty, without regard to whether those areas are

¹⁰⁷ See Taylor v. Louisiana, 419 U.S. 522 (1975); People v. Guzman, 60 N.Y.2d 403 (1983), cert. denied, 466 U.S. 951 (1984); see also People v. Cohen, 54 Misc. 2d 873, 875 (Sup. Ct. Kings Co. 1967) ("The jury roll need not be the perfect mirror of the community"); Duncan v. Louisiana, 391 U.S. 145 (1968) (14th Amendment extends right of jury trial to states).

overrepresented in the pool of returned questionnaires) might well run afoul of the Judiciary Law's randomness requirement. We therefore recommend that OCA continue to maintain data on non-deliverable questionnaires and analyze it annually to monitor whether and where problems of underrepresentation may arise.

The use of weighted random sampling to correct for undeliverable questionnaires should not be viewed as a substitute for other necessary measures. The problem of undeliverables reflects the rapid obsolescence of the primary source lists. The best solution for that is frequent updating of the source lists, using current data. And minority suspicions about the bona fides of the system must be attacked through a vigorous program of education and outreach, as well as by compiling data to dispel the notion that members of the minority community are not being called for jury service. But as part of a multi-pronged effort to convince members of the minority community that their presence is desired on juries, the use of weighted random sampling by zip code to ensure that sufficient questionnaires are delivered to minority jurors should be both effective and welcome.

Addendum: Peculiar Problems of Suburban Counties

A number of defense lawyers and bar associations whose members work in suburban courts in multi-county metropolitan areas (notably Westchester and Nassau) wrote or testified of the particular problems faced by minority defendants in such counties where the population is overwhelmingly white.^{41/} These defendants are often tried by juries in criminal cases selected from panels that have almost no minority members. They and their lawyers are concerned that the minority community and its viewpoints are not just underrepresented, but unrepresented at their trials. This seems particularly unfair when the chance of an African-American or Hispanic defendant's having a jury that includes his or her racial or ethnic peers changes radically depending on whether the crime is alleged to have been

^{41/} According to the 1990 Census, for example, the percentages of minority population in Nassau County ranges from 1.2% (in zip code 11709) to 34% (in zip code 11696).

committed in New York City (in the North Bronx or in Douglaston) or a few blocks away (in Yonkers or Lake Success).

Regrettably, we have concluded that the various solutions that have been put forth are as likely to exacerbate the problem as to correct it.

In New York's court system, the county is the basic polity of operations. There are many flaws in this arguably outmoded system. However, analyzing the state's fundamental political structure lies far beyond the charter of The Jury Project. Therefore, given the county system as a predicate, we have looked at several possible ways to get more minorities on juries in counties where the population is largely white.

One would be to draw jurors for trials in one county from all counties in the judicial district, or from the county of trial and from among adjacent counties. In most areas of the State, the benefits in terms of enhanced minority participation in local jury pools would be minimal; and in some areas, the resulting depletion of the minorities available to serve in their counties of residence would create problems of underrepresentation where there are none now, or exacerbate existing problems in areas where minority representation is marginal.

A Committee of the New York State Bar Association has suggested a program that would allow jurors from urban counties to volunteer to serve in adjacent suburban areas. Even assuming this program were limited to Westchester and Nassau Counties, it would create substantial issues of both cost and logistics. Moreover, if it were successful, it might only serve to exacerbate the existing juror shortage in Bronx, Queens and Kings Counties.

We have also considered whether to recommend that juries for City, Town, and Village courts be drawn from the limited geographic area they serve rather than a county-wide pool. This would make the juries in those courts more representative of the locality where the crime was committed. For example, a defendant who was accused of a misdemeanor in Yonkers would be tried by a panel of Yonkers jurors, rather than by a panel selected from all residents of Westchester County. Similarly, trials

in City Courts in cities throughout the State where small pockets of minorities are concentrated would be conducted by more "localized" juries. This would increase minority representation on juries in courts of inferior jurisdiction. However, such a program would actually deplete the number of minority jurors available to try more serious felony cases in the county-wide courts of superior jurisdiction or to try misdemeanor cases in mostly white towns and villages.²⁷ We are therefore reluctant to recommend it.

ABA STANDARD 5: TERM OF AND AVAILABILITY FOR JURY SERVICE

THE TIME THAT PERSONS ARE CALLED UPON TO PERFORM JURY SERVICE AND TO BE AVAILABLE THEREFOR, SHOULD BE THE SHORTEST PERIOD CONSISTENT WITH THE NEEDS OF JUSTICE.

- (a) TERM OF SERVICE OF ONE DAY OR THE COMPLETION OF ONE TRIAL, WHICHEVER IS LONGER, IS RECOMMENDED. HOWEVER, A TERM OF ONE WEEK OR COMPLETION OF ONE TRIAL, WHICHEVER IS LONGER, IS ACCEPTABLE.
- (b) PERSONS SHOULD NOT BE REQUIRED TO MAINTAIN A STATUS OF AVAILABILITY FOR JURY SERVICE FOR LONGER THAN TWO WEEKS EXCEPT IN AREAS WITH FEW JURY TRIALS WHEN IT MAY BE APPROPRIATE FOR PERSONS TO BE AVAILABLE FOR SERVICE OVER A LONGER PERIOD OF TIME.

New York Recommendation

1. *Convert to the shortest possible term of service, with one trial or one day being the goal and one week or one trial being the maximum permissible term of service.*

One Trial or One Day

The single most effective way of reducing the burden of jury service is to minimize the term and frequency of service. During the late 1980's, through both administrative and legislative initiatives, the term and frequency of jury service were reduced significantly throughout New York State. Many counties now have jury terms of one week or less, which satisfies the ABA's standard of "acceptability."

²⁷ Statewide, only about 11,500 jurors are used in the city courts each year (7,200 in New York City and 4,300 in the rest of the state).

Currently, those who have served are currently disqualified from further service for four years except in certified "juror shortage" counties (two years) and in Erie County (seven years).

The shortest possible term of service is a one trial or one day term, where jurors are dismissed from service after only one day unless they are selected on a jury. The concept of one trial or one day was pioneered in Houston, Texas, in about 1970. The one trial or one day system requires jurors to appear only one day as part of a jury pool for only one day. Jurors who are empaneled for a trial on that day serve only on that case, and are then discharged; those who are not called for a trial are dismissed at the end of the day. In either case, jurors have fulfilled their jury duty. A one trial or one day term makes it possible for people who cannot afford to be away from work for long periods to serve for just a few days. Similarly, a short term of service results in fewer requests for postponement and makes it easier for courts to justify strict enforcement proceedings.⁴⁹

A few counties in New York, including Dutchess, Oneida, Erie and Suffolk, already have systems at or approaching the one trial or one day term. New York, Bronx and Westchester County, on the other hand, currently require jurors to appear at the courthouse (or, in the case of Westchester, to be on one-hour telephone call) every day for up to two full weeks.

We recommend that every county work toward a one trial or one day term. For some counties, this will not be particularly difficult. For those that experience chronic juror shortages (a diverse group that ranges from three counties in New York City to some rural counties in the northern and western parts of the State), it may not be achievable. However, every county should work with OCA on shortening its term of service, and no county (including the counties of New York City) should have a term of service that exceeds one trial or one week -- i.e., no juror must remain or be placed on call for more than one week, and every juror is excused after serving on one trial.

⁴⁹ A 1984 Study by the Jury Commissioner of Middlesex County, Massachusetts (Cambridge and Suburban Boston) after one trial or one day had recently been implemented, for example, found that a full 90% of the jurors summoned under one trial or one day served two days or less, whereas only 5% served five or more days. The average term of service for those who were empaneled was 3 days (the average length of a trial in Middlesex County).

There are many (including many Jury Commissioners) who protest that certain summoned jurors will exploit a one trial or one day system by inventing reasons why they cannot be impartial on their called day, knowing that if they are not selected to sit on a case they can go home and forget about jury service for several years. They note that jurors who are in service for one or two weeks often try to keep from being empaneled during the last few days of their service if they can. We acknowledge that this happens. But we can understand why a person who has already spent four or eight days sitting around a courthouse might be tempted to look for a reason why he or she should not be empaneled on the last day of service -- particularly if the trial will take several days and may not even begin until after the juror's regular term of service has expired. But a person who has only been inconvenienced for an hour or two should not have the same motivation to "dodge" service, and our discussions with jurors all over the state suggests that the fear of wholesale defections from jury service is unfounded. Jury trials are conducted daily in Erie County which, as noted above, has used a one trial or one day since 1988. And the system has been in use in jurisdictions like Philadelphia, Boston, Washington, D.C., Miami, Detroit, Pittsburgh and Houston for many years; trial by jury continues to flourish in these cities. (Houston recently even went to a one trial or one-half day term!)

There may be a peculiar problem in converting New York to the one trial or one day system on the civil side. Successful conversion to a one trial or one day system requires judges and attorneys to scrutinize potential jurors' claims of hardship or partiality carefully. In every other jurisdiction that uses one trial or one day (with the exceptions of Philadelphia and Pittsburgh), judges are present at voir dire and can exert influence over potential jurors that forestalls efforts to evade service. Criminal judges in New York are often very effective in convincing recalcitrant jurors that they actually can serve on a particular case, even after they have expressed reluctance to do so. But attorneys do not carry similar "clout" with jurors. Indeed, because attorneys have every incentive not to offend potential jurors, they are inclined to respond to pleas for excusal by agreeing to dismiss the juror by consent. If this leads to difficulties in implementing a shortened term of service, the court system may have to consider how to

remedy the situation. We note, however, that Erie County has experienced no such problem since it converted to one trial or one day.

Qualifications, Disqualifications and Exemptions: Term of Service

ABA STANDARD 4: ELIGIBILITY FOR JURY SERVICE

ALL PERSONS SHOULD BE ELIGIBLE FOR JURY SERVICE EXCEPT THOSE WHO

- (a) ARE LESS THAN EIGHTEEN YEARS OF AGE, OR
- (b) ARE NOT CITIZENS OF THE UNITED STATES, OR
- (c) ARE NOT RESIDENTS OF JURISDICTION IN WHICH THEY HAVE BEEN SUMMONED TO SERVE, OR
- (d) ARE NOT ABLE TO COMMUNICATE IN THE ENGLISH LANGUAGE, OR
- (e) HAVE BEEN CONVICTED OF A FELONY AND HAVE NOT HAD THEIR CIVIL RIGHTS RESTORED.

New York Recommendations

1. *Amend Jud. L. § 510 to provide that persons are eligible for jury service if they are:*
 - (a) *U.S. citizens;*
 - (b) *18 years old or older;*
 - (c) *a resident of the county where called to serve;*
 - (d) *able to understand and communicate in English;*
 - (e) *not convicted felons; and*
 - (f) *have not served as a juror in the past four years (or two years in Certified Juror Shortage counties).*
2. *Amend Jud. L. § 511 to eliminate all occupational disqualifications except for sitting judges of state and federal courts of record.*

1. Qualifications

New York is famous (or infamous) throughout the United States for the extraordinarily high number of disqualifications or exemptions from jury service it offers. In a state with more than its share of litigation and a chronic undersupply of jurors, the current system of disqualification and exemptions makes no sense at all.

The New York Court of Appeals has described the following requirements for service as juror:

At a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court.

People v. Guzman, 76 N.Y.2d 1, 5 (1990) (permitting hearing impaired person to serve as juror).

In our view, this standard is met if a juror:

1. is a citizen of the United States;
2. is 18 years or older;
3. is a resident of the county in which called to serve;
4. understands and communicates in English;
5. has not been convicted of a crime punishable by more than one year in prison; and
6. has not been summoned to serve as a juror in a court of record within the past four years (or two years in those counties that are designated as "Juror Shortage" counties by the Chief Administrative Judge of the Unified Court System).⁴⁴

We therefore recommend amending Judiciary Law § 510 to make these the only qualifications for jury service.

Currently, Section 510(3) of the Judiciary Law automatically disqualifies from jury service anyone with "a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror." This language is open to the interpretation that persons with disabilities are per se disqualified from jury service, which would make it inconsistent with the statutory requirements of the recently enacted Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., ("ADA") which has been ruled applicable to jury service.⁴⁵ If a citizen believes that

⁴⁴ See N.Y. Jud.L. § 524(c); Rules of Chief Administrator § 128.9(b).

⁴⁵ See People v. Pagan, 191 A.D.2d 651 (2d Dep't), lv. to appeal denied, 81 N.Y.2d 1017 (1993); (visually impaired juror permitted to serve); People v. Caldwell, 603 N.Y.S.2d 713, (N.Y.C. Crim. Ct. 1993) (suggesting that automatically excluding visually impaired juror would run afoul of the ADA); Galloway v. Superior Court of District of Columbia, 816 F. Supp. 12 (D.D.C. 1993); (holding that policy of excluding blind jurors violates ADA); see also M. Lynch, "The Application of Equal
(continued...)"

he or she is unable to serve as a juror at all because of some disability, the citizen may apply for an excuse, which the jury commissioner will have discretion to grant. If a potential juror's disability is relevant to an individual case (inability to see or read in a case where the critical evidence is contained in documents, for example), it should be identified and dealt with during voir dire and through challenges for cause.

After serving, a juror should not be called again for a period of time. ABA Standard 6, concerning excusals, recommends that jurors be excused from jury duty if they have served on a jury within the past two years. New York has traditionally given a temporary disqualification to a juror who has recently served, and we prefer that jurors who have recently served not receive summonses and be forced to request an excusal. Therefore we make it a qualification that a juror not have served for a fixed period of time.

A two year period of disqualification may be necessary in jurisdictions where source lists cover only 60-65% of eligible jurors. But it is hard to see why the recall period could not be longer in a state where 90% or more of eligible jurors are on the master source list – provided that potential jurors' names are drawn directly from the source list and not from a smaller permanent qualified list. The experience in Erie County bears that out: by drawing names directly from the master source list, rather than a permanent qualified list, Erie County has been able to prolong the period of disqualification after service to every seven years – and Erie County uses a one trial or one day system!

We therefore recommend that the current four year period of disqualification after service be retained in any county where, after abolition of the permanent qualified list, it is clear that a shorter period is not needed to deal with a chronic juror shortage. We further recommend that those counties that currently have a two-year period of disqualification after service reevaluate this standard within three

²⁹(...continued)

Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes, 57 Albany L.Rev. 289, 296-305 (1993).

years after abolition of the permanent qualified list to see if a longer period is feasible.⁴⁶ Jury Commissioners should, of course, have discretion to permit a longer period of disqualification after service if they can manage it.

2. Disqualifications

Judiciary Law § 511 currently disqualifies the following individuals from jury service: (1) members in active service in the armed forces of the United States; (2) elected federal, state, city, county, town or village officers; (3) heads of civil departments of the federal, state, city, county, town or village government, members of a public authority, state commission or board; and (4) federal and state judges or magistrates.

We recommend that this law be amended to provide that the only disqualification from jury service be active status as a member of the judiciary in a court of record, be it state or federal. Government officials or members of the armed forces can and should receive excuses or postponements to allow them to meet their military obligations or deal with government emergencies.⁴⁷ Indeed, recent jury service by elected officials such as Los Angeles County Supervisor Gloria Molina, Florida Senator Bob Graham and California Senator Barbara Boxer has received favorable publicity.⁴⁸

We are aware that judges are qualified to serve as jurors in some jurisdictions, such as Colorado, Connecticut, Illinois and the District of Columbia, and we harbor doubts about retaining any occupational disqualifications from jury service. However, we believe there is sufficient basis in Canon 5 of the Code of Judicial Conduct, "A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of

⁴⁶ These certified "Juror Shortage" counties are: New York, Kings, Queens, Greene, Jefferson and the entire Fourth Judicial District. See N.Y. Jud.L. § 524(c); Rules of the Chief Administrator § 128.9(b).

⁴⁷ Although the California Attorney General has opined that a state's refusal to disqualify or exempt active duty military personnel from jury service has Supremacy Clause implications, 65 Op. Atty. Gen. Cal. 430 (1982), we disagree.

⁴⁸ See, e.g., "From Making Law to Laying Down the Law: Even Top Officials Get Called to Jury Duty," Los Angeles Times (Feb. 5, 1994); "Senator to Serve on Jury," St. Petersburg Times (Jan. 19, 1994); "Boxer Reports for Jury Duty," San Francisco Chronicle (Nov. 17, 1992).

Conflict with His Judicial Duties," to support the conclusion that judges should continue to be disqualified. Particularly pertinent are the provisions of Canon 5 that prohibits a judge from practicing law, acting as an arbitrator/mediator, or serving on a governmental body "that is concerned with issues of fact or policy other than the improvement of the law, the legal system, or the administration of justice." We conclude that the actions required of one as a deliberating juror are sufficiently close to Canon 5's prohibited activities to justify precluding active judges from jury service.

ABA STANDARD 6: EXEMPTION, EXCUSE AND DEFERRAL

- (a) ALL AUTOMATIC EXCUSES OR EXEMPTIONS FROM JURY SERVICE SHOULD BE ELIMINATED.
- (b) ELIGIBLE PERSONS WHO ARE SUMMONED MAY BE EXCUSED FROM JURY SERVICE ONLY IF:
 - (i) THEIR ABILITY TO RECEIVE AND EVALUATE INFORMATION IS SO IMPAIRED THAT THEY ARE UNABLE TO PERFORM THEIR DUTIES AS JURORS AND THEY ARE EXCUSED FOR THIS REASON BY A JUDGE; OR
 - (ii) THEY REQUEST TO BE EXCUSED BECAUSE THEIR SERVICE WOULD BE A CONTINUING HARDSHIP TO THEM OR TO MEMBERS OF THE PUBLIC, OR THEY HAVE BEEN CALLED FOR JURY SERVICE DURING THE TWO YEARS PRECEDING THEIR SUMMONS, AND THEY ARE EXCUSED BY A JUDGE OR DULY AUTHORIZED COURT OFFICIAL.
- (c) DEFERRALS OF JURY SERVICE FOR REASONABLY SHORT PERIODS OF TIME MAY BE PERMITTED BY A JUDGE OR DULY AUTHORIZED COURT OFFICIAL.
- (d) REQUESTS FOR EXCUSES AND DEFERRALS AND THEIR DISPOSITION SHOULD BE WRITTEN OR OTHERWISE MADE OF RECORD. SPECIFIC UNIFORM GUIDELINES FOR DETERMINING SUCH REQUESTS SHOULD BE ADOPTED BY THE COURT.

New York Recommendations

1. *Repeal Jud. L. § 512 to eliminate all exemptions from jury service.*
2. *Amend Jud. L. § 517 to grant jury commissioners broad power to grant non-permanent excuses from jury service if an individual is incapable of serving or would suffer undue hardship.*
3. *Amend Jud. L. § 517 to provide for a uniform (and strictly enforced) state-wide policy on deferral: one deferral as of right to a date for service specified by the juror.*

1. Exemptions

New York has the most extensive list of occupational and related exemptions in the United States.

Section 512 of the Judiciary Law provides more than twenty occupational exemptions:

1. Members of the clergy or Christian Science practitioners;
2. Licensed physicians, dentists, pharmacists, optometrists, psychologists, podiatrists, registered nurses, practical nurses, embalmers or Christian Science nurses;
3. Attorneys;
4. Police officers; correction officers; members of fire departments; or volunteer firemen;
5. Sole proprietors;
6. Persons seventy years of age or older;
7. Parents with a child or children under sixteen years of age, and whose principal responsibility is to actually and personally engage in the daily care and supervision of such child or children between eight a.m. and six p.m.;
8. Prosthetists and orthotists; and
9. Licensed physical therapists.

We recommend that this statute be repealed.

Over half of the states outside New York have either reduced or completely abolished occupational jury exemptions. The neighboring states of Rhode Island, Connecticut and Massachusetts have all eliminated automatic occupational exemptions in the past fifteen years.

Many of the exemptions can be explained only by looking back to the jury system a century ago, when jurors had to make themselves available for service at a "term of court" lasting four weeks. Often, jurors had to remain in the county seat for a week or more at a time because of the rigors of travel. In those circumstances, it was imperative to exempt from jury service persons whose immediate presence was necessary to community health and safety (i.e., the doctor, the police officer, the firefighter, the undertaker). Today, those exemptions cannot be justified on the same ground. And over time, the list has been expanded to include persons for whom there is no apparent reason for an exemption, other than political clout. To make matter worse, bills have recently been introduced in the state legislature to expand, rather than reduce, the list of exempt persons.²²⁷

Some occupational exemptions reflect generalizations or biases that are simply not acceptable. For example, while a small number of religious sects believe that their members are forbidden to sit in judgment of others, there is no basis to exempt all clergy from jury service; rather, this exemption reflects some generalized (and demonstrably erroneous) notion that clergy will be unable to apply temporal law or are more likely to be lenient or biased in a particular fashion than are other citizens.

Other occupational exemptions (notably those for doctors and law enforcement officers) are often justified on the ground that these individuals would not be appropriate jurors in particular cases (physicians in malpractice and some tort cases; police officers in criminal cases). Putting aside the dubiousness of this proposition, there are obviously a large number of cases that do not implicate the special training or presumed biases of doctors and police officers, on which they could sit without any problem at all.²²⁸

²²⁷ See Assembly Bills 6987, 868 and Senate Bills 5843, 6004 (1993-94 Session) (seeking to grant exemptions to certified social workers, members of volunteer ambulance services, certain school district employees, and chiropractors, respectively).

²²⁸ See generally "The Elimination of Occupational Exemptions From Jury Service in New York State Courts," New York State Bar Association, Commercial and Federal Litigation Section (Dec. 1990) (recommending elimination of all occupational exemptions, including exemption for attorneys).

The system of extensive occupational exemptions is one of the chief sources of public discontent about the jury, and, next to the use of permanent qualified lists, probably its single greatest inequity.²¹ Ordinary wage earners do not understand why they must disrupt their lives periodically to serve on juries, while highly-paid professionals need not endure the same burden. Working people who must use vacation time to serve on juries are justifiably upset that medical personnel and lawyers can be spared by their patients and clients for a month or more of vacation every year, yet don't have to sit on juries. If persons who work for hourly wages can be compelled to spend time on jury service, then sole proprietors of businesses can do so, too -- particularly where the sole proprietor employs others in his or her business establishment.

According to court administrators, the most important reason to eliminate occupational exemptions is the effect it would have on the jury pool. A 1982 Study by the New Jersey Jury Utilization and Management Task Force found the percentage of jurors excluded in New Jersey based on New Jersey's exemptions (which were similar to New York's) to be in the range of 15% statewide. According to data compiled by New York's Office of Commissioners of Jurors in 1984, occupational exemptions are claimed by five to ten percent of the New Yorkers who return their qualifications questionnaires.²² Jury Commissioners in New York, Westchester and Nassau Counties are particularly vocal about the detrimental impact of wholesale exemptions for medical personnel and lawyers (who are numerous among their residents) on their low percentage yield for jurors.

Our proposal to end disqualifications and exemptions should be viewed in the context of other Jury Project recommendations. A significantly shortened term of jury service (especially in those counties that can achieve the one trial or one day system) and the abolition of the permanent qualified list will minimize the inconvenience that all citizens are asked to bear; this should make the loss of an

²¹ See e.g., "Easy Exemptions Limit Fairness of Jury System," Buffalo News (editorial, March 2, 1986); "Jury Duty is Exactly That -- A Duty," New York Times, (editorial, Sept. 29, 1993).

²² See Interim Report of the Jury System Management Advisory Committee 35 (1984).

exemption more palatable. We are also recommending sensible and predictable uniform deferral procedures that give jurors maximum input as to when they are actually able to serve (see pp. 36-37 below). This, too, should alleviate the inconvenience of jury service for those who currently enjoy the luxury of avoiding it altogether.

Judiciary Law § 512 also contains an exemption for persons aged 70 and older. This exemption has been much criticized.²⁷ Given the expanding role and growing number of senior citizens in our society, we recommend that the current exemption for individuals aged 70 and older also be eliminated. Instead, senior citizens who are physically or mentally unable to perform as jurors, or who would be seriously inconvenienced by jury service, should seek an excusal, which the Jury Commissioner should readily grant.

2. Excusal

We recommend that a single, broadly-worded provision on excusal be enacted to replace Judiciary Law § 517. This amended section should give Jury Commissioners considerable discretion to grant excuses on a variety of grounds that would make it unreasonable to require an individual to serve on a jury:

A summoned juror may be excused from service by the Commissioner of Jurors if:

- (a) the individual has a mental or physical condition that causes him or her to be incapable of performing the duties of a juror; or
- (b) the individual asks to be excused because his/her service would be a continuing hardship to the individual, his/her family, or the public.

This provision would institutionalize what jury commissioners already now do: consider requests for excusal on a case-by-case basis and grant an excusal when warranted.

Reliance on the excusal process, rather than on statutory exemptions, should allow jury commissioners to deal with every situation that is now covered by Judiciary Law § 512. For example,

²⁷ See e.g., "How the Geeser Rule Spared Him Jury Duty," Rochester Democrat and Chronicle (Dec. 2, 1993); "You're Never Too Old to Serve On a Jury," Rochester Democrat & Chronicle (Jan. 21, 1987).

a parent who cares full-time for children under the age of 16 is currently entitled to an exemption under § 512(7). Under our proposal, if such a parent is unable to make alternative arrangements for the care of his or her children, he or she can obtain an excuse. The advantage of the excuse is that it is not permanent. Rather, the juror will be excused from service for the same period of time that someone who actually serves on jury duty is exempt: four years, or two years in Juror Shortage counties. At the end of the excusal period, the juror's name goes back into general jury pool; this prevents the excuse from becoming a permanent exemption or disqualification and allows jury commissioners to evaluate particular situations on a periodic basis.

Obviously, the success of the discretionary excusal system will depend on the ability of jury commissioners to distinguish between situations where a citizen can make alternate arrangements if allowed to defer service to a more convenient time, and those where a two or four year excusal is the appropriate solution. We are impressed with the ability of jury commissioners and their staffs to assess these situations accurately and fairly, and we have little doubt that they will carry out this expanded task diligently.

Two particular situations where flexibility is necessary were brought to our attention again and again. One is the parent who works outside the home during school hours but cares for his or her children in the home after school — a situation that commissioners are seeing more and more as parents balance economic needs with child safety considerations. These parents (mostly mothers) must be home by 2:30 or 3:00, which is incompatible with jury duty. Yet under current law, anyone who works outside the home twenty hours a week or more is not eligible for the child care exemption.²⁴ Parents should be encouraged to make alternate arrangements for their children after school, and if they can do so, they should serve. But if they cannot, commissioners should look favorably on a hardship request.

²⁴ See N.Y. Jud.L. § 512(7) (providing exemption for "parent . . . who resides in the same household with a child . . . under sixteen years of age, and whose principal responsibility is to . . . engage in the daily care . . . of such child . . . during the majority of the hours between eight a.m. and six p.m. . . .")

The other is the person who does temporary office work through a temporary agency. These individuals have no employer, yet they are not eligible to be treated as sole proprietors because their office temp income does not count as income from self-employment. The shortened term of service should make it easier for temporary workers to complete their service without significant hardship, but in appropriate circumstances commissioners should be sympathetic to excusal requests.

Given the significant differences between counties, specific procedures for applying for an excusal should be determined by the jury commissioners themselves based on local circumstances. We agree with the ABA, however, that some quantum of proof -- be it written documentation or having the summoned individual seek the excusal in person -- should be required before an excusal is granted. If the jury commissioner decides that excusals are to be granted only in person, then expanded office hours should be instituted so that summoned individuals will not be further inconvenienced when seeking their excuse.

3. Deferral

Citizens are frequently summoned for jury service at an inconvenient time, and it has become routine to grant deferrals as of right. However, the policy on deferrals currently varies significantly from county to county. In many counties (such as Kings and Sullivan) only one or two automatic deferrals are allowed. But in other counties -- notably New York County, where juror shortages are particularly acute -- jurors can now obtain five or six deferrals, with each deferral lasting six months. This does not foster public respect for the jury system.

We recommend that Jud. L. § 517 be amended to provide for a uniform statewide policy on deferral. Each summoned juror who is not entitled to an excusal should be able to obtain one deferral as of right. The deferral should be to a date certain selected by the juror, with the proviso that the selected date be no more than six months in the future. Thereafter, no deferrals should be permitted

except for a truly unavoidable emergency. Allowing the juror to select a date for service will enable the juror to arrange for work or child care coverage well in advance or to use vacation time during the period of jury service. This provision should be strictly enforced.

Persons seeking their one deferral should be entitled to do so by telephone. The deferral should be followed within seven days by written notification from the court, noting that the date the juror selected is now the date of service, and emphasizing that service will not be deferred again except in extraordinary circumstances.

ABA STANDARD 10: ADMINISTRATION OF THE JURY SYSTEM

THE RESPONSIBILITY FOR ADMINISTRATION OF THE JURY SYSTEM SHOULD BE VESTED EXCLUSIVELY IN THE JUDICIAL BRANCH OF GOVERNMENT.

- (a) ALL PROCEDURES CONCERNING JURY SELECTION AND SERVICE SHOULD BE GOVERNED BY COURT RULES AND REGULATIONS PROMULGATED BY THE STATE'S HIGHEST COURT OR JUDICIAL COUNCIL.
- (b) A SINGLE UNIFIED JURY SYSTEM SHOULD BE ESTABLISHED IN ANY AREA IN WHICH TWO OR MORE COURTS CONDUCT JURY TRIALS. THIS APPLIES WHETHER THEY ARE OF THE SAME OR OF DIFFERING SUBJECT MATTER FOR GEOGRAPHIC JURISDICTION.
- (c) RESPONSIBILITY FOR ADMINISTERING THE JURY SYSTEM SHOULD BE VESTED IN A SINGLE ADMINISTRATOR ACTING UNDER THE SUPERVISION OF A PRESIDING JUDGE OF THE COURT.

New York Recommendation

1. *Amend Jud. L. § 503 to provide that all county jury boards consist of the Presiding Justice of the Appellate Division, the Administrative Judge of the Judicial District and an elected Supreme or County Court Judge*

1. County Jury Boards

New York's system of jury administration resembles the system envisioned by the ABA Commission in some particulars but not all. Each county operates a unified jury system for all courts of both superior and inferior jurisdiction. The jury commissioner who administers the system is appointed by and accountable to a county jury board, with dotted line authority to OCA. However, while

OCA operates the mechanics of jury selection, nearly all areas are the subject of extensive legislative regulation.

We understand the ABA's desire to insulate the administration of the jury system from partisan politics and lobbying, but we do not believe that legislative oversight is the only, or even the major, impediment to jury reform. We are, therefore, not inclined to endorse its recommendation that the Legislature get out of the business of promulgating statutes concerning jury service altogether.

Despite recent budget cut-backs and the relatively high volume of litigation in New York, the jury commissioners do a truly impressive job of running the jury system throughout the State. Experiments like the implementation of essentially a one trial or one day system in Dutchess, Oneida, Erie and Suffolk counties, abandonment of the use of a permanent qualified list in Erie County, and creative efforts to increase the minority presence in Ulster and Monroe Counties attest to the energy and innovation with which so many of the Jury Commissioners approach their work.

We do recommend one major change in the current administrative scheme, and that is a change in the composition of county jury boards, with the goal of professionalizing the office of jury commissioner.

The increasing complexity of jury commissioners' jobs demands an ever-increasing level of professionalization, extensive coordination with other elements of the Unified Court System, and above all insulation from political influence. The jury commissioners outside New York City are appointed by county jury boards.²² These Boards vary in composition from one supreme court justice, one county court judge and a member of the county legislature (in most upstate counties) to all the elected judges (in Nassau County).²³ Because innovation and excellence in office is no guarantee of tenure in office, some jury commissioners admit privately that they feel constrained at times to overlook juror concerns in favor of the wishes of the jury board members and their political allies. We were informed of

²² See N.Y. Jud.L. §§ 502-504.

²³ See N.Y. Jud.L. § 503(a).

instances when jury commissioners either decided not to try particular reforms for fear of losing their jobs or were informed by members of their jury board to do (or not to do) a particular task if they wished to keep their jobs. In our opinion, this does not foster the level of professionalism that is required of jury commissioners today.

In New York City, the County Clerks (who are not elected officials and who serve as Clerks of the Supreme Court) also serve as jury commissioners. Since 1935, the clerks have been appointed by the Justices of the Appellate Division in their counties and are removable by those justices only for cause. The constitutional amendment that established this procedure was passed in order to insulate jury commissioners from political pressure.²⁷

Much of the same result could be achieved in the other 57 counties by depoliticizing the make-up of the county jury boards. We therefore recommend that Jud. L. § 503 be amended to provide that county jury boards throughout the state uniformly consist of the Presiding Justice of the Appellate Division, the Administrative Judge of the Judicial District and an elected Supreme or County Court judge. The appointment of jury commissioners should emphasize the candidate's professionalism, efficiency, innovativeness and administrative ability. Jury commissioners should be appointed for an initial term of five years, with the jury board retaining the right to remove a Commissioner at any time for cause. The Commissioner should be subject to a "retention election" type of reappointment procedure; if the commissioner has performed his or her job in a satisfactory manner, the presumption should be that his/her term will be renewed. OCA, to whom the commissioner has "dotted line" authority, should be consulted by the jury board for a full and frank evaluation of the commissioner's performance.

Some smaller counties have a "part-time" jury commissioner (often the retired County Clerk) who leaves the day-to-day administration of the jury system to local staff (often the Chief Clerk of the Court). This practice is not compatible with the professional system we are recommending. The position of part-time jury commissioner should be abolished in any county that currently has such an official. If the

²⁷ See N.Y. Constitution, Art. 13, § 13.

county does not have a volume of litigation sufficient to justify a full-time commissioner, then the county jury board should either join forces with an adjacent county and appoint a single commissioner to serve both jurisdictions, or the court employee who now performs the actual work of the commissioner (generally the Chief Clerk of the Court) should be appointed to the task, as is currently the case in New York City.

ABA STANDARD 11: NOTIFICATION AND SUMMONING PROCEDURES

- (a) THE NOTICE OF SUMMONING A PERSON TO JURY SERVICE AND THE QUESTIONNAIRE ELICITING INFORMATION REGARDING THAT PERSON SHOULD BE
 - (i) COMBINED IN A SINGLE DOCUMENT;
 - (ii) PHRASED SO AS TO BE READILY UNDERSTOOD BY AN INDIVIDUAL UNFAMILIAR WITH THE LEGAL AND JURY SYSTEM; AND,
 - (iii) DELIVERED BY FIRST CLASS MAIL.
- (b) A SUMMONS SHOULD CLEARLY EXPLAIN HOW AND WHEN THE RECIPIENT MUST RESPOND AND THE CONSEQUENCES OF A FAILURE TO RESPOND.
- (c) THE QUESTIONNAIRE SHOULD BE PHRASED AND ORGANIZED SO AS TO FACILITATE QUICK AND ACCURATE SCREENING, AND SHOULD REQUEST ONLY THAT INFORMATION ESSENTIAL FOR
 - (i) DETERMINING WHETHER A PERSON MEETS THE CRITERIA FOR ELIGIBILITY;
 - (ii) PROVIDING BASIC BACKGROUND INFORMATION ORDINARILY SOUGHT DURING VOIR DIRE EXAMINATION; AND
 - (iii) EFFICIENTLY MANAGING THE JURY SYSTEM.
- (d) POLICIES AND PROCEDURES SHOULD BE ESTABLISHED FOR ENFORCING A SUMMONS TO REPORT FOR JURY SERVICE AND FOR MONITORING FAILURES TO RESPOND TO A SUMMONS.

New York Recommendations

1. *Convert to a one-step summoning and qualification system throughout the State.*
2. *Repeal Jud. L. § 513 and remit the power to formulate the contents of the jury qualification questionnaire to the Chief Administrator of the Courts and the county jury commissioner; convert to computerized qualification questionnaires as soon as the technology can be implemented.*
3. *Amend Jud. L. § 527 to simplify enforcement procedures for non-response to jury questionnaires and summonses.*

All of the ABA's proposals are sensible and we endorse them. We make the following recommendations for their implementation in New York.

1. One-Step Summoning & Qualification

The one-step summoning and qualification process should be adopted throughout the state. Under the one-step qualification/summoning system, when the court needs jurors, a single mailer that includes both the qualification questionnaire and a summons is sent to a random selection of names drawn directly from OCA's master source list in the county. Jurors return the questionnaire immediately; the Commissioner's staff can quickly determine which jurors are qualified and which are not. Only jurors who do not claim to be disqualified or exempt report for service. Those who claim to be disqualified or exempt are told not to report for duty unless they are called by the jury commissioner to be examined about their disqualification or exemption. Based on the number of questionnaires that are sent back by potential jurors, the Jury Commissioner knows about how many jurors to expect each week.

The one-step process has been used successfully in Erie County since 1988; it is also used in Denver, Seattle, Dallas and Houston, as well as most jurisdictions in Florida and Pennsylvania.

In addition to greater convenience for the juror, the one-step system has the advantage of only one mailing to the prospective jurors, thereby producing significant savings in postage, forms and handling costs. These savings were estimated to be approximately \$21,000 in the year that Erie County converted to a one-step system.

2. Jury Questionnaires

We recommend that Jud. L. § 513, which prescribes the contents of jury qualification questionnaires, be repealed. The contents of the jury qualification questionnaire should be set by the Chief Administrator of the Courts and the various County Jury Commissioners. In every county, the questionnaire should ask the minimum number of questions necessary to determine a juror's qualifications. Its format should enable a jury commissioner's staff to tell at a glance whether a particular juror is qualified.²⁷ If it is possible to use computer technology (such as bar-coding) to make identification of non-qualified jurors easier, this should be done.²⁸ Because of the enhanced importance that the excusal process will assume, the form should include a question about whether the juror plans to request an excusal or a deferral to a date certain.

The counties can tailor the rest of the form to their own needs. The summons should include information about courthouse location, transportation, parking, phone numbers to call about deferrals and excuses, information about the telephone call-in system, nearby lunch facilities, and cable TV juror instruction information (see pp. 103-104 below).

3. Compliance & Enforcement

The failure of many New Yorkers to return their jury questionnaires is acute and contributes mightily to both the shortage of jurors and the possible non-representiveness of venires. For example, in Suffolk County, the site of frequent jury challenges for non-representativeness, 27% of juror qualification questionnaires are not returned.²⁹ In 1991, Kings and New York counties had questionnaire non-response rates of 50% and 51%, respectively. Although some of the non-responders

²⁷ The Erie County form, which is formatted so that all answers that would result in disqualification fall within a box that runs down the middle of the form, can be used as a prototype for the forms that may be used throughout the State (See Appendix E).

²⁸ An experiment with computerized coding is about to begin in Kings and Monroe Counties.

²⁹ See *e.g.*, People v. Waters, 123 Misc. 2d 1057 (Suffolk Cty. Ct 1984), *aff'd*, 125 A.D.2d 615 (2d Dep't. 1986); People v. Briggs, 67 A.D.2d 1004 (2d Dep't. 1979).

might not qualify for service anyway, a significant proportion are eligible to serve. OCA test mailings in Kings and Queens Counties in 1989 demonstrated that somewhere in the range of 2 million people are not responding to the qualification questionnaire in Brooklyn and Queens alone! A poor non-response rate diminishes the representativeness of the venire and places an unfair burden on those people who do respond to the jury call.

In recent years, improvements in the Office of Court Administration's computer system has increased the capacity of the jury commissioners to follow up on non-responders and no-shows. Regrettably, in many counties (particularly the large counties), there is very little organized follow-up on non-responses to questionnaires or compliance work. One reason is the lack of resources to devote to this aspect of jury administration. Another is the sheer number of non-responses that must be dealt with. A third reason is the extremely cumbersome procedure that must be followed in order to enforce non-compliance.

There is a high correlation between heightened juror yield and stepped-up enforcement/compliance procedures. Therefore, we recommend that Jud. L. § 527 be amended to simplify the current enforcement procedures that require, among other things, service in person or by first-class mail upon the recalcitrant juror, and a hearing upon notice by a judge or judiciary hearing officer. Our recommended follow-up procedure is modeled on the Monroe and Bronx County procedures, which have been quite successful in reducing the number of no shows:

1. When a questionnaire is not returned within six weeks after being sent (or, in a one-step process, when the juror fails to respond to the summons and does not obtain an excusal or deferral), the Commissioner's office should promptly send a second notice (indicating delinquent status) directing the individual to return the notice within five business days.

2. If there is no response to the delinquent notice within six weeks, a subpoena should be sent to the juror by first-class mail. There should be no need for formal service. The subpoena should call for an appearance on a date certain and should warn that failure to comply will result in a \$250 fine.

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3. Finally, if the individual does not appear at the Commissioner's office on the date subpoenaed, a notice should be sent, similar to the notices sent by the Department of Motor Vehicles when tickets are not timely paid, indicating that failure to appear on an adjourned date will automatically result in a \$250.00 fine.

Use of procedures similar to these in Monroe County (Rochester) over the last four years has reduced the non-compliance rate from 18% to 1% for summonses, and from 20-25% to 6-10% for questionnaires delivered but not completed and returned. A comparable follow-up program instituted in Bronx County reduced the non-compliance rate over a three-month period in 1993 from 21% to 5% for summonses, and from approximately 61% to 32% for questionnaires delivered, but not completed and returned.

We realize that enhanced compliance efforts will add yet another task to the overburdened dockets of Jury Commissioners at a time when they are facing staff cuts. Yet the importance of this effort cannot be overstated. We recommend that the OCA budget include increased line items for jury commissioners staff to reflect the realities of the job, with particular attention to new positions for enforcement.

PART II

STANDARDS RELATING TO JUROR
SELECTION AND UTILIZATIONABA STANDARD 7: VOIR DIRE

VOIR DIRE EXAMINATIONS SHOULD BE LIMITED TO MATTERS RELEVANT TO DETERMINING WHETHER TO REMOVE A JUROR FOR CAUSE AND TO EXERCISING PEREMPTORY CHALLENGES.

- (a) TO REDUCE THE TIME REQUIRED FOR VOIR DIRE, BASIC BACKGROUND INFORMATION REGARDING PANEL MEMBERS SHOULD BE MADE AVAILABLE IN WRITING TO COUNSEL FOR EACH PARTY ON THE DAY ON WHICH JURY SELECTION IS TO BEGIN.
- (b) THE TRIAL JUDGE SHOULD CONDUCT THE INITIAL VOIR DIRE EXAMINATION. COUNSEL SHOULD BE PERMITTED TO QUESTION PANEL MEMBERS FOR A REASONABLE PERIOD OF TIME.
- (c) THE JUDGE SHOULD ENSURE THAT THE PRIVACY OF PROSPECTIVE JURORS IS REASONABLY PROTECTED, AND THAT THE QUESTIONING BY COUNSEL IS CONSISTENT WITH THE PURPOSE OF THE VOIR DIRE PROCESS.
- (d) IN CRIMINAL CASES, THE VOIR DIRE PROCESS SHOULD ALWAYS BE HELD ON THE RECORD. IN CIVIL CASES, THE VOIR DIRE PROCESS SHOULD BE HELD ON THE RECORD UNLESS WAIVED BY THE PARTIES.

New York Recommendations

1. *Criminal voir dire should continue to be conducted as is presently done under CPL § 270.15, except that:*
 - (a) *Entire arrays should be screened for obvious cause challenges or inability to serve at the outset of questioning, and jurors who cannot serve on the case should be sent back to the central jury pool promptly.*
 - (b) *All criminal voir dire should be held on the record.*
2. *Conduct a pilot project in which some trial judges in several urban/suburban counties supervise voir dire in the civil cases they try.*
3. *Conduct an experimental program to see if supervision by judicial hearing officer of voir dire conducted under the uniform rules is necessary or desirable.*
4. *Adopt uniform statewide rules for civil voir dire that:*
 - (a) *Mandate the use of written jury questionnaires to cover basic background information and to pre-screen jurors for cause.*

- (b) *Convert to the use of the "struck" jury method of selection for civil voir dire.*
 - (c) *Impose time limits on attorney questioning during civil voir dire.*
 - (d) *Limit examination during voir dire to relevant material.*
 - (e) *Adopt the "non-designated alternate" system.*
5. *Protect juror privacy during and after the voir dire process.*

Voir dire – the method by which prospective jurors are questioned and selected to sit on a particular jury – is among the most controversial topics that we faced. In one guise or another, voir dire elicited more comments than any other issue on which jurors commented – even more than low jury pay, inadequate court facilities or mandatory sequestration.

The ABA Standard posits a system in which the conduct of voir dire is essentially the same in civil and criminal cases. New York does not have such a system. Criminal voir dire is governed strictly by statute (CPL § 270.15-270.25) It conducted in the presence of the trial judge, who does some (often most) of the questioning. Although it is not constitutionally or statutorily required, most criminal voir dires are on the record, in order to preserve the right to contest challenges under Batson v. Kentucky, 476 U.S. 79 (1986). The CPL gives courts discretion to use juror questionnaires (CPL § 2790.15(1)(a)), and OCA has promulgated a standard background questionnaire that is used by some but not all judges to speed the voir dire process. After both parties have completed their questioning, the People, and when the defendant, may challenge prospective jurors for cause. The prosecution thereupon exercises all its peremptory challenges, followed by the defendant. The prosecution may not exercise any remaining peremptories after the defendant has exercised his or hers. See CPL § 270.15(2). Each side has between ten and twenty peremptory challenges, depending on the nature and severity of the crime. See CPL § 270.25(2). No challenge for cause is appealable unless all peremptories are used. See CPL § 270.20(2).

Civil voir dire, by contrast, is conducted by attorneys without judicial supervision, unless a party requests it. See CPLR § 4107. Juries are empaneled wherever space can be found, which is seldom in a courtroom, except in smaller counties upstate. Rules for questioning vary from none (in most instances)

to those imposed by particular judges in parts functioning as individual assignment parts. In urban/suburban areas, the pre-trial IAS judge is not necessarily the trial judge, and trial judges are seldom assigned to cases until after jury selection. This means that there is effectively no judge who could supervise jury selection. Time limits on questioning and questionnaires or other time saving devices are used only when agreed to by the parties or imposed by an assignment judge -- a rare occurrence. Challenges for cause are difficult to resolve, if only because the attorneys have to find a judge to hear them (none being present in the empaneling room). As a result, and voir dire can take days or even weeks. Each party has three peremptory challenges, plus one for each alternate seat, but this number is effectively increased in many cases by the widespread practice of agreeing to excuse jurors whom neither side wishes to seat (sometimes referred to as "cause by consent"). The method and order for exercising peremptories varies from county to county. Voir dire is conducted on the record only in exceptional circumstances.

The differences between civil and criminal voir dire in New York makes it necessary to discuss each separately in light of the ABA Standards.

1. Criminal Voir Dire

Jury selection in criminal cases in New York does not conform to ABA Standard 7 in all particulars. However, with the notable exception of reducing the number of peremptory challenges (see discussion of ABA Standard 9 below), we do not recommend any significant changes to the current scheme of criminal voir dire in New York.

We agree with ABA Standard 7(a), which suggests the use of juror questionnaires to obtain basic background information about jurors. It is rarely possible to make that background information available to counsel in advance, but whenever this can be done, it should be. As noted, the CPL currently gives courts discretion to use juror questionnaires, and an official OCA form is available for this purpose. The New York State Association of Criminal Defense Lawyers informs us that the use of criminal juror questionnaires is increasing, and that counsel routinely prepare their own questionnaires specifically

focused on disqualifying criteria pertinent to the specific case.²⁹ As long as all questionnaires are approved by the court, and as long as appropriate steps are taken to protect juror privacy (by limiting circulation of questionnaires to judges and counsel, and by destroying all copies of questionnaires after they are used), we applaud this development and urge more criminal court judges to use juror questionnaires to speed the jury selection process.

Juror questionnaires are used differently by different judges. Some simply review jurors' written answers to questions with counsel and use it as a springboard for further questioning. Others hand questionnaires to jurors in the box and listen to the panelists answer the questions aloud, observing their demeanor, their ability to read and understand the question and their ability to communicate. The former method saves considerable time and eliminates one source of complaint for many jurors -- listening to the same questions asked over and over. However, the latter method allows the trial judge to identify jurors whose ability to understand and communicate are not compatible with service on the particular case being tried. Because we believe the presence of judges contribute to the efficiency of *voir dire*, we recommend that judges should be free to use the questionnaires in whatever way they think best (so long as the jurors' privacy is reasonably protected). However, we urge judges to be mindful of jurors' aversion to the tedium of repetition and of the time-saving advantages of obtaining written responses to the questionnaires whenever possible.

Both ABA Standard 7(b) and the CPL call on the trial judge to conduct the initial examination of the prospective jurors, and then permit counsel for the parties to ask appropriate supplemental questions. See CPL § 270.15. This system works well. We have considered, but are not inclined to adopt, the so-called Federal system, in which the court conducts the entire examination. In our view, attorney participation, properly monitored and controlled by the court, is important to ensure a fair and impartial jury -- particularly where a defendant's liberty is at stake.

The ABA recommends use of a "struck" system to select juries in both civil and criminal cases, while the CPL specifies use of a "strike and replace" method in criminal cases in New York. See CPL § 270.15. As will be seen, we prefer the "struck" system in civil cases (see pp. 58-60, below).

²⁹ See letter of NYSACDL to Colleen McMahon, Esq., dated November 30, 1993, at 2.

However, given the large number of peremptory challenges available on criminal cases (a minimum of twenty and a maximum of forty), we do not believe that use of a struck system in the criminal side would be practical in New York, even if the number of peremptories were somewhat reduced. We therefore reject the ABA's recommendation in the criminal context. We do, however, recommend screening an entire array for obvious cause challenges prior to seating the first panel in the box for more intensive questioning. This will free jurors who cannot possibly sit on a case from the tedium of waiting in the courtroom until they are reached for individual voir dire and will allow them to be sent to another voir dire.²¹

ABA Standard 7(c) requires the court to ensure that the prospective jurors' privacy is reasonably protected during voir dire. This is a common area of juror complaint, particularly in criminal cases. Jurors are understandably uncomfortable discussing where they live and work and giving information about their families in front of a criminal defendant; many also fear retribution from the defendant's family and friends.

CPL § 270.15 gives judges ample authority to curtail improper questioning by attorneys. But there is an inevitable conflict between the jurors' desire for privacy and the defendant's right to a public trial and to be present during jury selection. In our experience, judges generally do their best to balance these legitimate concerns. We can only urge them to continue to be mindful of the jurors' privacy interests and to minimize the amount of specific personal information that jurors must divulge in open court.²²

Finally, we endorse Standard 7(d)'s requirement that voir dire be held on the record in criminal cases, and we recommend that the CPL be amended to accomplish this result. Although this measure is not constitutionally mandated, see People v. Childress, 81 N.Y.2d 263, 268 (1993), sound policy

²¹ This, of course, is one of the considerable advantages of obtaining written response to the juror questions. Trial judges and counsel will have to devise ways to compensate when written questionnaires are not used — perhaps by addressing a few general questions about time requirements, sequestration, the identity of the defendant and relevant parties, etc., to all potential jurors at the outset of voir dire.

²² For example, jurors can be asked to give general information about where they live (a neighborhood, township, school district) rather than a specific address. It will seldom be appropriate to question jurors about details about their minor children, such as where they go to school. Where such details are required, in camera questioning should be considered.

supports the creation of a clear record of the jury selection in criminal cases to enable an appellate court to review compliance with Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, and otherwise to ensure that the defendant was tried by a fair and impartial jury. Voir dire need only be transcribed when challenges are at issue on appeal.

2. Judicial Presence During Civil
Voir Dire – A Pilot Project

Many jurors who go through civil voir dire have a bad experience, and they are not reluctant to discuss it. They have written us letters and testified at our public hearings. Jurors' perception that their time was wasted during jury selection was the most common complaint received on The Jury Project's toll-free juror hotline: over half of the 1,333 callers mentioned this issue.

These complaints all have a similar ring. The jurors do not understand why they must sit, often for days and occasionally even for weeks, while groups of six are asked the same boring questions over and over. They do not understand why they must wait until their names are called when it is apparent that they will be unable to sit on a particular case. (During a recent case tried by one member of The Jury Project, the last juror to be called out of an array of thirty had wasted six hours waiting to tell counsel that he used to work for one of the parties.) Jurors are often shocked that there is no judge present and that, in many courthouses, civil jury selection does not take place in a courtroom. They do not like being asked what they regard as intrusive and irrelevant questions by lawyers. They resent what they perceive as condescension from practically everybody who is officially associated with the court system – court officers, clerks and attorneys. They become furious when unsupervised lawyers and court personnel fail to appear on time, take long lunches, disappear without explanation and end the day early. Several jurors observed that if they acted this way in their own places of business, they would have been fired long ago. And they are livid when cases settle after jury selection; no speeches about the important role they have played in resolving the case convinces them that their time has not been wasted. Many express outrage at these abuses, not just as jurors whose time is being wasted, but as taxpayers whose tax dollars are being wasted on unnecessary jury fees.

We recognize that the most vocal jurors are likely those who have had the worst experiences. Many lawyers pick civil juries fairly and efficiently, and in many courthouses throughout the State jurors are treated with the respect they deserve. But complaints are not limited to jurors in New York City, or downstate, or in urban areas. Something is wrong with civil jury selection in New York, and something can and should be done to improve it.

Many Jury Project members believe that the root of these problems is New York's deeply ingrained tradition of permitting lawyers to pick juries in civil cases without a judge's being present.²⁷ This New York practice is highly unusual; in federal courts and virtually all other States a judge is present during voir dire and does some, if not all, of the questioning. See ABA Standards at 74-75. New York's civil voir dire practice is inconsistent with ABA Standard 7(b), which provides that the judge should conduct the initial questioning, and is expressly disapproved in the ABA's report. See id. at 79 n. 12.

Many members of The Jury Project (though certainly not all) believe that ABA Standard 7(b) represents the best approach to voir dire in civil as well as criminal cases. The advantages of having a judge present during jury selection are legion. From the jurors' perspective, it endows the proceeding with dignity and sends the message that jury service is indeed as important as the jurors are repeatedly told it is. It also means that voir dire will take place in a courtroom, rather than in often inadequate empaneling rooms, juror assembly areas or (as frequently happens in New York County) dimly lit hallways. It means that the judge will be there to stop any abusive or unnecessarily prolonged questioning, delay, or other improper conduct. Equally important, it means that jurors do not have to be sent home after being selected in order to wait (often for days, and sometimes even for weeks) until a judge is free to try the case. When the trial judge presides over jury selection, the trial starts as soon as the jury is picked.

²⁷ This tradition does not derive from the CPLR. Rule 4107 (ironically entitled "Judge present at examination of jurors") provides: "On application of any party, a judge shall be present at the examination of the jurors." Few litigants take advantage of this rule (and prospective jurors are not given the option!). Many New York civil trial lawyers have developed an arsenal of jury selection techniques that they believe would be hampered by judicial supervision. Those who might want a judge present are loath to ask for one at the risk of antagonizing a busy trial judge, who does not usually make time to oversee civil voir dires.

But requiring that judges be present would be a boon not only to jurors; it offers substantial benefits to the litigants and to the judicial system as well. Counsel would be able to obtain immediate rulings on challenges for cause, improper questions or comments, and other objections. Courthouse facilities would be conserved, since there would be no need for separate empaneling areas and there would be no waiting for rooms. Fewer jurors would be used, since the presence of a judge would put an end to the abusive elements of "cause by consent" while ensuring that a juror who truly could not sit on a case was excluded.⁴²

Finally, many of us believe that direct judicial supervision of jury selection would lead more cases to settle before an array of twenty-five or more jurors is wasted on a civil case that is not going to be tried. If the trial judge were assigned to preside over jury selection, he or she could hold a settlement conference before jury selection begins. If there were no settlement, a jury could be picked quickly and the trial started promptly thereafter. The elimination of down time during jury selection, coupled with judicial involvement from the outset, would put pressure on the trial lawyers and litigants to discuss settlement seriously before picking a jury, rather than doing so during a prolonged selection process or on the days (even weeks) that pass between voir dire and trial in many districts. (This issue is addressed further as part of our recommendations concerning juror utilization, see pp. 71-86 below.)

Two arguments are typically advanced against having a judge preside over civil voir dire.

First, some contend that total attorney control of jury selection is essential to produce fair and unbiased juries. The concern is that judges know much less than the attorneys about the facts of the case, and do not have a sufficient incentive to dig deeply enough in their questioning to find out whether particular jurors harbor subtle biases relevant to their ability to decide the case fairly.

This concern is misplaced. It confuses the issue of whether a judge should be present with the separate question of who should examine the prospective jurors. Currently, in criminal cases in New York, the trial judge is present throughout the voir dire but conducts only the initial questioning of the panel; the attorneys are then permitted to ask additional questions. See CPL § 270.15. If this method

⁴² The experience of The Jury Project panel members in other courts is that judges are generally eager to excuse panelists who are truly incompetent to serve and are often the first to suggest it.

(which also the ABA recommends) is fair enough to satisfy the rigorous constitutional demands applicable to the criminal process — where a defendant's liberty is at stake — it surely passes muster in civil cases, too.

The second, and far more substantial, objection to judicial presence during civil voir dire is based on the scarcity of judicial resources. Most judges in civil trial parts, struggling to keep up with a crushing caseload, spend their time trying cases, holding conferences, and hearing and deciding motions. If judges were required to be present during civil voir dires, they could not devote those hours to their other responsibilities. Some contend that, if a large number of additional judgeships were not created, the backlog of civil cases would grow even larger once judges began supervising voir dires. Residents of many smaller counties point out that they already enjoy de facto judicial supervision of voir dire, without having a judge sit in the courtroom. In those counties, the small number of both judges and cases allows the courts to operate a pure IAS system; judges use voir dire time to deal with other duties, but "look in" or otherwise keep tabs on voir dire to make sure it does not get out of hand.⁶⁹

Others, pointing to the experience of federal judges, judges in other states, and our own criminal judges, believe that imposing strict judicial control over civil jury selections would reduce wasted time and resources by eliminating voir dires that drag out for days or weeks and by encouraging parties to settle their cases before jury selection begins. To the extent that the fears of time wastage during judge-supervised voir dire are based on current practices (such as unlimited questioning by counsel and sending out cases for jury selection without regard to whether there are judges available to try them), critics of the present system argue that supervision by the trial judge would cure these ills. Unfortunately, data that would prove which side is correct on this important question do not exist.

Representatives of the Bench and Bar have expressed many different views on this subject. The New York State Bar Association recently endorsed the continuation of attorney questioning in civil voir dires, but took no position on whether judicial presence should be required. See Resolution of NYSBA House of Delegates, November 6, 1993. The New York State Trial Lawyers Association argues that it

⁶⁹ It seldom does. Jury commissioners and Bar and bench representatives from the Third, Fourth, Fifth and Sixth Judicial Districts report that voir dires rarely take more than one day to complete.

would be a waste of judicial time to take judges away from their other duties in order to supervise civil jury selections. See Recommendations of the NYSTLA Jury Reform Committee, dated November 15, 1993, at 1. Some judges take this position as well. But they are far from unanimous. The New York County Lawyers' Association recently interviewed forty randomly chosen criminal and civil Supreme Court Justices in New York County. Although these Justices have the heaviest caseload in the State and might be expected to oppose additional duties most strenuously, roughly half of the civil judges polled were in favor of adopting the federal voir dire system, in which the judge both presides over and conducts jury selection. See Report of the NYCLA Joint Task Force on Jury Service, dated November 9, 1993, at 5; Supplemental Report, dated December 7, 1993, at 4-5. The New York County Lawyers Association itself favors "greater and, perhaps, mandatory judicial supervision" through an amendment of CPLR 4107 to permit a judicial hearing officer or a judge to supervise "lawyer driven voir dire." NYCLA Jury Task Force Supplemental Report, dated December 7, 1993, at 6.

The Jury Project finds itself divided on this difficult issue. We do not endorse a prohibition of attorney questioning during civil voir dire. But we are unable to arrive at a consensus regarding whether voir dire should be judicially supervised. The absence of data about how such a rule would affect judicial resources and caseloads makes it especially difficult to arrive at a definitive conclusion.

Accordingly, we recommend that OCA commence a pilot project to look at civil voir dire supervised by the trial judge. The pilot project should be run in at least two counties in different judicial districts -- one borough in New York City and in an urban/suburban upstate district. It should last for at least one year. The pilot project should be designed 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 dires. OCA should assemble comprehensive data concerning the length and number of civil voir dires, the case settlement rate (both before and after jury selection), and the backlog of civil cases awaiting trial. Data on jurors' experiences under the two models should be gathered, as should information about juror preferences. If, after the pilot project is completed, it appears that judicial presence at lawyer-driven voir dire has a beneficial impact on the process without too deleterious an effect on our judges and their caseloads (an analysis that should not focus exclusively on OCA Standards and

Goals for disposition of cases), then OCA should consider whether to expand the pilot project to more judges within the county or to other counties.

No statutory amendment is needed to launch this pilot project. There is currently no statutory impediment to the trial judge's being present during civil voir dire; it is not forbidden by the CPLR. The only arguably relevant provision, CPLR § 4107, merely states that some judge (not necessarily the trial judge) must be present if a party makes application. The statute is otherwise silent.

We have considered the alternative suggestion of using judicial hearing officers to supervise voir dire. The model most often suggested is having a judicial hearing officer (JHO) monitor three or four voir dires simultaneously, checking to see that selection is proceeding promptly, being available for rulings, and where necessary intervening in the process to speed it to a conclusion.²⁷

JHO-supervised voir dire would not address several of the most critical problems in the current system, including the lack of a judicial presence at the voir dire, the inability to obtain immediate rulings, the need to conduct voir dires in unsuitable facilities rather than in courtrooms and down time after voir dire while waiting to start the trial. Only a pilot project using actual trial judges to supervise voir dires will allow us to compare a system that addresses those ills with the current model.

However, if uniform rules on the conduct of unsupervised civil voir dire are adopted (see below) it may make sense to use Judicial Hearing Officers as enforcers of these rules. OCA should designate several districts in which to try such a loosely supervised system, to see if the rules work more efficiently than in an unsupervised system. However, this effort should not distract from the pilot program on judicially supervised voir dire, which is central to our recommendations.

3. Uniform Statewide Jury Selection Rules

With or without a judge present during civil voir dire, we recommend that OCA adopt a set of uniform rules to govern civil voir dire throughout the State.

At present, civil juries are picked differently in different parts of New York. There are no consistent voir dire practices in the First and Second Departments, other than the use of the strike and

²⁷ Using JHOs in this manner would probably require an amendment to § 122.6 of the Rules of the Chief Administrator (governing assignments of JHOs) and might require an amendment to the CPLR.

replace method. Some judges have jury selection rules that they impose on counsel who will be trying cases in front of them. But since many cases are assigned for trial after jury selection, there is little opportunity for judicial involvement or the imposition of rules.⁵⁷

In the Third Department, local practice is modeled on departmental rules (now repealed) that are similar to the procedures set forth in the CPL for criminal voir dire. The most notable feature of Third Department practice is that the plaintiff, like a prosecutor, must exercise all challenges – for cause and peremptory – before the defense need exercise any. This gives a tremendous strategic advantage to the defense and results in a fairly widespread criticism of the process, both inside and outside the Third Department.

In the Fourth Department, the prevailing practice is to pick under "White's Rules" (named for Justice Robert White, who made these rules familiar in New York County while he served as the Trial and Assignment judge on furlough from his duties upstate). Under White's Rules, counsel first ask general questions to the panel as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. Follow-up questions to individual panelists are permitted. After challenges for cause are exercised, peremptory challenges are exercised singly and alternately, in rounds, by the parties: in the first round, by the party who gives the first opening statement; in the second round, by the party with the right to make the second opening statement; and so on. The plaintiff opens the questioning of replacement jurors in every round.

The New York State Trial Lawyers Association has recommended that civil voir dire "should be conducted in a uniform manner throughout the State. Rules should be published and available." Recommendations of the NYSTLA Jury Reform Committee, at 1. We agree. Any member of the New York bar should be comfortable picking a jury in any part of the State and should be able to do so according to clear, published rules. At the same time, uniform rules should be tailored so that they do

⁵⁷ Despite the adoption of an Individual Assignment System in New York in the mid-1980s, cases in high-volume districts are often assigned to a different judge for trial after conferencing. The trial judge is not necessarily the IAS judge who supervised the case at the pre-trial stage. In cases assigned to the four Commercial Parts in Manhattan, the trial judges have adopted rules for jury selection; these rules can be imposed because the trial judge is assigned to the case before jury selection.

not unduly impinge on practices in those areas of the state where voir dire is a relatively efficient process -- notably smaller counties upstate, where jury selection seldom takes more than a few hours.

In our opinion, any uniform rules for civil voir dire should include the following elements:

(a) Juror Questionnaires. In criminal cases, trial judges are given discretion to require prospective jurors to complete a questionnaire containing basic information regarding their ability to serve as fair and impartial jurors. See CPL § 270.15. OCA has developed a form for this purpose (Form 10), and many criminal judges use it to expedite their initial examination of the jurors. Some judges have the prospective jurors complete the forms; others (especially in areas where a significant number of jurors do not know how to write) have jurors respond orally, without the need for the court to read the same questions out loud over and over. The use of such questionnaires in the criminal context saves considerable time and, if done in writing, eliminates a good deal of the tedious repetition about which jurors so often complain.

We believe that this practice should be extended to the civil voir dire. We have modified the OCA's current questionnaire to make it appropriate for civil cases generally (see Appendix F). We urge that OCA adopt a rule requiring the use of this form in all civil cases unless the parties, with the approval of the trial judge or (where none is assigned) the trial assignment judge, jointly fashion a questionnaire tailored to the special features of a particular case. During the past few months, some civil side judges and lawyers who are members of The Jury Project have used our proposed civil juror questionnaire on an experimental basis; they have found that it greatly expedites the voir dire process. No CPLR amendment or legislation is necessary to implement this rule.

The new rule should leave room for judges and clerks to use the questionnaire in the most effective way. In general, however, the forms should be distributed and completed by jurors who are eligible for service on civil juries⁶² in the juror assembly room. The jurors can then bring the completed forms to any civil voir dires for which they are called. All jurors should give the forms to

⁶² In most counties, all jurors assemble in a single location and are sent out to civil or criminal cases as their names are drawn. In some urban counties, where civil or criminal cases are tried in different courthouses, some jurors are asked to report for civil jury duty and some for criminal jury duty. The jury commissioners will have to tailor our suggestions to their particular logistical situation.

the attorneys when they arrive in the room. When a juror is excused, the juror should retrieve the form and take it to the next voir dire.

If prospective jurors are assigned to a voir dire in which a special questionnaire is used, they can complete the questionnaires when they arrive at the empaneling room or courtroom and leave them behind when they are excused. In all events, copies of the completed questionnaires should be destroyed when the juror's service is completed, in order to ensure juror privacy.

In the context of a judicially supervised criminal voir dire, we were willing to permit judges to have jurors respond to the questionnaires orally rather than in writing. However, in an unsupervised attorney voir dire, we recommend that the background questionnaires be filled out and given to counsel, to cut down on the time needed for questioning prospective jurors. Whoever supervises the filing out of the questionnaire should be careful to ensure that jurors fill out their own questionnaires, since ability to read and write may be germane to a particular case. Obviously, accommodations will have to be made for some jurors — for example, those who are blind — so they are able to participate in a non-discriminatory manner.

(b) "Struck" Jury System. There are two general methods for voir dire: the "strike and replace" system and the "struck" system. We prefer the latter.

Under the "strike and replace" method, an initial panel of prospective jurors equal to the jury size (six in a civil case) are randomly chosen from the entire array of prospective jurors. These individuals are seated in the jury box and questioned. Challenges for cause are exercised, and those excused are replaced from the array. The replacement jurors are likewise questioned and challenged for cause, and additional replacements are made until the prospective jurors in the box are cause-free. Peremptory challenges are then exercised, more replacements are seated, and the process continues until no cause challenges are possible and the parties have exercised or waived all of their peremptory challenges. When a panel of six satisfactory jurors is obtained, it is sworn. Thereafter, selection of alternate jurors begins; it is conducted in the same manner.

Many attorneys dislike the "strike and replace" system because they have to withhold peremptories, for fear the randomly chosen replacement from the array may be worse than the prospective juror that is challenged.

In a "struck" system, no initial panel is selected. Background questions are asked of the entire array and challenges for cause are exercised by both parties. The array should be large enough (or supplemented as necessary) so that the number of "cause-free" prospective jurors is equal to or larger than the ultimate jury size desired (including alternates), plus the total number of peremptories that can be exercised by all parties.²⁷ The attorneys then exercise their peremptory challenges by alternately striking names from a list of the jurors until the number of jurors left equals six plus the number of alternates. If there are still too many jurors after everyone has exercised peremptories, six names are selected at random to sit as the jury.

There are many advantages to the struck system:

First, there is no reason to hold back peremptories, because they are exercised with full knowledge of who will remain on the jury. See G. Thomas Munsterman, *et al.*, "The Best Method of Selecting Jurors," 29 *The Judges' Journal* (Summer 1990).

Second, because questions can be posed to the entire array (instead of just six prospective jurors in the box), there will be less tedious repetition of basic questions, particularly when the lawyers use the juror questionnaires to cover basic background. Array members with disqualifications that are obvious from their questionnaires or from a few general questions asked at the outset can be dismissed quickly, returned to the central jury pool and used for *voir dire* in a different case.

Third, use of the struck system makes it easier to remedy a *Batson* violation. In the strike and replace system, peremptories are exercised at various times, and each juror who is challenged is excused at the time of the challenge. Only after two or (more likely) three peremptories are exercised will a

²⁷ We propose an initial panel of 25 prospective jurors. Based on a six-person jury with two alternates, plus four peremptory challenges per side (see discussion of ABA Standard 8 below), a panel of twenty-five would allow for nine challenges for cause, which normally ought to be sufficient. If experience demonstrates that a 25-member panel size is either too small or too large, OCA (or even the local jury commissioners) can easily amend its rule accordingly. This is one of the advantages of implementing *voir dire* procedures by administrative rule rather than statutory amendment.

Batson pattern because apparent. But by that time some of the challenged jurors are long gone, and it would be prejudicial to the remaining jurors (and perhaps impossible) to find them and put them back in the box. Thus, voir dire must commence anew after a Batson motion is granted. Under the struck methods, all peremptories are exercised at one time, by striking names from a list. Any suspect pattern will be immediately apparent when counsel reviews the list (which should occur prior to the dismissal of any challenged jurors). The party challenging the exclusion of jurors can obtain a ruling before the jurors are aware that they have been challenged, and the voir dire is saved.

Fourth, less physical movement of jurors is required in the struck system, since prospective jurors do not have to step up to and down from the jury box as challenges are exercised.

Fifth, in the struck system, prospective jurors are spared the embarrassment of being challenged and asked to step down individually from the jury box for no apparent reason. The "struck" jurors are excused as a group. See ABA Standards at 94-95.

Sixth, experience in other courts demonstrates that the struck system saves time. One of the judges on The Jury Project obtained the parties' consent to try the struck system, combined with a juror questionnaire, in both a routine and a complex civil case. He found that jury selection took considerably less time.

(c) Time Limits. The imposition of time limits in civil voir dire is essential. Probably the biggest problem with civil jury selection in New York today is that it takes too long. OCA has never attempted to keep records of the length of civil jury selections. We are aware that in many instances and locations it is done efficiently and professionally. Yet based on our own experiences, we also know that significant abuses occur. Unsupervised, attorneys are free to drag out the process for days and even weeks, questioning jurors endlessly and excusing dozens of jurors without using peremptories through the notorious practice of "cause by consent." Some of this delay is intentional, especially in the case of trial attorneys who are paid by the day or who use the jury selection period to conduct settlement negotiations. Some, no doubt, is unintentional -- it is simply the natural product of those who have grown used to a system in which civil voir dire is deemed the lawyers' business, with the court's attitude being, "Just let us know when you're done."

But whatever the cause, civil voir dires that go on for days or weeks are unacceptable. They waste the jurors' time, squander scarce courthouse facilities and contribute to our juror shortage by overconsuming jurors, who, after being dismissed, are lost to the jury system for several years.

As noted above, some members of The Jury Project believe that the most effective way to prevent these abuses is to have a judge present during jury selection. The pilot project discussed above should help determine whether that is so. But all of us agree that time limits should be imposed on civil voir dire. Such time limits should curtail many of the abuses and should not cause any problems in districts where lawyers currently pick juries efficiently.

We recommend an overall time limit of one day for jury selection in a two or three party civil case and two days in cases where there are four or more parties. Attorneys may have longer for voir dire only if they receive authorization from the trial judge or (if none is assigned) the trial assignment judge.

Those judges who currently enforce time limits on voir dire do so by limiting the time each party or each side may spend questioning potential jurors. We have reviewed the rules used by several judges. If the strike and replace method of jury selection is retained, we recommend that each side have 45 minutes to question the first six jurors put in the box (the initial panel), and an additional 10 minutes per side for each replacement juror who added after panelists from the initial panel are dismissed for cause. The court may authorize longer examination periods in appropriate cases, but these time limits should apply in the vast majority of civil cases.

If, as we recommend, the court system adopts one of the "struck" jury methods for conducting civil voir dire, each side should have 90 minutes to question the entire array of 25 potential jurors, or more time with the permission of the court. Given the use of questionnaires to obtain basic background information, this should be sufficient. All plaintiffs and all defendants constitute a side; if there are third parties who are neither plaintiffs nor defendants, they should be treated as an independent "side" unless the court orders otherwise.

The experience of judges who use time limits on questioning is that attorneys are able to police themselves and that abuses are few. However, when there are abuses, the attorneys are able to obtain rulings because the trial judge has already been assigned to the case. In jurisdictions where cases are not

assigned to trial judges until after jury selection, there is no one to look to for enforcement, so abuses may be more frequent. We recommend that each court be free to devise some sort of enforcement mechanism – an assigned judicial hearing officer who monitors several voir dires, the trial assignment judge, or some other designated individual – the only requirement being that each court must have an enforcement agent available to deal with abuses.

(d) Scope of Examination. ABA Standard 7 provides that voir dire examination should be limited to matters relevant to determining whether to remove a juror for cause "and to exercising peremptory challenges." We believe this is too broad. Since by definition a peremptory challenge can be made for any reason or no reason (subject to constitutional requirements), the ABA Standard, read literally, would permit a prospective juror to be questioned on any subject.

The only legitimate purpose of a voir dire examination is to uncover potential prejudice or bias on the part of the prospective juror that would interfere with the juror's ability to decide the case fairly and impartially. Such prejudice or bias, when sufficiently significant, may be a proper basis for a challenge for cause. Even if it does not rise to that level, it may lead a party to exercise a peremptory challenge. But the nature and scope of the inquiry should be limited to matters relevant to whether a juror may be challenged for cause.

(e) "Non-Designated" Alternates. We also recommend the use of "non-designated" alternate jurors. This is a departure from the current practice: CPLR § 4105 provides, "[T]he first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue." Under CPLR § 4106, one or two "designated" alternate jurors may be also selected, who can be ordered to replace a "regular" juror who dies, becomes ill, or otherwise becomes unable to serve before the final submission of the case.

We recommend that both of these CPLR sections be repealed and that a system of "non-designated" alternates be implemented either by statute or by OCA rule. (See Appendix B.) In an ordinary civil case, a total of eight jurors should be selected. The court may allow a greater number of jurors to be selected where a lengthy trial is expected or for any other appropriate reason. The alternates should not be chosen at the start of the trial. At the end of the charge, if more than six jurors remain,

alternates can be chosen (at random by the court) and excused from the jury. The remaining six deliberate and render the verdict.

We endorse the use of non-designated alternates because it encourages all of the jurors to pay close attention to the evidence and the charge. This will both improve the quality of the verdict if one or more alternates end up deliberating and give the alternate jurors a better experience even if they are excused; if alternates are not designated until the trial's end, none of the jurors will feel that they are "second class citizens" throughout the trial.

We have drafted a set of model uniform rules that embody all of the recommendations described above plus a number of additional provisions. (See Appendix G.) The most important is a proviso that, in appropriate cases, the parties may ask the court to waive particular rules or to supplement them according to the needs of a particular case.

4. Protection of Juror Privacy

The privacy of prospective civil jurors, no less than that of their peers on the criminal side, should be protected by the court. Violations can occur in two ways: unnecessarily intrusive questioning by counsel, and use of information developed in voir dire for other purposes.

Many of us believe that the best way to guard against abusive questioning is to have a judge present during voir dire, as the ABA Standard contemplates. But even without a judge present, use of a juror questionnaire with written responses should help protect juror privacy significantly, because most of the information provided will be seen only by the attorneys; jurors will not have to answer the laundry list of basic questions about their family, where they live and work, etc., in front of the entire panel. Where follow-up questions impinge on matters that a prospective juror finds sensitive, they can be pursued outside the hearing of the rest of the panel if necessary. Obviously, information obtained from jurors during voir dire should not be disclosed to non-parties or used for any purpose other than the selection of jurors. Juror questionnaires should be destroyed when they are no longer needed.

ABA Standard 7(d) provides that civil jury selection should be held on the record unless waived by the parties. However, the civil voir dire process is not ordinarily transcribed in New York. Since

there is no constitutional requirement that voir dire be held on the record, see People v. Childress, 81 N.Y. 2d 263, 268 (1993), we do not believe any change in the civil context is warranted.

ABA STANDARD 8: REMOVAL FROM THE JURY PANEL FOR CAUSE

IF THE JUDGE DETERMINES DURING THE VOIR DIRE PROCESS THAT ANY INDIVIDUAL IS UNABLE OR UNWILLING TO HEAR THE PARTICULAR CASE AT ISSUE FAIRLY AND IMPARTIALLY, THAT INDIVIDUAL SHOULD BE REMOVED FROM THE PANEL. SUCH A DETERMINATION MAY BE MADE ON MOTION OF COUNSEL OR ON THE JUDGE'S OWN INITIATIVE.

New York Recommendation

None.

1. For Cause Removal

In New York, this Standard would apply only in criminal cases, since there is no judge present during civil voir dire. Although the Criminal Procedure Law does not contain a provision expressly authorizing the court to remove a prospective juror for cause on its own initiative, we have found that in practice criminal judges have no difficulty excusing such jurors when appropriate. Because we do not see any need for change, we do not recommend any legislative or administrative action with regard to ABA Standard 8.

ABA STANDARD 9: PEREMPTORY CHALLENGES

- (a) THE NUMBER OF AND PROCEDURE FOR EXERCISING PEREMPTORY CHALLENGES SHOULD BE UNIFORM THROUGHOUT THE STATE.
- (b) PEREMPTORY CHALLENGES SHOULD BE LIMITED TO A NUMBER NO LARGER THAN NECESSARY TO PROVIDE REASONABLE ASSURANCE OF OBTAINING AN UNBIASED JURY.
- (c) IN CIVIL CASES, THE NUMBER OF PEREMPTORY CHALLENGES SHOULD NOT EXCEED THREE FOR EACH SIDE.
- (d) IN CRIMINAL CASES, THE NUMBER OF PEREMPTORY CHALLENGES SHOULD NOT EXCEED
 - (i) TEN FOR EACH SIDE WHEN A DEATH SENTENCE MAY BE IMPOSED UPON CONVICTION;
 - (ii) FIVE FOR EACH SIDE WHEN A SENTENCE OF IMPRISONMENT FOR MORE THAN SIX MONTHS MAY BE IMPOSED UPON CONVICTION; OR

- (iii) THREE FOR EACH SIDE WHEN A SENTENCE OF INCARCERATION OF SIX MONTHS OR FEWER, OR WHEN ONLY A PENALTY NOT INVOLVING INCARCERATION MAY BE IMPOSED. ONE ADDITIONAL PEREMPTORY CHALLENGE SHOULD BE ALLOWED FOR EACH DEFENDANT IN A MULTI-DEFENDANT CRIMINAL PROCEEDING.
- (e) WHERE JURIES OF FEWER THAN TWELVE PERSONS ARE USED IN CIVIL OR PETTY OFFENSE CASES, THE NUMBER OF PEREMPTORY CHALLENGES SHOULD NOT EXCEED TWO FOR EACH SIDE.
- (f) ONE PEREMPTORY CHALLENGE SHOULD BE ALLOWED TO EACH SIDE IN A CIVIL OR CRIMINAL PROCEEDING FOR EVERY TWO ALTERNATE JURORS TO BE SEATED.
- (g) THE TRIAL JUDGE SHOULD HAVE THE AUTHORITY TO ALLOW ADDITIONAL PEREMPTORY CHALLENGES WHEN JUSTIFIED.
- (h) FOLLOWING COMPLETION OF THE VOIR DIRE EXAMINATION, COUNSEL SHOULD EXERCISE THEIR PEREMPTORY CHALLENGES BY ALTERNATELY STRIKING NAMES FROM THE LIST OF PANEL MEMBERS UNTIL EACH SIDE HAS EXHAUSTED OR WAIVED THE PERMITTED NUMBER OF CHALLENGES.

New York Recommendations

1. *Reduce the number of peremptory challenges allowable in New York as follows:*

(a) *in criminal cases:*

- *Class A felonies - from 20 to 15 per side.*
- *Class B and C felonies - from 15 to 10 per side.*
- *Class D and E felonies - from 10 to 7 per side.*
- *From 2 per alternate to 1 per alternate.*
- *In all multi-defendant cases, one additional defense peremptory for each additional defendant.*

(b) *in civil cases:*

- *from 3 per party to 3 per side;*
- *from 1 per alternate to 1 per 2 alternates.*

2. *Judges should have authority to increase the number of peremptory challenges in appropriate cases.*

Peremptories -- challenges to prospective jurors made without giving a reason -- represent another aspect of the voir dire process that is ripe for reform in New York. A number of prominent judges have even argued that because peremptory challenges have frequently been used as a vehicle for racial discrimination, they should be banned entirely. See, e.g., Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring); People v. Bolling, 79 N.Y.2d 317, 326-31 (1992) (Bellacosa, Wachtler, and Titone, JJ., concurring).

We do not go that far. Notwithstanding the Supreme Court's recognition in Batson that peremptories have been used to exclude prospective jurors solely on account of their race, we do not think that they have outlived their usefulness. We reaffirm that peremptory challenges still play an important role, in both criminal and civil cases, in ensuring the fairness and impartiality of juries. See, e.g., Swain v. Alabama, 380 U.S. 202, 219 (1965). By observing often elusive aspects of prospective jurors' demeanor, experienced trial lawyers can and do identify individuals who may not be able or willing to render a fair and impartial verdict based solely on the evidence and the judge's charge, but who nonetheless are not subject to a challenge for cause. Batson and the cases that have explicated and expanded its teaching provide an appropriate means of preserving peremptories' salutary purpose while prohibiting invidious discrimination during the voir dire process.

Nevertheless, New York's system of peremptory challenges must be changed. New York provides for far more peremptories than the ABA Standards, the Federal courts, and virtually every other State. This not only exacerbates Batson problems, but increases voir dire time and, most important, uses up an inordinate number of jurors and thereby increases the burden on New York's already overburdened jury pool. In our view, reducing the number of peremptories would help solve these problems while preserving the right of every New York litigant to a fair and impartial jury.

1. Criminal Cases

The Criminal Procedure Law provides for among the highest number of peremptory challenges in the Nation. See Appendix H. For Class A felonies (which involve a maximum sentence of life imprisonment), twenty peremptories must be allowed to both the defense and prosecution. For Class B

(maximum sentence twenty-five years) and Class C (maximum sentence fifteen years) felonies, each side is permitted fifteen peremptories. For Class D (maximum sentence seven years) and Class E (maximum sentence four years) felonies, ten peremptories per side are provided. See CPL § 270.25(2). Three peremptory challenges per side are permitted in misdemeanor trials. See CPL § 360.30(2).

These numbers stand in sharp contrast to ABA Standard 9, which sets a maximum of ten peremptories per side in capital cases. New York does not have the death penalty, so that number is inapplicable here. Rather, all of New York's felonies fall within Standard 9(d)(ii), which allows only five per side. The CPL provides for double to quadruple this number.

New York also provides far more peremptories in criminal cases than do the Federal courts. Federal Rule of Criminal Procedure 24(b) provides that in non-capital felony cases (involving a potential sentence of more than one year's imprisonment) the defense gets ten peremptories and the Government, six.

Finally, New York's peremptory levels are among the highest of all the States. (See Appendix C.) New York provides twenty for Class A felonies and fifteen for Class B and Class C felonies, which comprise the vast majority of the commonly tried crimes. Only seven other states provide for fifteen or more peremptories in any type of non-capital case²⁰ and the maximum number allowed in most states is only three to eight. Even in death cases, where the most stringent procedural protections apply, the average number of peremptories given the defendant throughout the country is about thirteen.

In view of this substantial disparity, we recommend that CPL § 270.25(2) be amended to reflect the following reductions:

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 peremptories²¹

²⁰ California, Cincinnati, Minnesota, New Hampshire, New Jersey, North Dakota and Michigan.

²¹ We recommend no change in the number of peremptory challenges allowed in misdemeanor cases (three per side). See CPL § 360.30.

We do not believe that these modest reductions would risk making New York juries significantly less fair or impartial. Many other jurisdictions have been operating with fewer peremptories for a long time, and we are aware of no evidence that their juries have been significantly less fair or impartial than New York juries. Moreover, our recommendations are still markedly above the number of peremptories provided for in ABA Standard 9(d).

On the other hand, even the minimal reductions we propose would reduce opportunities for Batson violations and cut down on the number of prospective jurors who will be needed to obtain a jury in a criminal case. We estimate that our proposed reductions would save in the ballpark of 90,000 juror days per year – 64,000 in the five boroughs of New York City alone.²⁷ According to OCA, about 1.8 million juror days per year are used statewide, and about 1.2 million in New York City. Thus, under our proposed reductions, approximately five percent fewer jurors would be needed. Citizens would have to be called for jury service less frequently, and fewer jurors would have the unsatisfying experience of performing jury duty without actually sitting on a jury.

Most district attorneys' offices and a number of criminal defense groups, as well as the New York State Bar's Ad Hoc Committee on the Jury System and the New York State Bar Association's Criminal Justice Section, have written The Jury Project to object to any reduction in peremptories in criminal cases. A majority, though not all, of the task force finds these submissions unpersuasive. These groups emphasize the importance of peremptories as a supplement to challenges for cause in obtaining a fair and impartial jury. We agree – which is why we oppose abolishing peremptory challenges. But this point does not justify maintaining New York's large number of peremptories, when virtually every other State and the federal system allow far fewer with no proof that trials conducted in those jurisdictions are less fair to either side.²⁸

²⁷ These calculations are based on 4500 criminal trials per year statewide, and 3200 in New York City (OCA figures). If 10 peremptories were exercised in each of these cases (including both sides), and the average criminal voir dire takes up about two days of a prospective juror's time, the total yearly savings are approximately 90,000 juror days statewide and 64,000 in New York City.

²⁸ The Legal Aid Society contends that New York is a "typical American jurisdiction in its allotment of peremptories in criminal cases." Letter dated Nov. 17, 1993, at 2. According to the Legal Aid Society, "[t]here are 15 jurisdictions that provide more challenges to the accused than New York, 21 (continued...)

We also make the following recommendations with respect to peremptories in criminal cases:

- Alternate Jurors. The CPL currently allows each side two additional peremptories for each alternate juror. See CPL § 270.25(2). We regard this as excessive. Our recommendations are closer to one peremptory per juror. We therefore recommend that each side be permitted one extra peremptory for each alternate juror. This is still double the ABA's suggestion of one peremptory for every two alternates. See Standard 9(f).

- Multi-Defendant Cases. ABA Standard 9(d) provides that one additional peremptory challenge should be allowed for each defendant in a multi-defendant criminal proceeding. This is inconsistent with the CPL, which treats multiple defendants as a single party for peremptory purposes. See CPL § 270.25(3). We prefer the ABA's approach, which "recognizes that, in most instances, the apparent partiality of the prospective juror will apply to the case as a whole but provides protection against the risk of partiality against a single defendant." ABA Standards at 93. We recommend that the CPL be amended to permit one additional peremptory challenge for each additional defendant in a multi-defendant criminal case.²⁴

- Judge's Discretion to Increase Peremptories. ABA Standard 9(g) states that trial judges should have the authority to allow additional peremptory challenges when justified. Such an increase may be appropriate in cases involving extensive pretrial publicity, a very large number of defendants, or other extraordinary circumstances. Currently, the CPL does not expressly give judges discretion to grant additional peremptories, but in our experience judges have been able to achieve the same result in exceptional cases either by obtaining the parties' consent or by applying a looser standard to challenges

²⁴(...continued)

that provide fewer, and 12 that are approximately the same." *Id.* at 2 n.1. This is incorrect, as may be verified from the attached chart. See Appendix H. The author of the Legal Aid Society's letter stated that, for purposes of their analysis, they had doubled the number of peremptories in States in which criminal juries contain only six jurors (as opposed to twelve in New York). Leaving aside whether such a methodology is correct, only four states (Connecticut, Massachusetts, South Carolina and Wisconsin) allow six-person juries in serious felony trials. Even if peremptories in these states were doubled, only Connecticut, Massachusetts, New Jersey and South Carolina could be characterized as allowing more peremptories to the defense than New York in any type of non-capital felony case. We conclude that Legal Aid's numbers are erroneous.

²⁴ For example, three defendants being tried together would receive two additional peremptory challenges. Our recommendation differs slightly from ABA Standard 9(d), which provides for one additional challenge for each defendant, e.g., three defendants would get three additional peremptories.

for cause. Although a statutory amendment would probably be the most theoretically appealing way to address this issue, we do not believe it is necessary.

2. Civil Cases

We believe the number of peremptory challenges afforded in civil cases should be reduced as well. Our reasons are the same as in the criminal context: to reduce voir dire time, to reduce Batson problems, and to consume fewer jurors.

CPLR § 4109 currently gives each "party" three peremptories, plus one additional for each alternate juror. The ABA Standard, as applied in New York (which has six-person civil juries), would allow only two peremptory challenges for each "side," plus one additional challenge for every two alternate jurors. See ABA Standards 9(e) & (f).

We conclude that a middle ground is appropriate. We recommend a CPLR amendment providing for three peremptory challenges for each side, plus one additional challenge for every two alternates. The parties should not be able to increase the number of peremptories simply by consent. Rather, the CPLR should permit the parties in civil cases involving a very large number of parties, or in other extraordinary circumstances, to apply to the court for additional peremptory challenges before voir dire begins.

We also endorse the struck system for exercising peremptories set forth in ABA Standard 9(h). The advantages of the struck system are discussed above as part of our analysis of the voir dire process. See discussion of ABA Standard 7 at pp. 45-64 above.

ABA STANDARD 13: JUROR USE

- (a) COURTS SHOULD EMPLOY THE SERVICES OF PROSPECTIVE JURORS SO AS TO ACHIEVE OPTIMUM USE WITH A MINIMUM OF INCONVENIENCE TO JURORS.
- (b) COURTS SHOULD DETERMINE THE MINIMALLY SUFFICIENT NUMBER OF JURORS NEEDED TO ACCOMMODATE TRIAL ACTIVITY. THIS INFORMATION AND APPROPRIATE MANAGEMENT TECHNIQUES SHOULD BE USED TO ADJUST BOTH THE NUMBER OF INDIVIDUALS SUMMONED FOR JURY DUTY AND THE NUMBER ASSIGNED TO JURY PANELS.
- (c) COURTS SHOULD ENSURE THAT EACH PROSPECTIVE JUROR WHO HAS REPORTED TO THE COURTHOUSE IS ASSIGNED TO A COURTROOM FOR VOIR DIRE BEFORE ANY PROSPECTIVE JUROR IS ASSIGNED A SECOND TIME.
- (d) COURTS SHOULD COORDINATE JURY MANAGEMENT AND CALENDAR MANAGEMENT TO MAKE EFFECTIVE USE OF JURORS.

New York Recommendations

1. *Encourage civil settlements prior to voir dire by adopting measures such as the following:*
 - (a) *requiring a mandatory settlement conference just prior to sending a case out for jury selection.*
 - (b) *requiring a voir dire fee of \$1,000, to be split equally by each side; this fee shall be waived as to any party granted permission to proceed as a poor person. Apply these fees toward the costs of increased juror compensation.*
 - (c) *amending CPLR § 5001 to provide for pre-judgment interest in tort cases that are not settled at or before the pre-trial conference required by Uniform Rule 202.26.*
 - (d) *amending CPLR §§ 3219, 3220 and 3221 to provide for a single procedure for post-note-of-issue offers to compromise, which*
 - (i) *would have former adjudication effects only as between the settling parties;*
 - (ii) *would provide for the recovery of an expanded class of costs and forfeiture by the plaintiff of pre-judgment interest from the date of the offer to compromise if the offer was not accepted and the plaintiff failed to obtain a more favorable judgment at trial.*
2. *Promulgate a rule that limits the number of civil juries that can be selected and held for trial.*
 - (a) *For each civil part, there cannot be at any one time more than one jury on trial, one jury picked and waiting, and one jury being picked.*

- (b) *Civil juries must be disbanded if the trial has not begun after five days from the date the jurors are sworn.*
3. *Expand the use of telephone call-in systems so that jurors who will not be needed for voir dire do not have to report on a particular day.*
 4. *Amend CPL § 240 to provide for earlier disclosure by the District Attorney of Rosario materials.*
 5. *Adopt the practice that no juror should be sent out for a second voir dire until all jurors have been sent out for a first voir dire.*

Juror utilization involves how many jurors are summoned for a particular day, how many cases are sent out for voir dire, how many prospective jurors are assigned to each array, and how long it takes for the trial to begin once a jury is picked. Our failure to use jurors efficiently is the principal reason why, for most citizens, jury duty is synonymous not with a meaningful opportunity to perform an important public service, but rather with aggravation and endless waiting.

As jurors told us over and over again in correspondence, at the public hearings, on our toll-free juror hot line, and in numerous personal encounters, their number one complaint about jury duty is that their time is wasted at almost every opportunity. This single problem — not crumbling facilities, not mistreatment by attorneys or courthouse staff, and not inadequate jury fees — outranks all the others.²⁷

We share their outrage. Nonetheless, we also recognize that juror management is a complex art that entails daily judgments about many inherently unpredictable matters, such as when, and how many, cases will settle, and how long trials will take. But in making these judgments, the courts have for too long placed insufficient value on the time and convenience of the citizens who are interrupting their busy lives, often at significant cost and sacrifice, to perform an essential public duty. Instead, it is the time and convenience of judges, lawyers and insurance companies that are considered paramount.

This must change. The courts can no longer view the juror pool as a drinking fountain, ready at all times to supply attorneys and judges with a fresh flow on a moment's notice. When water sits around for too long, it becomes stagnant. The same is true for jurors. Bored, frustrated, and angry jurors have shorter attention spans. Once assigned to a panel, they are more likely to try to come up with

²⁷ See Appendix I.

excuses to avoid being picked. If they are picked, they may be less dedicated or able to patiently consider the evidence and render a fair verdict. And the next time they are summoned, they are more likely to try to avoid jury service altogether. In short, we believe the only way to improve the public's attitude toward the jury system is to treat them with efficiency when they do serve.

To this end, we embrace all of the general principles contained in ABA Standard 13. But that is the easy part. As with everything else, the devil is in the details.

Although many aspects of effective juror utilization depend on the specific needs of particular courthouses and communities, we believe concrete recommendations are possible that can improve juror utilization throughout the State without interfering with local innovations and initiatives. We have identified a number of specific areas for reform. Two have already been discussed: streamlining the voir dire process and reducing the number of peremptory challenges. Some other areas that can be examined for improving juror utilization in New York are encouraging civil settlements before jury selection, abolishing jury "stacking," increasing use of telephone call-in systems, and earlier production of Rosario materials by the prosecution in criminal cases. We also propose a number of uniform juror-use regulations that can be promulgated by OCA.

1. Encouraging Civil Settlements Before Voir Dire

Serious settlement discussions in civil cases often do not occur until after jury selection. Indeed, on a statewide basis, roughly forty to fifty percent of civil cases that make it to voir dire are settled before the trial begins:

<u>Year</u>	<u>Civil Trial Starts</u>	<u>Voir Dires</u>	<u>% Settled Between Voir Dire and Trial</u>
1988	5,920	9,268	36.1%
1989	6,074	11,594	47.6%
1990	5,965	11,435	47.8%
1991	5,954	12,411	52.0%
1992	5,820	9,411	38.2%

Using 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 have "served" without ever hearing a witness. In

areas where there are currently juror shortages, this is an intolerable result. The practice diverts too many jurors to civil cases who could be used and are needed in criminal cases. And it infuriates the jurors themselves, who do not appreciate being selected for service, being sent home because no judge is available, and then finding out days or weeks later that the case has settled (in some counties, at the rate of 80-90%).

Nor can these statistics be accounted for by legitimate litigation strategy. There are many reasons why a case settles mid-trial: particular witnesses "play" better or worse than expected; the judge makes a significant evidentiary ruling; or other events occur that materially change a party's prospects for victory, and lead to a settlement. But there are few valid reasons why so many cases should settle after jury selection but before the first witness takes the stand. Clearly, some cases settle at that point because a party believes that the jury selected is particularly "good" or "bad" from its perspective. But that particular reason costs the State and the system dearly.

Based on our own experience, as well as information provided to us during our work on The Jury Project, we conclude that these belated settlements statistics result from 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. This practice is abetted by judges who send cases "out to pick" without regard to whether anyone is available to try them, because they believe that that is the surest route to settlement. We have been told that certain insurance companies actually have a policy not to make substantial settlement offers until a jury has been selected in order to obtain maximum leverage over their often financially weaker and more risk-averse adversaries. Municipalities are often accused of the same tactic. And trial lawyers who are paid by the day have a financial incentive to spend time picking a jury before attempting to settle the case.

The only way to solve this problem is to build incentives into the system that will encourage parties to settle civil cases before wasting an array of jurors on a case that will never go to trial. We have given serious consideration to four specific ideas: mandatory pre-voir dire settlement conferences, a jury-use fee, imposition of prejudgment interest in tort cases, and strengthening the CPLR's "offer to

compromise" procedures. There are cogent objections to each of them. However, these or similar measures have to be considered if using jurors as settlement pawns is to stop.

(a) Mandatory Pre-Voir Dire Settlement Conferences. Uniform Court Rule 202.26 requires the court to hold a pretrial conference after the filing of a note of issue and certificate of readiness, unless the judge dispenses with such a conference in any particular case. Settlement ought to be among the subjects discussed at such a conference. However, in some counties this conference is held months or years before the jury selection takes place. If the mind-set of litigants and judges is as described above, the conference is unlikely to be fruitful because it is not held under threat of an imminent trial.

Ideally, no case would be sent out for jury selection unless there is a settlement conference immediately preceding the voir dire. The case should be conferenced on Day 1 and, if no settlement was reached, sent out to pick on Day 2. These pre-voir dire settlement conferences could be held before the court judge if its identity is known, or before some other judge, JHO or special master who is skilled in settling cases where the matter will not be assigned for trial until after jury selection. Principals and insurers should be present, and insurers should be required to give authority to settle, at risk of having judgment entered against them.

We endorse any and all other efforts to encourage settlement earlier in the case, including the use of "blockbuster" or settlement parts, the adoption of "settlement weeks" or other mediation techniques.²⁶

(b) Voir Dire Fee. CPLR § 8020(c) currently imposes a \$50 fee on any party (other than the State and City of New York) that files a demand for a jury trial.²⁷ Other states charge litigants a more significant voir dire or jury fee, to cover the cost of empanelling a jury. A similar fee in New York might work as follows:

²⁶ We note with interest OCA's recent creation of a special part to try to clear the backlog of tort suits against New York City. We are encouraged by this serious effort to resolve cases short of jury selection and hope that it will be successful without resort to "jury stacking," a practice we view as unacceptable.

²⁷ A \$55 jury demand fee is required in the New York City Civil Court and in county district courts. See N.Y. City Civ. Ct. Act §§ 1806, 1911(h); N.Y. Uniform Dist. Ct. Act § 1806-A.

Voir Dire Fee.

Before an initial panel of prospective jurors may be released for voir dire in a civil action, a fee of \$1000 shall be paid to the clerk of the court. One-half of the fee shall be paid by the plaintiff or plaintiffs together; and one-half shall be paid by the defendant or defendants together. The fee shall be waived as to any party granted permission to proceed as a poor person pursuant to CPLR § 1101.

The \$1000 figure is the one-day cost of an array of 25 jurors (the number we recommend for use in a civil case where the jury is selected using the struck juror method) at a rate of \$40 per day (the daily juror fee we recommend in Part III of this report). In other words, the proposed fee covers the cost of one day of voir dire.²¹ If such a fee were enacted, we would recommend making it applicable to all litigants (State and City as well as private parties) and amending CPLR § 8201 to make the voir dire fee part of the costs recoverable by a party in whose favor a judgment is entered.

A voir dire fee is a jury-use fee. It has two general purposes: to give all parties a meaningful incentive to settle before picking a jury, and to raise funds to increase the daily compensation paid to jurors to \$40. The proposed fee is carefully structured to achieve both of these objectives. First, it is substantial. This is essential to both of the fee's purposes: a nominal fee would not provide a meaningful settlement incentive²² and would do nothing to offset the cost of increasing jurors' per diem. Second, the fee is levied just before jury selection begins, to encourage settlement before an array of prospective jurors is pressed into service. And third, the fee is split by the parties. This is necessary to give both sides an incentive to settle. By contrast, the \$50 jury-demand fee applies only to the party making the initial demand (usually the plaintiff), and the State and City can demand a jury for free.

The proposed voir dire fee is fully consistent with New York's constitutional guarantee of the right to trial by jury, particularly since the fee would be waived for parties proceeding in forma pauperis. Although the New York courts have not had the occasion to consider the constitutionality of such a fee,

²¹ If the juror compensation increase is not adopted, we would set the voir dire fee at \$500 — \$375 for the cost of 25 jurors at \$15/day, plus \$125 for juror transportation costs and administrative costs, including the expense of processing fee and transportation requests.

²² We are well aware that \$1,000 split among the parties may not be substantial enough to encourage well-heeled parties or insured defendants to settle. But \$500 per case on a book of several hundred or a thousand trial-ready cases each year adds up. Our hope is that the aggregate cost to insurers, municipalities and others who are frequently in litigation will have a deterrent effect.

the "overwhelming majority of states . . . have held that the constitutional right to civil jury trial may be made subject to the assessment of a reasonable fee." Butler v. Supreme Judicial Court, 611 A.2d 987 (Me. 1992).²⁷ The rationale of these decisions is straightforward:

A share of [the costs incurred when a jury trial is demanded] must be paid by the litigants or all must be paid with government tax revenues. It is only fair that the litigants bear a reasonable portion of the expense incurred due to the exercise of their rights unless determined to be indigent. One should not be entitled to exercise constitutionally protected rights at the expense of others if financially able to bear his [or her] share of the costs.

County of Portage v. Steinpreis, 312 N.W.2d 731, 734 (Wisc. 1981); see also Fox v. Hunt, 619 So. 2d 1364, 1366 (Ala. 1993) ("The guarantee of a right to trial by jury is not a guarantee of the 'right to litigate without expense'; therefore, requiring the payment of a reasonable jury fee is not an infringement on the right to a trial by jury.").

Nor should our proposed jury-use fee be deemed excessive. \$1000 is only a small portion of the actual cost of paying an array of prospective jurors to sit through voir dire and thereafter a six-person jury (plus alternates) to attend an average-length trial. Other states require litigants to bear the cost of the jurors' fees and expenses for all or part of the trial. See, e.g., Cal. Civ. Proc. Code § 631(a)(5)(1) (Supp. 1994) (requiring the party demanding the jury trial pay in advance the cost of 20 jurors' fees for one day); La. Stat. Ann. § 13:3049(B)(2) (flat jury-demand fee of \$84, plus \$300 a day for each day of the trial); N.M. Sup. Ct. Rules § 1-038(c) (Michie 1992) (\$100 jury-demand fee plus \$100 for each subsequent day the jury is in session; double fees for 12-person juries); Nev. Rev. Stat. Ann. § 6.150(6) (Michie 1986 & Supp. 1993) (requiring advance payment of each trial juror's daily compensation); cf. Maine Admin. Order SJC-321 (flat \$300 jury-demand fee).

²⁷ See, e.g., Fox v. Hunt, 619 So. 2d 1364 (Ala. 1993); Reizer v. Goepfert, 613 A.2d 1336 (Conn. App. 1992), cert. denied, 615 A.2d 1044 (Conn. 1992), cert. denied, 113 S. Ct. 1416 (1993); County of Portage v. Steinpreis, 312 N.W.2d 731 (Wisc. 1981); Royalpark-Moore v. Hubbard, 508 P.2d 1064 (Okla. 1973); see also People v. Collins, 131 Cal. Rptr. 782 (1976), cert. denied, 429 U.S. 1077 (1977); Massie v. AAR Western Skyways, Inc., 5 Cal. Rptr. 2d 654 (Ct. App. 4th Dist. 1992); Strukowski v. Wilkie, 261 N.W.2d 434 (Wisc. 1978); Brownell v. Quinn, 197 N.E.2d 721 (Ill. App. Ct. 1964); Hartford Fire Ins. Co. Group v. Taylor, 145 So. 2d 751 (Fla. App. Ct. 1962). But see Hammer v. Justice Court, 720 P.2d 281 (Mont. 1986). See generally Flaherty, Validity of Law or Rule Requiring State Court Party Who Requests Jury Trial in Civil Case to Pay Costs Associated with Jury, 68 A.L.R. 4th 343, 348-50 (1989).

The most unusual aspect of our proposed jury-use fee is the requirement that it be shared by all parties -- not just the party who filed the jury-trial demand. A party who does not want a jury may understandably resent having to pay a portion of the jury-use fee. Nevertheless, joint payment of the fee by all parties is essential to promote settlement before jury selection begins -- a valid legislative purpose. See Steinpreis, 312 N.W.2d at 738 (noting that a jury fee "discourages jury demands in actions where a last minute settlement is anticipated"). Our inquiries suggest that both sides are responsible for delaying civil settlements.

Any party who prevails at trial should be permitted to recover the jury-use fee as a taxable cost. It is fair to assess jury costs on a party who did not want a jury but is ultimately found liable, because no trial would have been necessary but for the liable party's wrongful conduct.^{11'}

(c) Prejudgment Interest. CPLR § 5001 currently provides for prejudgment interest only in contract actions and in certain actions involving property rights. Awarding prejudgment interest is widely perceived as another effective means of encouraging early settlements, since the longer a settlement is delayed the greater the potential exposure to the defendant. Indeed, we are advised that most of the settlements that occur after jury selection but before trial come in tort cases, where prejudgment interest is not currently awarded.

OCA has recommended that sort of pre-judgment interest be awarded in personal injury cases. See The State of the Judiciary 1009 at 22. The defense bar strenuously opposes any change in current law. As a compromise, prejudgment interest could be awarded in those cases not currently covered by CPLR § 5001, but only in the event that a settlement is not reached at the post-note of issue conference required by Uniform Court Rule 202.26. In that case, interest would run from the date of the conference. Because this conference can precede jury selection by a fairly substantial period of time in many counties, the deterrent effect of this compromise award of prejudgment interest in tort cases could be substantial, while plaintiffs are unlikely to turn down reasonable post-discovery settlement offers in order to get interest.

^{11'} Parties who settle during trial can, of course, shift payment of some, all or none of the jury-use fee between them in any way they see fit -- for example, reimbursement for the voir dire fee can be factored into the settlement.

(d) Offers to Compromise. The CPLR contains three separate mechanisms that have the potential to encourage plaintiffs to settle before the commencement of voir dire. CPLR § 3219 permits a defendant in a breach of contract case to deposit with the clerk of the court an amount that he deems sufficient to satisfy the claim against him, and to serve on the plaintiff a written tender of payment to satisfy the claim. If the plaintiff accepts the tender, he withdraws the money and the clerk enters judgment dismissing the pleading. If the tender is not accepted and the plaintiff fails to obtain a more favorable judgment, he may not recover interest or costs from the time of the offer, but must pay costs for defending against the claim (but not including attorneys' fees). Under CPLR § 3220, a contract defendant may serve on the plaintiff a written offer to allow judgment to be taken against him in a specified sum. If the offer is not accepted and the plaintiff fails to obtain a more favorable judgment, plaintiff must pay the expenses necessarily incurred by the defendant for trying the issue of damages. Finally, under CPLR § 3221, any civil defendant (except in matrimonial actions) may, at any time not later than ten days before trial, serve upon the claimant a written offer allowing an adverse judgment to be taken for a specified sum. If the offer is accepted, the case is over. If not, and the claimant then fails to obtain a judgment more favorable than the offer, the claimant must pay the adverse party's costs from the time of the offer. In each case, the offer is not made known to the jury. See also Fed. R. Civ. P. 68.

These sections are seldom used, and understandably so. First, an offer to "compromise" should be just that — a settlement, not an adjudication. Under CPLR §§ 3219, 3220 and 3221, the offeror must allow an adverse judgment to be taken. Accordingly, the case may have res judicata effect if the offer is accepted. See New York Central Mut. Fire Ins. Co. v. Kilmurray, 181 A.D.2d 40, 585 N.Y.S.2d 599 (3d Dep't (1992)); Card v. Budini, 29 A.D.2d 35, 285 N.Y.S.2d 734, 736 (3d Dep't 1967). This inhibits the making of offers by defendants especially if there are other parties in the case or similar claims involved in the case or in related matters. Second, the rule permits a defendant to recover only "costs" accruing after an offer is declined if the plaintiff does not fare better at trial. But the costs permitted under the CPLR are minimal. See CPLR §§ 8201 (setting costs at a maximum of \$300) and 8301 (specifying taxable disbursements). In particular, they do not include what are usually the most

substantial cost of litigation -- attorneys' fees -- or expert witness fees, the full cost of deposition transcripts, etc. See 8 Weinstein, Korn & Miller, New York Civil Practice ¶ 8301.04 (1993). Thus, there is little incentive for a defendant to resort to these procedures, or for the plaintiff to take the offer seriously, except in the smallest cases.

To make the "offer to compromise" procedure more palatable to defendants and more persuasive to plaintiffs, we recommend the following changes:

1. CPLR §§ 3219, 3220 and 3221 should be collapsed into one section devised for all cases.
2. An offer under the revised procedure should not have res judicata or collateral estoppel effect, except insofar as dismissal of the case resolves all issues between the settling parties only.
3. These rules should apply only to offers made after a note of issue is filed, to encourage serious settlement proposals based on full discovery, and to discourage defendants from making insubstantial offers at an early stage in an effort to save on costs.

4. "Costs" or "expenses" as computed pursuant to this rule should include all expert fees and deposition costs, without any limitation on the amount thereof (although not including attorneys' fees). In addition, if an offer to compromise is not accepted, and the plaintiff does not obtain at trial a judgment that is more favorable than the offer, the plaintiff should forfeit its right to pre-judgment interest beginning on the date the offer is made. Obviously, the effectiveness of this proposal in tort cases will depend on the fate of our recommendation on pre-judgment interest.

We harbor no illusions that these or similar measures will end the unfortunate practice of settling cases after jury selection. We therefore offer one more recommendation. Courts should keep track, not just of how many cases settle after jury selection, but also of who the parties in those cases are and who their attorneys and insurance carriers are. If it appears that identifiable parties, attorneys or carriers are abusing the process of jury selection for their own ends, OCA should take whatever action it deems appropriate to discourage that practice, including enlisting the aid of others. For example, if particular insurance carriers habitually settles cases only after a jury is empaneled, it would be perfectly appropriate for OCA to ask the State Insurance Commissioner to open a probe into the practice. Shining a light on those who are costing the State thousands of jurors and millions of dollars in jury fees might help reorient

all of us in our thinking about how cases are managed and how we contribute to the waste in the current system.

2. Jury Stacking

Another serious juror utilization abuse occurs when dozens of civil cases are sent out for jury selection time with the knowledge that no judge will be available to try many of them for weeks or even months. This happens only in civil cases because in criminal cases jury selection cannot begin until a judge is available to conduct it.

The practice of jury "stacking" is a disaster for both jurors and litigants. The jurors who have already been told that they will be serving on the date they appear for voir dire (and who have arranged their lives accordingly) are told that they will have to return at a later time for the trial. But they do not know exactly when they will be asked to return.²⁷ This makes planning jurors' lives extremely difficult -- so difficult that many jurors are unavailable when the trial actually begins. To avoid having to reopen voir dire at that point, many lawyers in counties where jury stacking is prevalent now select four or even six alternates -- thereby wasting still more jurors and rendering them unavailable for several years.

We have seen truly egregious examples of this practice. For example, in Suffolk county last November, there were 55 civil juries picked and waiting, with just eight judges available to try cases. Their cases were not reached for two to three weeks. It was a wonder that any of the jurors were available when their cases were called for trial -- and a testament to the good citizenship of those who actually served. Obviously, jury selection was being used to force settlement. Many of those cases did settle -- but at a cost to the taxpayers of thousands of dollars in juror fees, a cost to the court system of hundreds of citizens who never got to act as jurors, but who could not be called for jury service for four years, and a cost to the jurors in disgruntlement at having an experience that was not purposeful.

Not all counties engage in jury stacking. In those upstate counties, where caseloads and judicial resources combine to make true judicial supervision possible, the practice is generally to have one jury

²⁷ The one exception is the "pre-Christmas" jury. In some counties downstate, juries are selected in mid-December and asked to return the first day after New Years' Day to start the trial.

trying a case and another being selected. In the special commercial parts and certain other trial parts in New York City, the practice is for the judge to have one jury on trial, another jury picked and a third jury in voir dire (known as the 1-1-1 system). Bronx County's entire civil caseload is administered under the 1-1-1 system. Jury stacking is discouraged in Queens County as well.

Jury stacking is wasteful; it must end. We therefore recommend that OCA implement a statewide 1-1-1 administrative rule: for each civil trial part, there can at any one time be no more than one jury on trial, one jury picked and waiting, and one jury being picked. Currently, about half of the cases in which juries are selected settle before trial. The 1-1-1 rule attempts to strike a balance between reducing the number of juries in search of a trial judge and attempting to keep civil trial judges busy with a reasonably continuous flow of trials. If a judge on occasion completes a trial and no jury is ready and waiting, there are still many productive uses for the judge's time -- writing opinions, deciding motions, or even overseeing the attorneys picking the next jury. And if on occasion two juries are picked and waiting for a particular judge, the system will probably be able to absorb the additional case.

Compliance with the 1-1-1 rule will require much greater communication and cooperation between trial judges, trial assignment judges and jury room managers. In many courthouses this communication is haphazard at best. Assignment judges and jury room dispatchers should be in contact with each trial part one or more times every day regarding the progress of the ongoing trial and when a verdict or settlement is expected. Assignment judges and jury room personnel should also strictly monitor all ongoing civil voir dires, both to ensure compliance with the time limits and other rules we propose, and to keep close tabs on settlements and on how many juries have been picked but are not able to begin trial because no judge is available.

We also recommend an OCA-imposed time limit on how long a civil jury may be held after being sworn until the trial begins. Ideally, juries should begin hearing evidence as soon as they are sworn. However, the system can tolerate a five day wait for a trial part -- but no more than five days. If more than five days elapses before the trial begins, the jury should be disbanded. Of course, if this happened frequently, it would represent a huge waste of potential jurors. But we believe the time limit would

provide a meaningful incentive to trial assignment judges and jury room managers to adjust the number of cases sent to voir dire. It would also operate as an incentive to get cases settled.

Some will undoubtedly protest that the 1-1-1 system will slow down the resolution of cases, or cause counties to fall behind in their compliance with OCA's Standards and Goals. They will be correct only if the Bench and Bar do not alter their current mindset about the relationship between selection of a jury and a settlement and if Standards and Goals do not reflect the cost to the system of that practice. If more cases do not settle prior to the ultimate moment, the number of post-note of issue cases will increase (theoretically) because fewer cases will be sent out to "begin a trial" (i.e., pick a jury). However, the reality is that a judge can only try one case at a time, no matter how many cases are sent out for jury selection. So the only thing that will back up is the number of cases in which the parties and counsel are unwilling to hold serious settlement discussions. It is simply intolerable to tax the State with the exorbitant costs of picking juries to facilitate settlement.

Others argue that the ill-effects of jury stacking can be cured by informing jurors in cases that settle before trial that their readiness to serve helped the case settle and therefore saved the judicial system the time and expense of a trial. We do not accept this view. For one thing, the jurors in many counties cannot even be given this explanation because they are sent home after voir dire to wait until a trial judge is available. But in any event, all the jurors who communicated with us find this explanation specious.

There is an equally pernicious jury stacking practice on the criminal side, though it is better referred to as "array stacking." Some criminal side judges routinely demand that jury commissioners set aside an additional array of prospective jurors, just in case the initial array runs out. This practice, too, wastes jurors, because they cannot be sent to voir dires where they are needed. It should be unnecessary if initial arrays are large enough to accommodate the number of challenges reasonably anticipated.

3. Telephone Call-In Systems

Nearly all counties in New York State currently use telephone systems to manage juror utilization. We urge all to do so. These systems, when run properly, provide maximum convenience to jurors, who

only report when it is highly likely that they will be needed for a voir dire. Call-in systems also save the State money, since jurors are paid only when their presence is actually needed.

Telephone call-systems can be used effectively before prospective jurors even report for duty. For example, the jury summons can include a telephone number that jurors can call to learn whether to report on the first day. A tape recorded message (identifying groups of jurors by number) states whether the juror's attendance will be required on that day. If the juror must appear, the message can also specify the time and, in jurisdictions with more than one courthouse, the place. If the juror is not needed on a particular day, the message should direct the juror to call back the next day (unless the term of service is over).²⁷

This call-in system is sometimes modified to require all summoned jurors to report on the first day, and then call each evening to see if they are needed the next day. This is less desirable, since it contemplates that some juror will have to waste a day in court without any reasonable chance of being assigned to a voir dire.

Telephone call-in is also currently used in many counties after jurors have been selected to sit on a particular civil jury but no judge is available to try the case. The selected jurors can be given a number to call each day to find out whether their trial will start the next day. We view this use of telephones as a necessary evil (since it is the by-product of jury stacking), but we consider it better than the alternative of forcing jurors to report to court when there is no reasonable prospect of starting their trial.

Despite the obvious advantages of these phone-in systems, a few larger counties have resisted them. They assert that the demand for jurors is so great that all of the summoned jurors are needed from day one. We recognize that it is difficult for the largest counties to anticipate juror demand with certainty, because in high-volume courthouses unpredictable variations in settlement rates and trial lengths can lead to widely different juror needs on particular days. However, with practice even extremely busy jury commissioners can learn to anticipate juror needs by maintaining frequent phone contact with administrative judges, assignment judges and trial judges. Queens County (the State's second most

²⁷ In Westchester County and in some less populous counties that are not too large, courts have been able to telephone each prospective juror when needed; the summons merely places the recipient on one-hour alert. Such personal service is obviously not feasible in larger counties.

populous county, with thirty-six criminal and seventeen civil trial parts) has successfully implemented a telephone call-in system; with appropriate assistance from OCA, there is no reason why other populous counties cannot do so as well. We recommend that every county implement a telephone call-in system as soon as possible, and in any event within three years.²⁴

Any telephone call-in system should have sufficient lines to accommodate the anticipated volume of calls, so jurors do not spend hours dialing and redialing busy phone numbers.

4. Rosario Materials

In criminal cases, trials are frequently delayed because of the People's last-minute production of so-called Rosario materials – prior statements of prosecution witnesses. See CPL § 240.45(1); People v. Rosario, 9 N.Y.2d 286, cert. denied, 368 U.S. 866 (1961). CPL § 240 provides that the disclosure must be made "[a]fter the jury has been sworn and before the prosecutor's opening address," although generally no mistrial or reversal is required as long as the defense is given the statements sufficiently in advance of the witness's testimony to prepare for cross-examination.²⁵ In cases where there is considerable Rosario material, judges are often forced to delay trial starts after the jury is sworn so the defense can digest the Rosario material and prepare to meet the prosecution's case. Or, if Rosario materials are turned over during the trial, the judge may have to recess the case and dismiss the jury for a few hours or even for the day.

We endorse an amendment to the CPL requiring disclosure of Rosario materials before jury selection begins. This should result in no significant prejudice to the prosecution. But it will reduce the need for a recess – which wastes the jury's time – immediately after selection or in the middle of a trial.

²⁴ In some jurisdictions, such as Bronx County, a large percentage of the population do not have phones. This does not mean that call-in cannot be used, however. Many prospective jurors do have phones, and others have access to pay phones. Of course, jurors with no phone access should always be permitted to report to the courthouse and learn promptly whether they will be needed that day.

²⁵ See, e.g., People v. Ranzhelle, 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580, 585 (1986); People v. Ciola, 136 A.D.2d 557, 523 N.Y.S.2d 553, 555 (2d Dep't), appeal denied, 71 N.Y.2d 893 (1988); People v. Burreto, 143 A.D.2d 920, 533 N.Y.S.2d 568 (2d Dep't 1988), appeal denied, 73 N.Y.2d 1011 (1989).

5. Re-Use of Jurors in Voir Dire

In the interest of fairness, we also recommend that Jury Commissioners throughout the state adopt the practice that no juror should be sent out for a second voir dire until all jurors have been sent out for a first voir dire. We have been advised that in some counties certain potential jurors who are not selected to sit on particular juries (as a result of a peremptory or for cause challenge) are sent to a second voir dire before some jurors who are in the central jury room are sent out on their first voir dire. This should not happen. The simple expedient of putting all returning juror's juror cards in a separate wheel and drawing all names from the first wheel before turning to repeat jurors solves the problem.

Addendum: Additional Uniform Juror-Use Regulations

Finally, we recommend that OCA adopt the following self-explanatory uniform juror-use regulations:

6. Priority shall be given by jury room dispatchers and/or jury commissioners to criminal cases. The administrative judge shall attempt to work with judges on scheduling trials in a manner that best utilizes jurors.

7. All judges and court personnel who have contact with jurors shall have incorporated within their training requirements a segment on working with jurors to assist in making jury service a pleasant experience. In addition, all new criminal court judges shall receive training in how to conduct voir dire efficiently and effectively.

8. Attorneys shall be on time whenever jurors are required to appear. Appearance for a civil or criminal jury trial shall have precedence over other court appearances.

9. Every effort shall be made to produce prisoners who are defendants in jury trials on time so that the trial is not unreasonably delayed.

10. Judges shall cooperate in minimizing the amount of time prospective jurors spend waiting around. For example, judges may not "hold" jurors while completing unrelated court business; nor may they delay jury selection to obtain "fresh" jurors when excused but qualified jurors are available.

ABA STANDARD 17: JURY SIZE AND UNANIMITY OF VERDICT

- (a) JURIES IN CRIMINAL CASES SHOULD CONSIST OF:
 - (i) TWELVE PERSONS IF A PENALTY OF CONFINEMENT FOR MORE THAN SIX MONTHS MAY BE IMPOSED UPON CONVICTION;
 - (ii) AT LEAST SIX PERSONS IF THE MAXIMUM PERIOD OF CONFINEMENT THAT MAY BE IMPOSED UPON CONVICTION IS SIX MONTHS OR FEWER. A UNANIMOUS DECISION SHOULD BE REQUIRED FOR A VERDICT IN ALL CRIMINAL CASES HEARD BY A JURY.
- (b) JURIES IN CIVIL CASES SHOULD CONSIST OF NO FEWER THAN SIX AND NO MORE THAN TWELVE PERSONS. IT IS ACCEPTABLE TO HAVE EITHER UNANIMOUS OR NONUNANIMOUS VERDICTS IN CIVIL CASES, PROVIDED HOWEVER THAT A CIVIL JURY SHOULD NOT BE AUTHORIZED TO RETURN A VERDICT WHICH IS CONCURRED IN BY LESS THAN THREE QUARTERS OF ITS MEMBERS.

New York Recommendation

None.

New York law is consistent with ABA Standard 17. In criminal cases, a unanimous verdict by a twelve-person jury is required. See CPL §§ 270.05, 310.80; *People v. Light*, 285 A.D. 496, 138 N.Y.S.2d 262 (4th Dep't 1955) (unanimity of verdict). In civil cases, the jury is composed of six persons, CPLR § 4104, and a verdict may be rendered by not less than five-sixths of the jurors constituting the jury, *id.* § 4113(a). We recommend no changes in these provisions.

PART III

STANDARDS RELATING TO THE JURY EXPERIENCE

Introduction

Parts I and II of this Report can be grouped loosely under the rubric "Jury Technicalities and Techniques." We turn now to items that fall most naturally under the heading "The Jury Experience." In this part of our report, we deal with the amenities of jurors' lives: the environment in which they work, the orientation they receive, their treatment at the hands of attorneys and court personnel, and the special circumstances attendant to the deliberative process.

This line of demarcation is, of course, artificial. Everything that goes into the process of jury selection and management affects "The Jury Experience." Jurors would feel better about serving if they were summoned less frequently and if the courts were managed so that their time were better and more efficiently utilized. But better management is not enough. Jurors have justifiable complaints about facilities, orientation and education, sequestration and the treatment they receive at the hands of court personnel. These need to be separately addressed.

Very little of what follows will be new to those who have been interested in the jury process, and very little should be controversial. Most people believe that jurors have a right to decent surroundings, humane working conditions, considerate treatment, and helpful and informative instruction at all phases of their visit to the courthouse. Few would argue that jurors who give high marks to the way they were treated are the jurors most likely to deliberate fully and fairly, and to come back willingly when they are called to serve again. The logical imperative is to take their complaints seriously and do something about them.

ABA STANDARD 14: JURY FACILITIES

COURTS SHOULD PROVIDE AN ADEQUATE AND SUITABLE ENVIRONMENT FOR JURORS.

- (a) THE ENTRANCE AND REGISTRATION AREA SHOULD BE CLEARLY IDENTIFIED AND APPROPRIATELY DESIGNED TO ACCOMMODATE THE DAILY FLOW OF PROSPECTIVE JURORS TO THE COURTHOUSE.
- (b) JURORS SHOULD BE ACCOMMODATED IN PLEASANT WAITING FACILITIES FURNISHED WITH SUITABLE AMENITIES.
- (c) JURY DELIBERATION ROOMS SHOULD INCLUDE SPACE, FURNISHINGS AND FACILITIES CONDUCTIVE TO REACHING A FAIR VERDICT. THE SAFETY AND SECURITY OF THE DELIBERATION ROOM SHOULD BE ENSURED.
- (d) TO THE EXTENT FEASIBLE, JUROR FACILITIES SHOULD BE ARRANGED TO MINIMIZE CONTACT BETWEEN JURORS, PARTIES, COUNSEL AND THE PUBLIC.

New York Recommendations

1. *Improve dilapidated courtroom and jury facilities to provide an adequate and suitable environment for jurors.*
2. *Bring existing courthouses into compliance with New York State Handicapped Access Requirements; monitor new construction for compliance with the Americans with Disabilities Act.*
3. *Significantly increase funds for court maintenance.*
4. *Support newly introduced legislation that would give the State responsibility for courthouse cleaning, routine maintenance and minor repairs.*
5. *Encourage creative subcontracting, such as use of parolees to perform routine courthouse maintenance work.*
6. *Encourage use of outside funding sources to improve juror amenities like libraries, TV/video facilities and vending areas.*

1. Court Facilities

The Committee endorses the recommendation of the ABA for the maintenance of jury facilities.

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That many of our courthouses are dilapidated, cramped, undermaintained and (in a few cases) unsafe is beyond dispute. These conditions have been documented repeatedly, by the press,²⁵ by a public commission that performed a detailed study of every court facility in the state in the early 1980s,²⁷ and by other groups, such as the New York State Judicial Commission on Minorities. (State Commission on Minorities Report at 12-29). To these voices we can add those of jurors, who testified eloquently and at length to the inadequate and sometimes squalid conditions they are forced to endure:

- The maintenance of the building is barely minimal; the bathrooms are filthy and badly equipped. Half the stalls have no toilet paper and doors do not latch. . . . There is nothing, nothing about the courtroom that suggests the sacredness and majesty of our principles of justice.
- The facilities in the Waiting Room are simply awful, depressing and totally undignified. The chairs are totally uncomfortable, the air is stale and the atmosphere is just unbearable. . . . In many cases, the toilets don't even flush, no proper facilities for washing exist, and the situation is just awful. . . .
- Many seats in the Central Jury Auditorium are broken and unusable . . . the men's toilet facilities . . . are the same unsanitary and offensive conditions prevalent in the New York City subway system . . . litter [is] strewn on each descending level, these areas haven't been cleaned in weeks - maybe even months.
- Prospective jurors surrender the cleanliness of their workplace and the respect for their personal dignity for being held hostage, for a least a week, in an unsanitary and depressing environment. Can't we even have a clean and presentable court building?
- Depressing and grimy surroundings: The walls in the jury room, halls and outer offices are grimy, unpainted or with old paint peeling . . .
- With between 21 to 23 jurors in a room, there are only about eight sturdy, complete chairs. All the other chairs are rickety, seats caving in, arms broken off and just plain unusable . . .
- [At] 100 Centre Street . . . the waiting room, which I think doubles as the waiting room to hell. It's overcrowded. It's dirty. It's disgusting. There are not enough chairs for the people called. We had to lean on the wall or sit on the floor, which was filthy or people spilled out into the hallway. Chairs that were there were broken. Stuff coming out of them. It was just a hideous thing . . . I don't think anyone should have to go into a big filthy place and sit on the floor for six hours a day.

²⁵ See, e.g., "Suffolk County Court Project Stalled," New York Times, § 12 LI, p. 4, col.4 (Mar. 19, 1989); "Poor Court Maintenance: Exhibit A," New York Times § B, p. 1, col.3 (Dec. 11, 1980).

²⁷ See Chief Judge's Court Facilities Task Force, Survey of Court Facilities in New York State (OCA 1981).

The Jury Commissioners, who are on the receiving end of most complaints, underscored juror concerns about facilities:

From Staten Island:

The Central Jury Room in Richmond County located in the basement level consists of a room 25 feet by 60 feet. The small size of this room dictates that the existing corridor of 9 feet by 60 feet is also used. This corridor serves as the jury room, the EBT rooms, and selection rooms and of course is used by attorneys, litigants and the general public. There is also a problem of water backing up and flooding the area in heavy rainstorms . . . there is a serious lack of cleaning both the floors and the chairs which at most times are dusty and not inviting to sit on. It is often too cold in the winter and often too hot in the summer.

(Report of Hon. Mario Esposito, County Clerk, Richmond County, August 6, 1993)

From Buffalo:

[T]he deliberation rooms are bad. Those rooms all have at least one window, most of them have just one, but the problem is when the door is closed because they're deliberating, there is no flow of air. The duct system that supposedly is up there is antiquated and for the most part blocked off because it doesn't work any more. The primary concern, though, is the death trap issue. There are numerous courtrooms over there that have one way up or down and God forbid there is ever a fire in this, an old building, and the materials used in that building, it could go up so quickly, the jurors wouldn't have a prayer. As far as kicking out the air conditioner and jumping from the window, they would be dead from the jump.

(Testimony of Mehrl King, Jury Commissioner, Erie County, October 7, 1993, pp. 180-181)

From Poughkeepsie:

The Central Jury Room has a very high ceiling towards the front and low ceiling and mezzanine towards the rear. The men's restroom is located in the basement and the ladies restroom is located on the mezzanine.

There is a general need for patching and painting, especially on the south wall (see photos). There is a water damage on the west wall and ceiling, up the stairway to the mezzanine, and on the mezzanine. At least six leaded panes of glass need replacement and all need cleaning. The water cooler should be replaced and coffee vending machines installed. Window treatments should be upgraded. Additional cushioned chairs and sofas should be provided. There is inadequate control of the antiquated heating and air conditioning systems. The main entry doors are in poor condition and have no crash bars for emergency egress.

There are no impaneling rooms. The mezzanine has proved unsuitable for use as an impaneling room - it is in poor condition, it is not accessible to the handicapped, and proceedings are interrupted by use of the ladies room. There is a need for impaneling rooms and the related furnishings.

(Memorandum from Hooker Heaton, Commissioner of Jurors, Dutchess County February 14, 1994)

From Chautauqua County:

Chautauqua County does not have actual Jury Assembly rooms. The jurors report and are advised to sit or stand in the hall and wait until they are called into the respective Courtrooms. We have a limited amount of space in the hall and the chairs that are there are old and wood chairs. There is not adequate space for the jurors to hang their coats, boots, etc. This problem mainly occurs on their first day of reporting for service when the full panel is instructed to report.

(Letter from Donna L. Emo, Commissioner of Jurors, Chautauqua County, February 10, 1994)

In many counties, upstate as well as down, the public's picture of the majesty of justice is peeling paint, broken toilets and dirty rooms. This does not promote respect for the system or encourage citizens to want to serve as jurors.

Inadequate and cramped facilities create difficulties beyond the discomfort of jurors and staff. Many urban courthouses, and even some courthouses in smaller counties, lack sufficient rooms for picking juries. When empaneling rooms are not available, delays result. Civil side practitioners who spoke or wrote to us recounted instances when they arrived at court at 9:30 a.m. but were unable to get a room in which to pick until noon or later.²⁷ In one non-urban upstate courthouse, juries are often selected in a corner of the juror assembly room. Several of our recommendations, including conversion to a one trial or one day system and the imposition of time limits on civil *voir dire*, presume that time will be used efficiently during the working day. To the extent that lawyers are unable to meet with prospective jurors because no rooms are available, there will be slippage from the goals we are proposing -- which defeats the purpose of our work.

Not surprisingly, our views echo those of all who have looked at this problem before us. Court maintenance must be improved, and safe, clean facilities adequate to the task of juror empanelment and deliberations must be constructed where none are available. Passage of the Americans with Disabilities Act underscores the need (already reflected in New York law) to make our courthouses accessible to the blind, the mobility-impaired and others who are disabled but capable of serving on juries. And the

²⁷ Nassau County adds an interesting twist to this aspect of the facilities problem. Local rules require that all juries in cases with three or more parties be picked in a courtroom (though without a judge's being present) -- even when large empaneling rooms are available. This practice results in a tremendous waste of lawyer and juror time, since when courtrooms are being used for trials (as they should be), they are not available for jury selection.

amount of money allocated to court maintenance must be increased significantly, so that dirty facilities are cleaned properly and dilapidated courthouses repaired regularly.²⁷ Unless that occurs, the ability of the State to implement the ABA Guidelines is limited.

Since 1987, the responsibility for capital facilities and for maintenance and repair has been governed by the Court Facilities Act. Under that Act, counties (or the City of New York) pay the cost of "maintaining" court facilities occupied by the Unified Court System. The term "maintenance" is broadly defined to include cleaning and regular maintenance, heat and light (including utility bills), and major repair to the "envelope" of the building. Counties are reimbursed for 10 to 25% of their expenses from the Court Facilities Fund. (The exact percentage is based on the taxing capacity of the county; for example, New York City receives reimbursement for 13% of its expenditures, while Herkimer and Schenectady Counties receive close to 25%.) Counties are also responsible for the capital expenses involved in the planning and implementation of improvements to court facilities, with reimbursement from the State for a portion of their interest expenses.

The problem with this system is that the tenants — the people who are employed by the court system and who work in the courts — have no control over the maintenance staff and are unable to deploy maintenance workers to deal with situations as they arise. By the same token, the maintenance workers are not accountable to the people who inhabit the court buildings. This situation is guaranteed to breed inefficiency and neglect. It is also much resented by administrative judges and jury commissioners, who told us repeatedly that maintenance was much better when it was controlled from within the courthouse by court personnel.

The accountability problem is exacerbated because the only sanction available to the Unified Court System under the Court Facilities Act is withholding the State's reimbursement for local maintenance. This sanction has led some counties to agree to improvements: for example, after 20 quarterly payments (about \$7 million) were withheld from New York City in 1990-91, the City agreed to hire 100 more

²⁷ An example of the current dilemma: New York City currently allocates just \$26 million annually to maintain twenty-seven court facilities in the five boroughs. The amount covers daily cleaning, routine maintenance (e.g., repairing chairs, painting, fixing a broken light socket, buying toilet paper), major structural repairs (the roof, the masonry, electrical system upgrades) and the Con Edison bills!

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cleaners, add a night shift and pay for some special court maintenance projects. But in the meantime, the courthouses were dirty and all their occupants -- including the jurors -- suffered.

Control over the day-to-day maintenance of court facilities should rest with the people who work in the buildings. Local accountability would allow maintenance activities to be directed and dictated by the persons who have the most direct stake in when and how they are carried out.

The Office of Court Administration recently proposed legislation that would have the State assume full responsibility for cleaning buildings and routine maintenance/minor repairs. Local authorities would remain responsible for major repairs (which are more closely analogous to capital expenditures than to routine maintenance), as well as heat and light charges. By way of illustration, OCA would fix the chairs, replace the bathroom stalls and paint the courtrooms; the upstate counties and New York City would fix the leak in the roof, repair the crumbling masonry steps and pay for utilities. The State would carry out its obligations by subcontracting out the work, either to municipal authorities or to private contractors. The new system would be phased in over a four-year period.

Converting to this model would:

(a) Improve local control: By taking responsibility for routine maintenance (including cleaning), the court system could do something about the conditions that breed the majority of the public's complaints. The people who hear those complaints would direct maintenance activities and could hold contractors accountable if they failed to adhere to standards that would enhance our courthouses. Cleaning and maintenance contractors would be responsible to the tenant. Each court facility could have within it some occupant -- an administrator, judge or senior clerk -- who would deal with cleaning and maintenance problems in that building, just as a commercial tenant deals with the landlord of its particular premises to resolve similar problems.

(b) Cost localities less money: OCA estimates that the cost of assuming this responsibility would be about \$18 million per year. Currently, the 57 upstate counties and New York City received about \$8 million per year in reimbursement for routine maintenance plus major repairs and utility costs. If the State assumes this function, the localities will lose the reimbursement, but they will save the additional \$10 million in hard costs, putting them \$2 million to the good.

We heartily endorse OCA's proposal as a sensible solution to a vexing problem. We urge the Legislature to take up the measure soon and to adopt it speedily.

Those who are responsible for court maintenance, whether OCA or the counties, should look for creative opportunities to save money through subcontracting. One such program was tried a few years ago in Manhattan, where parolees on work-release programs were used to do routine maintenance work (cleaning, painting) in the Criminal Courts Building at 100 Centre Street. The results were excellent: the work was done, efficiently and well; there were no security problems; and a significant public service was rendered at substantially less cost than would otherwise have been the case. This sort of solution should be encouraged.

As far as juror facilities themselves go, we recommend that local court administrators establish amenities such as libraries, television/video facilities and vending areas for jurors. These items need not impact on budgets; jury commissioners in several counties have established partnerships with outside funding sources. The Ulster County Bar Association donated the television and VCR in that county's juror assembly room. Westchester County obtains magazines, pamphlets and other materials from the public library in order to maintain a stock of current reading materials for jurors. Private companies, public interest groups and bar associations can and should be approached to assist with projects such as building a reading or video library, underwriting the cost of equipment or donating used equipment, etc.

Finally, local court administrators should identify and consult with public-interest groups and public-spirited consultants who specialize in the improvement of public spaces to see if they have creative ideas for improving the use of space in existing facilities at minimal cost.

One issue related to facilities needs to be separately addressed. Jurors and jury commissioners from many counties complain about the lack of parking facilities for use by jurors. In some counties, municipal lots adjacent to county facilities are simply not large enough to accommodate jurors' cars, and either there are too few public facilities available in the vicinity of the courthouse or jurors are nervous about walking several blocks in the rough neighborhoods where some of our courthouses are located. In other counties, administrative judges and jury commissioners are unable to arrange for jurors to use the ample parking that is available, despite their best efforts. In Bronx County, the Jury Commissioner's

office told prospective jurors that there was no parking in the vicinity of the courthouse, while 25,000 parking spaces sat empty two blocks away at Yankee Stadium. The irony was not lost on us – especially when some otherwise able jurors asked for hardship excusals because they had no access to public transportation and could not get to court if they could not park.

Parking facilities must be provided for jurors. Fortunately, there are solutions other than new construction. Jury commissioners have arranged for parking to be set aside in nearby public garages and even in church parking lots that are not heavily used during the week. Some are exploring the use of vans to transport jurors from a distant parking facility to the courthouse. These and other innovative ideas should be encouraged.

ABA STANDARD 15: JUROR COMPENSATION:

- (a) PERSONS CALLED FOR JURY SERVICE SHOULD RECEIVE:
 - (1) A NOMINAL AMOUNT IN RECOGNITION OF OUT-OF-POCKET EXPENSES FOR THE FIRST DAY THEY REPORT TO THE COURTHOUSE.
 - (2) A REASONABLE FEE FOR EACH SUCCEEDING DAY THEY REPORT.
- (b) SUCH AMOUNTS AND FEES SHOULD BE PAID PROMPTLY.
- (c) STATE LAW SHOULD PROHIBIT EMPLOYERS FROM DISCHARGING, LAYING OFF, DENYING ADVANCEMENT OPPORTUNITIES TO OR OTHERWISE PENALIZING EMPLOYEES WHO MISSED WORK BECAUSE OF JURY SERVICE.

New York Recommendations

1. *Increase daily juror fee to \$40 and abolish the separate reimbursement for transportation costs.*
2. *Employers with over ten employees should continue to pay juror-employee's fee for the first three days of service.*
3. *Guarantee prompt, and if possible immediate, payment of juror fees.*
4. *Create OCA ombudsman to administer and enforce Judiciary Law Section 519 (prohibiting employers from penalizing employees who miss work because of jury service).*
5. *Encourage construction and use of courthouse child-care facilities.*

1. Juror Fees

Jud. L. § 521 sets juror compensation at \$15 per day, plus some amount for travel: in New York City, \$2.50 per day (the cost of round trip subway or bus tokens), and outside the City, the actual costs for gas and mileage (reimbursed at the rate of 15¢ per mile). An employer with more than ten employees must pay the juror at least \$15 per day for each of the first three days of service. Jurors whose employers do not thereafter pay them are paid by the state. Jurors who are self-employed, who work for small firms, or who are unemployed receive payment from the State from their first day of service.

Juror compensation in New York is inadequate. In many areas of the state, a fee of \$15 per day does not cover the cost of parking and lunch. It certainly does not cover the cost of child or elder care for those who have responsibilities at home. Moreover, the system for reimbursement of travel expenses is cumbersome and costly to administer.

Jury duty is a civic responsibility and people can fairly be asked to make sacrifices in carrying out that responsibility. But when juror compensation does not cover jurors' out-of-pocket costs, many citizens cannot afford to serve, particularly if service lasts a week or more. The low rate of pay leads to a high volume of requests for hardship excusals under Jud. L. § 517, which permits jury commissioners and courts to excuse a particular juror upon a showing that the juror's attendance "would cause undue hardship or extreme inconvenience to the applicant, a person under his care or supervision, or the public." Particularly in parlous economic times, judges and jury commissioners are inclined to grant such requests. As a result, in some counties, the jury pool consists largely of public employees, retirees, and persons who work at companies that pay full salaries for their employees during jury service. If our goal is representative juries, this is not a healthy situation.²⁰

Juror compensation in New York also lags well behind the federal standard of \$40/day. This is one reason why federal jury service is viewed with less disfavor than state jury service.

We have looked at a variety of models for increasing juror compensation, in search of a system that is simple to understand and to administer and equitable in light of both actual out-of-pocket costs to jurors and our recommendation that the term of service be shortened. We recommend that the daily fee be increased to \$40, the same as the federal rate, and that it be paid only to jurors who actually report to the courthouse. For the first three days of service, employers should be required to pay their juror-employees at least this amount (unless the juror's daily wage is less, in which case the employer should pay the daily wage).²¹ Thereafter, the State should pay \$40 per day (as is true currently) unless the employer continues to compensate the employee for the remainder of his/her service. Where employees are compensated by their employers during jury service, the State should not pay the juror at all. Unemployed jurors and those who work for employers with fewer than 10 employees (except those who

²⁰ Nor is it a new one. A 1930 Columbia Law Review note quotes a Mr. Sutcliffe, who served on juries for 18 years and then wrote a paper entitled Impressions of an Average Jurymen (1922), which contained the following observation: "Juries are largely made up of middle-class merchants, manufacturers, brokers, salesmen and the like. The per diem man, if he makes over three dollars a day, evidently has little difficulty in getting off." Note, Proposed Legislation for Jury Reform in New York, 30 Col. L. Rev. 721, 725 n.22 (1930).

²¹ This model is similar to the system in Massachusetts, where the per diem fee is \$50 and employers pay it for the first three days of service.

voluntarily pay their workers) should receive \$40 per day from the State beginning with the first day of jury service. Jurors should have the discretion to waive their fee; if they do, the money should be allocated to a fund for improving jury facilities. The surcharge for transportation should be eliminated altogether. It is inequitable (for example, many New York City jurors drive to court, but they are reimbursed only with the cost of public transportation) and the amounts involved do not warrant incurring the substantial processing costs.

In an effort to determine the cost to the State of this proposed fee increase, we have calculated the actual cost to the state for 1.9 million juror days (the total number of projected jury days statewide for the period from July 1993 to June 1994) at the rate of \$40 per day, and subtracted from that the sum of:

- 1) the amount that will be saved by eliminating the transportation reimbursement; and
- 2) a 10% savings for the administrative costs associated with processing the transportation reimbursements, which would no longer be necessary.

The total additional annual cost comes to approximately \$8.9 million. That amount can be further reduced by some number representing the savings to the State from not paying jurors whose employers voluntarily compensate them during jury duty; currently such jurors receive fees from the State after the third day of their service. If conversion to the one-trial or one-day system, the more widespread use of telephone call-in systems, proposed changes in the conduct of *voir dire*, a reduction in the number of peremptory challenges and especially the elimination of "jury stacking" result in a reduction in the number of jury days, as they should, the number will be reduced still more. Finally, if our proposal to end mandatory sequestration of juries in criminal cases is adopted, the monies saved could (and in our opinion should) be applied to increase juror compensation. Thus, the annual budgetary impact of increasing juror fees should be significantly less than \$8.9 million.

The Task Force strongly endorses the ABA's recommendation that jury fees be paid promptly. It takes six to eight weeks for jurors to receive reimbursement at present. In Miami (Dade County) Florida, by contrast, jurors receive a check when they leave the courthouse on their last day of service. We see no reason why a similar system could not be used in New York. To the suggestion that there

might be auditing and accountability problems with a decentralized payment system, we can only observe that Dade County must have such problems as well. They are obviously soluble.

4. Jud. L. § 519

In accordance with ABA Standard 15(c), New York law prohibits employers from penalizing employees who miss work because of jury service, or from failing to pay an employee-juror \$15 per day for the first three days of service. Violations of N.Y. Jud. L. § 519 constitute a criminal contempt of court.

Enforcement of this statute is usually informal. Jurors having problems with their employers typically report them to the jury commissioner or county clerk, who contact the employer, inform the employer of its legal obligations, and attempt to obtain the employer's cooperation.²² When the employer continues to resist, the case is forwarded to the Labor Bureau of the New York State Department of Law (the Attorney General's office), which makes its own effort to resolve the problem informally and then, on rare occasions, commences criminal contempt proceedings.

We recommend strengthening enforcement of Jud. L. § 519. However, in our view this should not be accomplished by creating a private right of action for jurors or by initiating criminal contempt proceeding against employers who violate the statute. Such procedures are too cumbersome and costly and would only add more cases to the overburdened courts. Instead, we endorse the appointment of an ombudsman at OCA to receive and review complaints about employer violations of § 519. The ombudsman should have the power to hold hearings and assess civil penalties in appropriate cases.

5. Child Care

A major problem for many prospective jurors is child care. We applaud those counties that have added child-care facilities in courthouses and urge others to follow suit. This is particularly critical if we are going to make an effort to summon more poor people, including single mothers, for jury service. However, providing courthouse child care will not help parents with school age children, who must be home by 2:30 or 3:00 p.m. so there is adult supervision when the children come home from school. We

²² We understand that some judges, when informed that a juror is having difficulty with an employer, call the employer themselves in order to straighten out the situation. We disapprove of this practice, which compromises the judge's petition as a neutral arbiter of disputes.

are hopeful that shortening the term of service will lessen the burden on these parents, by enabling them to make temporary after-school child-care arrangements that will permit them to serve.

ABA STANDARD 16: JUROR ORIENTATION AND INSTRUCTION

- (a) COURTS SHOULD PROVIDE SOME FORM OF ORIENTATION OR INSTRUCTIONS TO PERSONS CALLED FOR JURY SERVICE:
- (i) UPON INITIAL CONTACT PRIOR TO SERVICE;
 - (ii) UPON FIRST APPEARANCE AT THE COURTHOUSE;
 - (iii) UPON REPORTING TO A COURTROOM FOR VOIR DIRE;
 - (iv) DIRECTLY FOLLOWING EMPANELMENT;
 - (v) DURING THE TRIAL;
 - (vi) PRIOR TO DELIBERATIONS; AND
 - (vii) AFTER THE VERDICT HAS BEEN RENDERED OR WHEN A PROCEEDING IS TERMINATED WITHOUT A VERDICT.
- (b) ORIENTATION PROGRAMS SHOULD BE
- (i) DESIGNED TO INCREASE PROSPECTIVE JURORS' UNDERSTANDING OF THE JUDICIAL SYSTEM AND PREPARE THEM TO SERVE COMPETENTLY AS JURORS;
 - (ii) PRESENTED IN A UNIFORM AND EFFICIENT MANNER USING A COMBINATION OF WRITTEN, ORAL AND AUDIOVISUAL MATERIALS.
- (c) THE TRIAL JUDGE SHOULD
- (i) GIVE PRELIMINARY INSTRUCTIONS DIRECTLY FOLLOWING EMPANELMENT OF THE JURY THAT EXPLAIN THE JURY'S ROLE, THE TRIAL PROCEDURES INCLUDING NOTE-TAKING AND QUESTIONING BY JURORS, THE NATURE OF EVIDENCE AND ITS EVALUATION, THE ISSUES TO BE ADDRESSED, AND THE BASIC RELEVANT LEGAL PRINCIPLES;
 - (ii) PRIOR TO THE COMMENCEMENT OF DELIBERATIONS, INSTRUCT THE JURY ON THE LAW, ON THE APPROPRIATE PROCEDURES TO BE FOLLOWED DURING DELIBERATIONS, AND ON THE APPROPRIATE METHOD FOR REPORTING THE RESULTS OF ITS DELIBERATIONS. SUCH INSTRUCTIONS SHOULD BE MADE AVAILABLE TO THE JURORS DURING DELIBERATIONS;
 - (iii) PREPARE AND DELIVER INSTRUCTIONS WHICH ARE READILY UNDERSTOOD BY INDIVIDUALS UNFAMILIAR WITH THE LEGAL SYSTEM.

- (d) BEFORE DISMISSING A JURY AT THE CONCLUSION OF A CASE, THE TRIAL JUDGE SHOULD
- (i) RELEASE THE JURORS FROM THEIR DUTY OF CONFIDENTIALITY;
 - (ii) EXPLAIN THEIR RIGHTS REGARDING INQUIRIES FROM COUNSEL OR THE PRESS; AND
 - (iii) EITHER ADVISE THEM THAT THEY ARE DISCHARGED FROM SERVICE OR SPECIFY WHERE THEY MUST REPORT.

THE JUDGE SHOULD EXPRESS APPRECIATION TO THE JURORS FOR THEIR SERVICE, BUT THE JUDGE SHOULD NOT EXPRESS APPROVAL OR DISAPPROVAL OF THE RESULT OF THE DELIBERATION.

- (e) ALL COMMUNICATIONS BETWEEN THE JUDGE AND MEMBERS OF THE JURY PANEL FROM THE TIME OF REPORTING TO THE COURTROOM FOR VOIR DIRE UNTIL DISMISSAL SHOULD BE IN WRITING OR ON THE RECORD IN OPEN COURT. COUNSEL FOR EACH PARTY SHOULD BE INFORMED OF SUCH COMMUNICATION AND GIVEN THE OPPORTUNITY TO BE HEARD.

New York Recommendations

1. *Ensure that jury summons contains all necessary information, including directions to courthouse, available parking, explanation of compensation system, etc.*
2. *Send copy of compensation form with summons.*
3. *Use cable TV/local access channels to provide juror orientation.*
4. *Revise State Bar's current juror orientation video and require its use in all courthouses.*
5. *Revise Pattern Jury Instructions.*
6. *Implement mandatory education programs on importance of jury service for students of all ages.*
7. *Increase public service announcements, seminars, and employer education programs promoting jury service.*

The ABA Standard on Juror Orientation and Instruction is sensible and, for the most part, it is followed in New York. However, after reviewing juror orientation practices in a number of counties, The Jury Project is convinced that the orientation process can and should be improved.

1. Juror Summons

ABA Standard 16 correctly observes that juror orientation must begin when the initial summons to service and/or qualification questionnaire is received. The text of a jury summons will necessarily vary from county to county, but at a minimum the form should contain the following information:

- (a) Date the juror is being called for service;
- (b) The time by which the juror is expected to be present in the courtroom. Phraseology is important here: it is better to say "You must be in room 324 by 9:00 a.m." than "Report for service at 9:00 a.m." Much time is lost on jury call days because jurors are not in place by the time the day is suppose to begin. One upstate commissioner told us quite candidly that there was no sense in commencing orientation until 10:00 a.m. because jurors straggled in at all times between 9:15 and 10:00. This type of attitude could sabotage efforts to expedite the voir dire process.
- (c) Instructions on how to get to the courthouse. A map of the area immediately adjacent to the courthouse would be helpful.
- (d) Information about public transportation to the courthouse.
- (e) Information (including location and cost) about parking in the vicinity of the courthouse. If there is no parking or limited parking, this should be stated on the form. Similarly, if there are parking meters on the streets adjacent to the courthouse, jurors should be told whether they will be allowed to park at those meters. If meters need to be fed frequently, they cannot be used for jury parking. If some sort of identification sticker is needed in order to make use of designated juror parking, it should be enclosed with the notice or the juror should be instructed to present his or her summons to the garage attendant on the first day of service.
- (f) Information about facilities for lunch -- if there is a cafeteria the jurors are free to use, whether there is an area where bag lunches can be eaten, nearby restaurants and the approximate cost of a meal.
- (g) A statement explaining the one-trial/one-day system of jury service.
- (h) An explanation of the telephone call-in system and a number to call in order to find out if the juror's services are needed.
- (i) If pre-orientation is available on local cable T.V., the time and channel to watch.

- (j) An explanation of the compensation system.
- (k) A statement that employers are not permitted to take adverse action and a number to call if you are having employer problems (such as the OCA ombudsman we recommend below).
- (l) Information about the juror's right to one deferral and how to go about obtaining it.

This may seem like a great deal of information for a summons, especially since the summonses that are currently in use in New York State are rather small computerized forms. However, a number of jurisdictions (such as Los Angeles County, Colorado, the District of Columbia, and Dade County, Florida) have redesigned their jury summonses, using forms that are slightly larger; considerable information is printed on the back side of the last piece of carbonless paper. The same thing can be done here.

One other matter should be taken up prior to the juror's arrival in court. At present, jurors do not receive forms for fee reimbursement until they arrive at the courthouse for jury service. In most counties, five to fifteen minutes of the orientation period is wasted while clerks walk the jurors through the reimbursement form as they fill it out. The reimbursement form should be attached to the summons and instructions for filling it out should be included in the summons packet. The completed form can be presented to a clerk when the juror arrives at the courthouse.

2. Cable Television

In addition to printing helpful information on the summons form, counties can take advantage of the ever-increasing reach of cable television and local access channels to impart preliminary background information and instructions to jurors. We recommend that each county prepare a short (fifteen to twenty minute) video presentation that contains information on how the citizen was chosen for jury service, a brief discussion of the importance of being a juror, directions to the court facility, advice about the time to arrive and about parking and restaurant facilities in the area, an explanation of what will happen in their first few minutes in the courthouse, and perhaps a quick video tour of the jury assembly area. By making arrangements with the local cable authority to run this video at several convenient times during the day and evening, Jury Commissioners could reach a significant percentage of the jurors — not all, obviously, but most — to reinforce the basic information contained on the summons and to make the

jurors more comfortable with their immediate surroundings and the procedures that will be followed when they arrive at court.

We emphasize that this local access video presentation, while eminently desirable, cannot and must not substitute for the inclusion of relevant information in the summons packet. Not all jurors have access to cable television and every juror is entitled to this minimum amount of orientation before arriving at court.

3. Orientation Video

If all this significant background information is given to the jurors prior to their arrival at the courthouse, juror orientation on the morning of arrival can be streamlined and directed toward other facets of jury service. The New York State Bar Association produced an excellent orientation video, which has been in use in New York State for several years. At present, some jury commissioners show it and some do not.

We recommend that the video be redone (and we understand that the New York State Bar Association has already procured funding to do so). The video should be about twenty minutes in length. It should welcome the jurors, thank them for coming to serve, and explain the procedures that will be followed during the course of their jury service. In particular, it should describe the voir dire process, explain some of the terminology that jurors will hear during the voir dire process (e.g., plaintiff, defendant, evidence, charge). This video should also contain some rudimentary information about the elements of a trial. The video should be shown promptly at 9:00 a.m. or whenever the jurors are required to assemble; it might also be shown again a half-hour later, or copies could be made available to late arriving jurors for private viewing on a VCR.

Some judges have expressed concern about showing explanatory videos of this nature to potential jurors, apparently believing that it is their exclusive province to explain these processes to jurors in their courtrooms. Indeed, for this reason, judges in some counties have refused to allow the juror commissioner to show the current instructional video.

We respectfully dissent from this point of view. General information about the voir dire and trial processes should be given to all jurors before they are sent out for jury selection, both to familiarize them

with the process and to increase their level of comfort. It is a matter of both educational efficiency and common courtesy. In our view, showing the orientation video ought to be mandatory.

We also note that most of the judges who object to the showing of an orientation film or any general video presentation about the trial process sit on the criminal side. The fact that criminal judges enter the process earlier and direct or oversee voir dire in the cases before them necessarily affects their evaluation of the need for instruction given by some medium other than themselves. However, in most counties (including a number of counties where the video is not shown), jurors for both criminal and civil cases are called for voir dire out of a single central jury room. Jurors who are called for civil cases will not have the benefit of a presiding judge in the courtroom during voir dire. It is unfair to give them no instruction in the process other than whatever unsupervised statements the attorneys for the parties may make. We do not believe it is appropriate to give counsel for the parties responsibility for a task that rightly belongs to the court system.

We have considered, but do not recommend, the showing of a third video presentation when jurors report to a courtroom for voir dire. Orientation ought not be necessary at this point in the jury service process if jurors have been properly oriented in the central jury facility.

4. Pattern Jury Instructions

"Orientation" from the time of empanelment through the dismissal of the juror is really not orientation at all, but instruction by the judge about the case. The ABA Standards concisely and accurately describe what these instructions ought to contain.

Probably the most critical aspect of the ABA Standards is the statement that judges should "prepare and deliver instructions which are readily understood by individuals unfamiliar with the legal system." The propensity for judges and attorneys to deliver instructions taken right out of the Pattern Jury Instructions or some other similar text is rooted in the perfectly understandable belief that using the "magic words" will lessen or eliminate the possibility of a reversal by a higher court. New York's appellate courts have reinforced that belief on a regular basis by overturning charges that vary from the Pattern Jury Instructions and expressing a preference for using charges from the PJI.²⁷

²⁷ See, e.g., Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466, 479 (1993).

However, many of the Pattern Jury Instructions are often difficult for jurors to understand. This has been conveyed to this task force by some former jurors and others in the justice system. While we commend the dedication and scholarship of the members of the Committee on Pattern Jury Instructions and acknowledged the usefulness of their work product to the bench and bar, we believe that a major revision of the Pattern Jury Instructions is now necessary. This will be a massive but worthwhile undertaking. Its goal should be to produce pattern instructions that will be more understandable by lay jurors and that eschew instructions couched in outmoded and unfamiliar language or that are tautological. The revisors will, of course, have to pay careful attention to settled case law, and the group ought to continue to include some learned appellate and trial judges and academics. It would also be useful to call upon the resources of an institution like the New York University School of Communications or a similar body to assist in the task of clarifying and simplifying some of the overly technical phraseology of decisional law.

5. Community Education and Outreach

In our view, ABA Standard 16 addresses only part of the orientation problem. Prospective jurors' understanding of and appreciation for the jury system will be enhanced only if citizens are educated before they ever receive a summons to serve. Children in particular must be taught to respect the jury system and to appreciate the value of citizen participation in the judicial process. All citizens should be well informed about the importance of jury service and should have instilled in them positive attitudes toward the jury system and jury service. Education can be the vaccine that counters our common tendency to become cynical about the need for all citizens to participate as jurors.

Education is especially critical in those historically disenfranchised communities where there is little respect for, and a great deal of suspicion about, the court system and its treatment of minorities. Enhanced public education about jury service is a critical component — and may be the critical component — of ensuring an adequate flow of minority jurors in parts of the state where the number of minorities who report for jury service is disproportionate to their number in the community. Several jury commissioners have reported that their efforts to reach out to the minority community have been rebuffed

or met with suspicion.²⁷ The roots of that hostility understandably run deep. Only by educating those communities from a very young age about the importance of jury service can we make significant inroads in their suspicions.

We therefore recommend that the Office of Court Administration reach out to the State Department of Education to develop mandatory education programs on the jury system and jury service for elementary, middle and secondary schools. These programs should teach not only the history of trial by jury and how the jury system operates, using mock trials, but also respect for the jury system and for civic virtue generally. As more than one witness put it, a renewed emphasis in our schools on old-fashioned civics would be entirely appropriate. The New York State Bar Association, with its superb educational programs and expertise in all aspects of legal education, can no doubt play an important and facilitative role in the development of appropriate curricular material for use statewide.

We further recommend that the Office of Court Administration develop a series of public service announcements promoting the importance of jury service for airing on both broadcast and cable television at frequent intervals.

We recommend that the state and local bar associations, in conjunction with civic minded groups and local court officials, develop a series of public seminars and programs for varied audiences (both young people and adults) about the importance of jury service to the general community. These programs should be offered in schools, churches, community associations and other forums that present speakers to general audiences. In conjunction with these programs, readable written materials about jury service in a particular locality should be prepared and widely disseminated. (A particularly effective example of such materials is the brochure entitled "What Gives You The Right To Sit There And Judge Someone Else?" published by the Franklin H. Williams Judicial Commission on Minorities.)

We recommend that the county and state bar associations also implement a program of employer education about jury service, focusing on two key elements: the true cost of jury service to employers,

²⁷ For example, Erie County Jury Commissioner Mehrl King testified at our hearing that he had sent 200 letters to targeted minority leaders and community groups in October 1992 asking for help in encouraging minorities to participate in the jury system. After getting no response, he sent out a second mailing in February 1993, and got only five responses. See Tr. Oct. 7, 1993, at 169-71.

and the legal obligations of employers to their employees who are called for jury service. Important aspects of these programs should be the advantages of the one-trial or one-day system, the ability of jurors to obtain one deferral of service to a self-selected date (which enables employers to know well in advance when employees will be serving and to plan accordingly), the financial obligations of employers to jurors, and the right of employees not to suffer adverse job consequences as a result of complying with their civic duty.

ABA STANDARD 18: JURY DELIBERATION

JURY DELIBERATIONS SHOULD TAKE PLACE UNDER CONDITIONS AND PURSUANT TO PROCEDURES THAT ARE DESIGNED TO ENSURE IMPARTIALITY AND TO ENHANCE RATIONAL DECISION-MAKING.

- (m) THE JUDGE SHOULD INSTRUCT THE JURY CONCERNING APPROPRIATE PROCEDURES TO BE FOLLOWED DURING DELIBERATIONS IN ACCORDANCE WITH STANDARD 16(C).
- (n) THE DELIBERATION ROOM SHOULD CONFORM TO THE RECOMMENDATIONS SET FORTH IN STANDARD 14(C).
- (o) THE JURY SHOULD NOT BE SEQUESTERED EXCEPT UNDER THE CIRCUMSTANCES AND PROCEDURES SET FORTH IN STANDARD 19.
- (p) A JURY SHOULD NOT BE REQUIRED TO DELIBERATE AFTER NORMAL WORKING HOURS UNLESS THE TRIAL JUDGE AFTER CONSULTATION WITH COUNSEL DETERMINES THAT EVENING OR WEEKEND DELIBERATIONS WOULD NOT IMPOSE AN UNDUE HARDSHIP UPON THE JURORS AND ARE REQUIRED IN THE INTEREST OF JUSTICE.
- (q) TRAINING SHOULD BE PROVIDED TO PERSONNEL WHO ESCORT AND ASSIST JURORS DURING DELIBERATION.

New York Recommendations

1. *Continue to give judges discretion to allow juror note taking.*
2. *Amend CPL § 310.20 to give judges discretion to supply a copy of the charge to jurors during deliberations.*

A number of issues that are addressed by ABA Standard 18 are discussed by us in other contexts (see, for example, our discussion of Judicial Instructions to Juries at p. 107 above, our discussion of facilities at pp. 89-96 above, and our views on mandatory sequestration at pp. 112-117 below.) The remaining recommendations are non-controversial.

1. Juror Note-taking

Two issues that are not directly addressed by Standard 18 were subjects of considerable discussion by The Jury Project. A number of jurors complained to us about not being able to take notes and about not being given any good reason why they can't. Many judges and lawyers believe that note-taking distracts jurors from the important task of watching and listening to witnesses, while others argue that

it would promote fairer and more reasoned verdicts. Some persons believe that the views of notetakers will carry undue weight during jury deliberations, or that the notes themselves will supplant the evidence as recalled by the jurors; others discount these views or point out that they can be controlled by careful instructions from the presiding judge. At least one jurors' rights' group urges most strongly that jurors should be allowed to take notes.

The diversity and disparity of views on this subject was reflected in the task force itself. Ultimately, the consensus was to recommend that judges be permitted to allow jurors to take notes as a matter of judicial discretion, so long as the jurors are instructed not to rely unduly on their own or others' notes, to evaluate witness demeanor as well as testimony, and to ask for read-backs of testimony whenever juror recollections and notes conflict.

This proposal does not require a statutory amendment. On the criminal side, in *People v. Tucker*, 77 N.Y.2d 861 (1991), the Court of Appeals upheld juror notetaking while the court reinstructed the jury on the elements of the crimes charged. The trial judge had instructed the jurors to request a readback if a disagreement arose between a juror's recollection and the notes, and, over defense counsel's objection, permitted the juror to take his notes into the deliberating room. *See id.* at 862. On the civil side, our recommendation reflects existing civil practice and gives emphasis to the judicial discretion that already exists.

2. Copy of the Charge

Another item on which a substantial number of jurors commented was the failure to give them a copy of the charge. In many states, this is done as a matter of course. *See, e.g.,* Cal. Penal Code § 1093 (West Supp. 1994); Mont. Code Ann. § 46-16-504 (1991).

One problem with giving New York jurors a copy of the charge is logistical: many judges read their charges from rough handwritten notes, and few court reporters have the technological capability to produce a transcript of the charge immediately.²⁷ If producing a written charge will result in a substantial delay between the charge and the commencement of deliberations, no one on the task force

²⁷ The technological capability is available, but it costs approximately \$10,000, and very few court reporters are purchasing such a device on their own.

favors it. However, if the jury asks for a copy of the charge and the technology is available to produce one without undue delay, then judges should be given the discretion to provide it.

Currently, CPL § 310.20 strictly limits the materials that may be given to the jury upon retiring to deliberate. They may be given a written list of the offenses charged and the possible verdicts thereon, and, in the court's discretion, exhibits received in evidence. That is all. During deliberations, if the jury asks for further instruction with respect to a statute, CPL § 310.30 gives the court discretion to provide them with the text of any statute, but only with the parties' consent.

Since the charge invariably contains the elements of the relevant statute, the Court of Appeals has held that Section 310.30 prohibits giving a written copy of the charge to the jury absent the parties' consent. See People v. Johnson, 81 N.Y.2d 980 (1993). In the view of the task force, the discretion in this matter should lie with the judge, not with the parties. Moreover, as long as the entire charge is provided, neither the defense nor the prosecution should, as a general matter, suffer any prejudice. Therefore, we recommend an amendment to CPL § 310.20 to permit the court, in its discretion, to supply the jury with a copy of the entire charge when it retires to deliberate.

ABA STANDARD 19: SEQUESTRATION OF JURORS

- (a) A JURY SHOULD BE SEQUESTERED ONLY FOR THE PURPOSE OF INSULATING ITS MEMBERS FROM IMPROPER INFORMATION OR INFLUENCES.
- (b) THE TRIAL JUDGE SHOULD HAVE THE DISCRETION TO SEQUESTER A JURY ON THE MOTION OF COUNSEL OR ON THE JUDGE'S INITIATIVE, AND THE RESPONSIBILITY TO OVERSEE THE CONDITIONS OF SEQUESTRATION.
- (c) STANDARD PROCEDURES SHOULD BE PROMULGATED TO MAKE CERTAIN THAT:
 - (i) THE PURPOSE OF SEQUESTRATION IS ACHIEVED; AND
 - (ii) THE INCONVENIENCE AND DISCOMFORT OF THE SEQUESTERED JURORS IS MINIMIZED.
- (d) TRAINING SHOULD BE PROVIDED TO PERSONNEL WHO ESCORT, AND ASSIST JURORS DURING SEQUESTRATION. USE OF PERSONNEL ACTIVELY ENGAGED IN LAW ENFORCEMENT FOR ESCORTING AND ASSISTING JURORS DURING SEQUESTRATION IS DISCOURAGED.

New York Recommendations

1. *Abolish mandatory sequestration, giving judges discretion to sequester in appropriate cases.*
2. *Retain a budget line item for sequestration so that judges will have funds available to sequester a jury where appropriate.*
3. *Use money saved by abolishing mandatory sequestration toward increased juror fees.*

New York is the only state in the United States that mandates sequestration of juries in felony cases. See CPL § 310.10. Every other state jurisdiction, and every federal jurisdiction, leaves the question of whether or not to sequester to the discretion of the judge presiding at the trial. The ABA Standards endorse discretionary sequestration. The time has come for New York to adopt this enlightened practice.

The case against mandatory sequestration is overwhelming.

Mandatory Sequestration costs money. In the year that ends April 30, 1994, the State of New York will pay over \$4 million to sequester over 1,400 juries, over 80% of them in New York City, and over 85% in the New York City metropolitan area (the five boroughs and the 9th and 10th Judicial Districts) (See Appendix J). Sequestration costs an average of \$2,816.00 per night: \$709.37 for lodging, \$208.00 for meals, and \$1,899.00 for court officers' overtime.

A significant portion of that sum would be saved if sequestration were optional, freeing up money to meet urgent needs, including increased juror compensation. Indeed, if ending mandatory sequestration saved the state 80% of amount it currently spends to sequester juries²² and if only 60% of that savings were used to pay increased juror compensation, it would cover 25% of the increase in juror fees we have proposed.

Mandatory Sequestration May Affect the Decision-Making Process. The prospect of having to remain overnight at a hotel may cause jurors to rush to judgment -- or, alternatively, to delay their decision so they can take advantage of a "perk." See Van Dyke, Jury Selection Procedure 181-3 (1977). Indeed, conventional wisdom is that some prosecutors and defense attorneys like sequestration because

²² We assume that the State would have to retain some budgeting for discretionary sequestration; we have arbitrarily selected 20% of today's cost.

they believe it makes juries more (or less) likely to convict. See Report of New York State Bar Association Action Unit No. 7, December 1, 1988, at 8; C. Winick & A. B. Smith, "Post-Trial Sequestered Juries Tilt Toward Guilty Verdicts," N.Y.L.J. p. 1 (Dec. 12, 1986). This is not, in our view, a legitimate use of or rationale for sequestration.

Mandatory Sequesterations Leads to Wasted Juror Time: Judges are well aware of the costs (both financial and psychological) associated with mandatory sequestration and frequently do what they can do avoid them. For example, some judges have told us they will not charge a jury in the afternoon or on a Friday because they want to avoid a sequester if they can. The result: an extended period of service for the jurors, down time at a critical point in the trial, and inefficiency in the utilization of criminal side judges, who cannot start another trial until they have charged the last jury. This and similar ad hoc solutions do save the State some money, since juror fees for an extra day of service cost far less than sequestration. But they waste juror time and thereby contribute to juror dissatisfaction with the system. Some judges also try to avoid sequesters by getting prosecutors and defense counsel to waive sequestration. See People v. Paul, 79 N.Y.2d 970 (1992); People v. Webb, 788 N.Y.2d 335 (1991). Some private defense attorneys are amenable, but public defenders have told us they will not consent as a matter of policy, unless they can use waiver as a bargaining chip to obtain prosecutorial concessions. And prosecutors believe that sequestration helps ensure convictions. Thus, waiver of sequestration is rare.

Mandatory Sequestration Is Resented by Jurors: Not surprisingly, jurors do not like to be sequestered. It entails a major disruption in their already disrupted lives, and except in high profile cases they do not see any need for it. None of jurors who spoke or wrote to members of the Jury Project about sequestration believed it had any value. One juror even admitted that sequestration did not accomplish its purpose of shielding jurors from outside influence during deliberations:

Q: Do you think sequestration was necessary?"

Former Juror: No, because we looked at television anyway. And I can't believe the thing that was -- it was a murder trial or something on television, and I looked at it, but it would not have changed my mind.

Mandatory Sequestration May Create Constitutional or Statutory Problems: The rise of Batson challenges and their extension (under the New York Constitution) to religion, national origin, and gender, has added a new wrinkle to the mandatory sequestration issue. Criminal side judges have told us that a disproportionate number of women ask to be excused from serving on criminal juries because they are unable to be away from their homes overnight due to child or elder care issues. Since the Batson principle has been extended to women by the First, Second and Third Departments of the Appellate Division,²⁷ a defense lawyer could well mount a Batson-type challenge if faced with an array from which most women were excused. Members of certain religious groups are unable to be sequestered and therefore ask to be excused from criminal juries; this, too, could result in challenges. Disabled jurors are sometimes unable to be sequestered because they require special assistance with certain activities that cannot be provided when they are away from their homes and regular companions. This may give rise to challenges to sequestration under the American with Disabilities Act.

If mandatory sequestration served a valid purpose — if it could be demonstrated that sequestration in all cases was necessary to ensure the constitutional guarantee of a fair trial — any constitutional hurdle posed by the disproportionate exclusion of women or other cognizable classes from criminal venues might be surmountable. But no such showing can be made, since the constitutional guarantee of a fair trial is being met in the other 49 states and the 94 federal judicial districts where most juries are not sequestered.

The case for mandatory sequestration, by contrast, is underwhelming. Juries are supposed to be sequestered to keep jurors from being improperly influenced from any source, whether innocent or improper. But it is far from clear that sequestering juries only during deliberations (as is done in New York) sufficiently insulates jurors from outside influence, since the jurors can see, hear or read forbidden material, or be threatened or otherwise influenced, during the trial. This suggests that the reason for the mandatory sequestration in New York has little or nothing to do with its ostensible purposes (and the only acceptable purpose), namely, insulating its members from improper influence.

²⁷ See People v. Allen, 605 N.Y.S.2d 503 (3d Dep't 1993); People v. Blunt, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990); People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dep't 1990).

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It is far more likely that mandatory sequestration continues in effect, at a time when the court system has other urgent priorities, because prosecutors and/or defense attorneys believe it affects the outcome of the case — a manifestly improper purpose — or because it serves the interest of a special interest group: in this case, the senior court officers, who obtain a significant income supplement by virtue of the overtime hours they work during sequestration and who therefore lobby for its preservation.²⁷ Their economic interest is understandable. But it would be far better to deal with the problem of compensation for uniformed court officers in a straightforward fashion than to visit the problem of mandatory sequestration on a beleaguered jury system.

It is true that, on occasion, a mistrial is avoided because the jury is sequestered. But that serendipitous results cannot, in our opinion, justify perpetuation of a system that costs so much and has so little to commend it. Judicial discretion to impose sequestration in particular cases ensures that it will be used when it is truly needed to guarantee a defendant's constitutional rights.

We therefore recommend that mandatory jury sequestration be abolished, and that CPL Section 310.10 be amended to give judges discretion to order sequestration in appropriate cases. The Legislature should retain some funding for discretionary sequestration in the OCA budget, so that judges will feel they have the ability to sequester.

When juries are sequestered, the conditions should enable them to deliberate in a calm and unhurried manner, with plenty of opportunity to rest from their stressful task. Both prosecutor and defense attorneys have told members of The Jury Project that they believe having deliberations until 10 or 11 p.m. is beneficial. We find it inhumane. Consistent with ABA Standard 18 (which we have already endorsed), jurors should not be required to deliberate more than ten hours in a day, unless the court determines that a longer deliberation will not work an undue hardship. If the jurors wish to continue until a later hour, that is their privilege, but it is equally their prerogative to have some time to rest and relax, and they should not have to ask for it.

²⁷ Actually, a relatively small proportion of the court officers obtain this benefit. As noted above, sequestrations are rare outside of New York City and extremely rare outside of the counties that make up the City's metropolitan area. Furthermore, the senior court officers get the lion's share of the sequestration assignments; the more junior court officers do not enjoy the approximately \$600/night in overtime pay that the three officers assigned to each jury earn.

NEW YORK STANDARD NO. 20:

1. *Jurors shall at all times be treated with courtesy and respect by judges, attorneys and court personnel.*
2. *Commissioners of Jurors and court personnel shall regularly examine their practices to ensure that routine matters are carried out in ways that maximize the convenience of jurors.*

There is no ABA Standard dealing with the issues we are about to address. Nonetheless, they cannot be unique to New York.

Perhaps the most disheartening testimony we received from jurors, both in person and by mail, concerned "an attitude problem" on the part of lawyers, judges and court personnel. We who are insiders in the system need to be reminded from time to time that the system ought not to be run for our benefit and at our convenience. We are in court to serve our clients and the public. The public includes the jurors. In a state where the right to trial by jury must remain forever inviolate, jurors are a necessary element of the system. We simply cannot function without them. Yet as we noted in the preface to this report, all too often we treat them as a necessary evil - to be tolerated, not treated as guests, and certainly not catered to.

Juror after juror spoke or wrote at length about discourteous, thoughtless or inappropriate behavior by insiders in the court system. Here is a representative sample of their statements:

- It's bad enough to have to call repeatedly to receive no answer, but to go down to the clerk's office and be greeted by rude, arrogant clerks who can hardly bear to answer a question is even worse. To top it off, the day I went, the secretarial pool, or whatever you call the group of ten people at desks, had the radio turned up and were dancing and clapping their hands like they were being paid to have a party. This was the background for a surly woman clerk who told me when I showed her my son's birth certificate, "Ahh, everybody has a baby. Go take a hike."
- [N]othing in my experience has been as inefficient or characterized by the ineptitude I witnessed in the much vaunted judicial process. "Hurry up and wait" is an understatement. The first day of hearing testimony the judge asked us to be present promptly at 10:00. We were not called into the courtroom for an hour. But, promptly at 1:00 we adjourned for lunch. We were told to be back at 2:15. When we returned at 2:15 we were not called into the courtroom until 3:00. But, we promptly adjourned at 4:00. There was never an excuse or explanation of the delays. . . . Given the fact that we heard approximately an hour's worth of testimony from each of four witnesses, this case could have taken a day or at most two days if the judge had effected a more productive work schedule. Instead, it took four days. . . . If I did business in the manner of the Supreme Court, bankruptcy would ensue in short order.

- The clerk informed us that only a few of us need return the next day for service and asked for volunteers. Surprise! No volunteers. Instead of acceding to our wishes and selecting the unlucky few by lottery, this person instead forced us all to come back the next day "to punish us for being uncooperative."
- The clerks . . . were rude and nasty. They showed no respect and treated jurors like children. I believe they hate their jobs, but that is no reason for them to take out their hostilities on the public. For example, on the morning of September 15, not having been selected for a panel, I asked one of the clerks whether I could be excused for Rosh Hashanah on the next day. His response was: "I know all about the Jewish holidays. That is some excuse. Go and sit down."
- Regrettably, the appearance and conduct of some of the judges do not bring credit on the judiciary. Their robes are stained, they address the jurors with their feet on the bench, and their temperament is far from judicial. In fact, it is injudicious.
- The attorneys constantly repeated themselves in talking to us. We all felt that they talked down to us. Our words to them are: We were smart enough and patriotic enough to get here. Please do not talk down to us.
- Then began the judge's painfully tedious task of questioning potential jurors for the coveted seat on the jury . . . Men were asked what they did for a living. Women were asked if they "worked outside the home." How courtly, I thought. Married men were asked if they had children, and the occupation of each adult child. One woman worked outside the home, but was either divorced or a widow, and was not questioned about her children. In a tacit rebuke of the bench, she raised her hand and said, "Your Honor, I have two children. My son is an engineer and my daughter is a concert pianist." Touché, I thought.
- [T]hey would call about a hundred of us and herd us upstairs to another dirty hallway, where we were left for hours, no explanation as to what we were doing there.
- [A]t one point there was an emergency at my office. I went up to this scary little office, where this little [woman] screamed and screamed at people, I said I had an emergency, could I be excused for the afternoon, not for the whole term. She screamed everybody has a emergency, get out of here.
- Then I was called in for another voir dire. I was in terror, as you can imagine. The two attorneys came in. They were clearly good friends. They were kind of jovial, joking with each other. I said this will be okay. We sat there in that room for six hours while they questioned us over and over as to an extremely simple car accident. What they were really doing was sort of Jerry Lewis and Dean Martin. They stood up there and told jokes. They did stand-up. They went on and made inappropriate personal remarks to the men and women. They would leave the room and stay outside for forty-five minutes, leaving us sitting there. This time I was the very last person and everybody else was gone. Finally it was about 4:15, I said can you tell me why on earth it took you so long to do this. It took six hours to ask each person four questions. What was this club act? They said, well, it was a Thursday. The following Monday was a court holiday. We want the long weekend and we don't want to go to trial

tomorrow. If we had picked our jury this morning in the hour, we would have gone to trial and it would ruin our long weekend.

Based on this and similar testimony, we make the following suggestions for the system's insiders:

- (a) Stagger staff hours in jury commissioners' (or county clerks') offices, so that paperwork can be done in off-peak times so as not to interfere with juror processing. Have office hours prior to 9:00 a.m. and between 5:00 and 7:00 p.m. at least one day a week (as most Department of Motor Vehicles offices do), so that summoned jurors who need to deal with juror commissioners about excusal, deferrals, handicapped accommodations or similar administrative matters can conduct their business with the courts before or after working hours. Post clear instructions in a prominent place in every jury commissioner's office, so that persons who arrive to transact business will know where to go and what to do; don't make people stand in one line so they can be told to get in another. Where forms are provided (for example, a form requesting a deferral), place the forms in containers or on shelves with a sign designating where they are.
- (b) Have jurors to be in the jury assembly room by 9:00 a.m., so that administrative matters and orientation can be attended to prior to 9:30 a.m. and arrays can be sent out for selection beginning at 9:30 a.m. If this means that the magnetometers or other security devices have to be opened earlier, open them.
- (c) Abandon roll call where it is still used to take attendance. It causes needless delays and strikes many jurors as juvenile. Station a clerk at the door to check off attendance on a list. This clerk can also collect reimbursement forms and pass out parking stickers or other special information at the same time.
- (d) Rigorously enforce a full work day for all court personnel, with one hour for lunch, as is customary in private sector work places.
- (e) Promulgate and rigorously enforce rules that prohibit court personnel from doing personal work during the court day.
- (f) Give jurors clear and complete explanations about what is happening to them and why. If jurors have to be taken out of the room during the course of voir dire or trial, they should be told why.

If there are going to be unusual delays, jurors should be told why. They are capable of understanding the information without prejudicing a case.

(g) Design procedures so that jurors experience the minimum amount of physical disruption and inconvenience. It is easier for two attorneys and a court reporter to go into a robing room for a conference than it is for ten jurors to file in and out.

(h) Enforce a full and consistent trial day in the courtroom. The disruption to jurors' lives should take no longer than is absolutely necessary. Jurors' schedules should be paramount, not the schedules of lawyers, judges or witnesses. Once jury selection commences, the completion of that trial should be the first order of business for everyone involved, and all outside activities should give way before it.

(i) Devise a brief survey form, not unlike the ones used by major hotel chains, that jurors can fill out as they leave the courthouse. Give them a chance to sound off about their experience. Then pay attention to their complaints and do something about them.

(j) Above all, treat jurors with courtesy and with respect. Do not ignore them, talk down to them or direct inappropriate remarks to them. Appreciate the tremendous sacrifice most of them are making to help the system function, and show our appreciation by taking whatever steps are necessary to minimize their inconvenience.