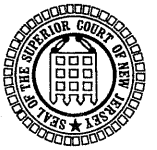
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JOSEPH F. LISA
JUDGE



SENTRY BUILDING
216 HADDON AVENUE
WESTMONT, NEW JERSEY 08108-2815

May 16, 2005

Chief Justice Deborah T. Poritz
Hughes Justice Complex
25 W. Market Street
P.O. Box 970
Trenton, NJ 08625-0970

RE: **Special Supreme Court Committee on Peremptory Challenges and Voir Dire**

Dear Chief Justice Poritz:

Early last year, the Supreme Court appointed the Special Committee on Peremptory Challenges and Jury Voir Dire. The Committee was asked to evaluate what steps might be taken to improve the jury selection process in both civil and criminal cases. The Committee was also asked to evaluate the number of peremptory challenges allowed in both civil and criminal cases.

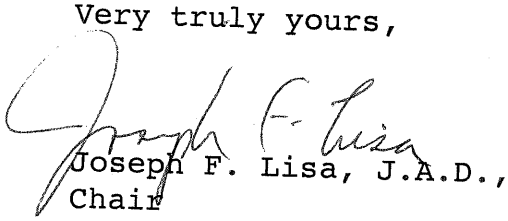
In its charge to the Committee, the Court directed that we review reports previously issued on the subject by New Jersey conferences and committees (including the "Weiss Report"), evaluate the impact of the 2000 amendment to Rule 1:8-3 on the conduct of voir dire, review other jurisdictions' jury selection processes involving peremptory challenges, review relevant case law, and consider any objective or anecdotal information involving the jury selection process or use of peremptory challenges.

The Committee membership included representation from the bench and bar. The judges possessed extensive experience in presiding over both civil and criminal jury trials. The attorneys, in addition to personally having significant jury trial experience, each represented an important attorney organization or bar association. The Committee membership also reflected a balanced geographic representation from all parts of the State. The work of the Committee was enhanced by the diverse views and backgrounds of the members.

The Committee first met on April 7, 2004, after which the Committee and several subcommittees met regularly until the final Committee meeting on April 26, 2005. The Committee's work is now complete, and I am pleased to submit to the Court our report.

I take this opportunity to advise the Court that the members of this Committee served with great distinction and diligence. They are to be commended, and they have my thanks for their very capable, constructive and professional contributions to the Committee's work. On behalf of the Committee, I thank the Court for giving us this opportunity to be of service.

Very truly yours,



Joseph F. Lisa, J.A.D.,
Chair

JFL:clb

cc: Associate Justices of the Supreme Court
Stephen W. Townsend, Clerk of the Supreme Court
Honorable Philip S. Carchman, J.A.D., Administrative Director of the Courts
All Members of the Special Committee
Staff of the Special Committee

REPORT OF THE SPECIAL SUPREME COURT COMMITTEE ON PEREMPTORY CHALLENGES AND JURY VOIR DIRE

May 16, 2005

COMMITTEE MEMBERS

Honorable Joseph F. Lisa, J.A.D., Chair

Carlos H. Acosta, Jr., Esquire - Hispanic Bar Association of New Jersey
Honorable Linda G. Baxter, P.J.Cr.
Abbott S. Brown, Esquire - Association of Trial Lawyers of America - NJ
Honorable Marilyn C. Clark, P.J.Cr.
Honorable Elaine L. Davis (P.J.Cr., Retired)
Honorable Harriet E. Derman, P.J.Cv.
Honorable Frederick P. DeVesa, P.J.Cr.
Honorable Peter E. Doyne, J.S.C.
John C. Eastlack, Jr., Esquire - New Jersey State Bar Association
Judith B. Fallon, Esquire - Association of Criminal Defense Lawyers of NJ
Honorable Travis L. Francis, P.J.Ch.
Honorable Maurice J. Gallipoli, A.J.S.C.
C. Judson Hamlin (J.S.C., Retired) - Trial Attorneys of New Jersey
Glenn R. Jones, Esquire - Assistant Attorney General
Joseph E. Krakora, Esquire - Assistant Public Defender
Philip R. Lezenby, Esquire - New Jersey Defense Association
Honorable John F. Malone, J.S.C.
Raymond E. Milavsky, Esquire - County Prosecutors Association of New Jersey

Michael F. Garrahan, Esquire, Administrative Office of the Courts, Staff

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ATTACHMENTS

1. Model Voir Dire Questions, Criminal
2. Model Voir Dire Questions, Civil

APPENDIX

A. Committee Charge in Memorandum from Judge Williams

B. Table Showing Peremptory Challenges in Other Jurisdictions

C. Solicitation for Attorney Comment (NJ Law Journal and NJ Lawyer)

D. Summary of Responses from Attorneys (not members of the Committee)

E. Solicitation for Comment by Association Representatives on the Committee

F. Copies of Committee Members' Association Responses

G. Question to Presiding Judges re: Standard Voir Dire Practices

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I. Voir Dire Survey Questionnaire to Criminal and Civil Trial Judges

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L. Weiss Report

M. Minority Report on behalf of the County Prosecutors Association of New Jersey

N. Minority Report on behalf of the Association of Criminal Defense Lawyers of New Jersey and the Office of the Public Defender

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

The Special Committee has developed proposed Jury Selection Standards for the purposes of improving jury selection and making it more uniform statewide. The Committee recommends that the Supreme Court approve these proposed standards. Upon approval, they should be distributed to all trial judges as a separate document. (Each standard is accompanied by extensive commentary.)

Standard 1. <u>Voir Dire Method</u>

The method chosen to conduct voir dire must assure a thorough and meaningful inquiry into jurors' relevant attitudes so the court and counsel can identify jurors who may possess a bias, prejudice, or unfairness with regard to the trial matter or anyone involved in the trial.

Standard 2. <u>Standard Questions</u>

When questioning prospective jurors, the judge must include the model jury selection questions approved by the Supreme Court for that type of trial, which are attached.

Standard 3. <u>Supplemental Questions</u>

Counsel shall be encouraged to submit relevant supplemental questions for the court's consideration at the pre-voir dire conference; the judge shall review all proposed questions and determine whether to include each one, setting forth the determination on the record.

Standard 4. <u>Attorney Participation</u>

At the discretion of the trial judge, if requested by counsel, at least some participation by counsel in the questioning of jurors should be permitted.

Standard 5. <u>Challenges For Cause</u>

Jurors should be excused for cause, either by the court sua sponte or upon a party's request, when it appears that it will be difficult or impossible for the juror to be fair and impartial in judging the case.

RECOMMENDATION 2

The Special Committee recommends that the Supreme Court establish a standing committee, suggested to be called the Committee on Jury Selection in Criminal and Civil Trials, to provide continuing oversight of this important area – first with respect to the implementation of any approved Special Committee recommendations and, thereafter, to continue to work to assure uniformity in statewide practices. Several specific standing committee responsibilities are identified in the discussion accompanying this recommendation and in subsequent recommendations.

RECOMMENDATION 3

The Special Committee recommends that the Supreme Court authorize the development of a jury selection manual that will address the specifics of jury selection for judges and attorneys.

RECOMMENDATION 4

The Special Committee recommends that the Supreme Court authorize the proposed Committee on Jury Selection in Criminal and Civil Trials (Recommendation 2, above) to be responsible for proposing any revisions to the standard jury selection questions that are included within the Jury Selection Standards proposed in Recommendation 1. That responsibility will include any changes to questions that are approved, as well as expansion to cover additional case types beyond those contained in the standards.

RECOMMENDATION 5

The Special Committee recommends that the Supreme Court approve a jury selection training program for judges that will include separate program components covering not only the existing program that is conducted for new judges and programs that may be conducted at the annual New Jersey Judicial College, but also a training program component that will provide for continuing education of judges assigned to the civil and criminal divisions.

RECOMMENDATION 6

The Special Committee recommends that the Supreme Court direct the proposed Committee on Jury Selection in Criminal and Civil Trials to develop a jury selection training program for attorneys.

RECOMMENDATION 7

The Special Committee recommends that the Supreme Court approve a rule change that will expand the pre-trial voir dire conference required by R.1:8-3(f) to also include:

- Submission in writing by attorneys of proposed voir dire questions; and
- Require the trial judge to rule on the proposed questions on the record.

RECOMMENDATION 8

The Special Committee recommends the reduction of the number of peremptory challenges in criminal trials to 8 challenges for a defendant being tried alone, with 6 challenges permitted to the State. Where there are multiple defendants, each defendant will be permitted 4 peremptory challenges, with the State permitted 3 challenges for each defendant.

RECOMMENDATION 9

The Special Committee recommends the reduction of the number of peremptory challenges in civil trials to 4 per party.

RECOMMENDATION 10

The Special Committee recommends that the Supreme Court approve its proposed revision to R.1:8-3(c) that will authorize the trial judge to also be able to decrease the number of peremptory challenges available to the parties (as well as increase that number), when the judge has determined that it is appropriate to adjust the number of peremptory challenges in multiple party trials.

I. Preamble

The New Jersey Supreme Court appointed the Special Committee on Peremptory Challenges and Jury Voir Dire in early 2004. The Court appointed Judge Joseph F. Lisa, J.A.D. as Chair. The Committee's membership includes nine other judges with extensive experience in presiding over jury trials, both civil and criminal, and nine attorneys. The Court selected the attorneys based upon recommendations from various bar associations and attorney organizations. Therefore, in addition to personally having significant trial experience, each attorney member also represents an important constituency in New Jersey's legal community. The attorney members represent the Office of the Attorney General, Office of the Public Defender, Hispanic Bar Association of New Jersey, Association of Trial Lawyers of America - NJ, New Jersey State Bar Association, Association of Criminal Defense Lawyers of New Jersey, Trial Attorneys of New Jersey, New Jersey Defense Association, and County Prosecutors Association. The Committee is staffed by Michael F. Garrahan, Esq., of the Administrative Office of the Courts. Upon completion of the selection of members, the Committee held its first meeting on April 7, 2004.

The Committee's charge, as reflected in the letter to the Chair from the Honorable Richard J. Williams, J.A.D., Administrative Director of the Courts (See Appendix A), was to examine the subject of peremptory challenges and voir dire practices in New Jersey. The Committee was also asked to evaluate whether the 2000 amendment to R. 1:8-3, which added subparagraph (f), requiring a pre-voir dire conference, has resulted in any impact on the conduct of voir dire. The Committee's charge did not extend to the trial of capital cases, and nothing in this report pertains to the number of peremptory challenges or voir dire practices in those cases.

The Committee's work is now complete. This report was approved at the Committee's final meeting on April 26, 2005. Minority reports were then filed by Committee representatives of the County Prosecutors Association of New Jersey (see Appendix M) and the Association of Criminal Defense Lawyers of New Jersey and the Office of the Public Defender. (See Appendix N). The minority reports express disagreement only with respect to Recommendation 8.

The report will describe the work of the Committee in detail. Before doing so, it is deemed helpful to generally describe the process followed by the Committee and some of the conclusions reached, and to summarize the Committee's recommendations. First of all, it can be succinctly stated that R. 1:8-3(f) has had no demonstrable impact on the manner in which voir dire has been conducted before and after its adoption in 2000. Next, it should be noted that the Committee first turned its attention to the quality of the voir dire process. It was recognized from the outset that the quality of the voir dire process is inextricably intertwined with the appropriate number of peremptory challenges. The more thorough and meaningful the voir dire process in ferreting out juror bias, the less need for peremptory challenges. Thus, many months before the Committee even broached the subject of the number of peremptory challenges, extensive analysis was conducted about the voir dire process and ways of improving it.

This emphasis is reflected in the Committee's recommendations. Seven of the ten recommendations made by the Committee pertain to the quality of the voir dire process. Most notably, those recommendations include the approval and implementation of a comprehensive set of voir dire standards to be utilized by all trial judges. The proposed standards include the required use of standard questions as a baseline, with encouragement to judges to supplement them on a case-specific basis, including with input from the attorneys. The encouragement of some level of attorney participation is included. The standards recommend an expansive granting of excusals for cause. Also notable is the recommendation that a standing jury selection committee be established, with representation from the bench and bar, to monitor compliance with the standards and recommend appropriate modifications from time to time. The standing committee would draft a voir dire manual for use by judges and attorneys and develop revisions and additions to standard questions. The recommendations also include expanded training for judges as well as attorneys and enhancement and expansion of the pre-voir dire conference procedures.

With respect to the number of peremptory challenges, it is plain to the most casual observer that the numbers allowed in New Jersey are far out of the mainstream of those allowed in the other forty-nine states, the District of Columbia, and the Federal judicial system. As shown in Appendix B, in civil trials, only 10 out of 52 jurisdictions

allow more than 4 peremptory challenges per party. This includes New Jersey, which currently allows 6. Fourteen jurisdictions allow 4; twenty-six jurisdictions allow 3; and two jurisdictions allow 2. This discordance is further amplified by the fact that out of the seven jurisdictions that allow 6 challenges, New Jersey is the only one that has 6 deliberating jurors, instead of 12.

On the criminal side, New Jersey is even farther out of the mainstream. As reflected in Appendix B, the comparison to other jurisdictions is more complicated in criminal because some jurisdictions vary the number allowed depending on the seriousness of the charge and the number of jurors required to return a verdict. For trials of more serious cases (designated in Appendix B as "Felonies"), the median number of peremptories for defendants nationwide is 6 and the mean number is 7.4. New Jersey now allows 20 for a single defendant in enumerated cases deemed more serious. For trials of less serious cases (designated in Appendix B as "Misdemeanors"), the nationwide median is 4 and the mean is 4.2. New Jersey now allows 10 in the non-enumerated cases, which are deemed less serious.[1] The Committee has determined that reductions should be made. In addition to the expected improvement in the voir dire process, other factors also inform this conclusion.

The Committee is not recommending the elimination of peremptory challenges. The Committee believes that allowing a reasonable number of peremptory challenges provides litigants with a "safety net" in the jury selection process and engenders confidence in litigants' acceptance of the final verdict because they have been given a direct role (apart from the court) in selecting those who will decide their fate. The Committee is also mindful of the trend in judicial decisions in the last two decades recognizing abuses in the use of peremptory challenges to discriminate based on race,

[1] The Committee recognizes that classifications of more serious and less serious criminal cases, by whatever nomenclature or enumeration, vary from jurisdiction to jurisdiction. Accordingly, comparisons are not precise. However, for purposes of our analysis, the comparisons reflected in Appendix B are reasonable and reliable in assessing New Jersey's relative position in the nation in the number of peremptory challenges allowed in criminal cases. The table in Appendix B was compiled by the National Center for State Courts for the very purpose for which the Committee has utilized it, to compare jurisdictions.

gender, ethnicity and religion. See State v. Fuller, 182 N.J. 174 (2004). These decisions have prohibited such improper use of peremptory challenges by all parties in both criminal and civil trials. Ibid. The Committee is of the view that the judicially-recognized abuse of peremptory challenges provides an independent basis for reduction in the numbers allowed. With a large number of peremptory challenges allowed, parties are better able to camouflage their improper discriminatory use. Conversely, with fewer allowed, there will be a greater deterrent and diminished ability to misuse peremptory challenges for prohibited purposes.

On the civil side, when the size of juries was reduced from 12 to 6, no corresponding change was made in the number of peremptory challenges, thus, in effect, doubling the proportionate number of peremptory challenges available to civil litigants. On the criminal side, the rules presently in effect provide for a two-tier system. For crimes deemed more serious, the defendant gets 20 peremptory challenges and the State 12; for the less serious crimes, the defendant and the State get 10 peremptory challenges each. The Committee determined that the two-tier system should be eliminated, and the same criteria should apply for all indictable offenses (except capital offenses, which are not part of the Committee's consideration). Elimination of the two-tier system is appropriate because (1) with offense-specific and other mandatory sentencing provisions, many of the so-called less serious offenses carry much more substantial penalties than those deemed more serious; and (2) even if an effort were made to establish more rational classifications in each tier, procedures designed to select a fair jury and provide the parties with a fair trial should be equally applicable in all criminal trials. It is incongruous to suggest that the process should be "more fair" in more serious cases. If the process is fair, it is fair. Further, the number of peremptories allowed in New Jersey for the more serious cases is very far out of the national mainstream and most in need of reform by substantial reduction.

Other factors bearing upon the decreased need by defendants for peremptory challenges in this modern era are the significant changes in the criminal justice system that have evolved over the many decades since these numbers were originally set. All defendants are now represented by counsel. Indeed, indigent defendants in New Jersey are very well represented by very competent and experienced attorneys

provided by the Office of the Public Defender. The pool of jurors has been broadly expanded and now includes a broad cross-section of society, many of whom are more likely than those in the previous pools to identify with and be sympathetic to defendants in criminal trials. Along these same lines, societal attitudes have changed to be less favorable to law enforcement and government than in past times. The rights of the accused are safeguarded much more in current times by decisional law providing, for example, for the inadmissibility of confessions, suppression of evidence, etc. than in prior times. In addition to these and other changing circumstances over the years, the State continues to bear the burden of proving the charge beyond a reasonable doubt to a unanimous jury.

These factors persuaded the Committee to reduce the number of peremptory challenges in criminal trials. However, notwithstanding these factors, a majority of the Committee held to the view that there remains some residual advantage to the State in a criminal trial. (The State represents "the people," including, in a broad sense, the jurors; the police are there to keep all of us, including the jurors, safe; although accepting the legal principle of presumption of innocence, if the case has come this far, to trial, there must be significant evidence of guilt; etc.) For these reasons and because the right to trial by jury is a right possessed by the defendant, the Committee determined that defendants should receive more peremptory challenges than the State.

The Committee recommends reduction of peremptory challenges in civil trials from 6 per party to 4 per party. The Committee also recommends that judges have the discretion to decrease, as well as increase, the numbers allowed in multiple-party trials to avoid injustice. The number may never be decreased below 3 per party. In criminal trials, the Committee recommends that defendants receive 8 and the State 6 peremptory challenges in one-defendant cases. In multi-defendant cases, each defendant would receive 4, and the State would receive 3 for each defendant.

The Committee has determined that these reductions, coupled with the improved jury selection process, will not be detrimental to the litigants and will not adversely affect the interests of fairness and justice. The Committee believes that the reduction will enhance in the eyes of the public the credibility of our system of administering justice by curtailing the "turnstile" process by which juror after juror, deemed acceptable by the

court, is dismissed by the attorneys for no apparent reason. The reductions will decrease by many thousands over the course of each year the number of citizens called to jury service. This will also result in a corresponding saving in the expenditure of public funds and reduce the administrative burden associated with jury service. As discussed later in this report (see Recommendations 8 and 9), using conservative assumptions, the number of jurors required to actually report for duty each year will be reduced by about 27,000. Based on experience, approximately 1 out of 3 persons summoned meets the statutory qualification criteria to serve as a juror and can serve on the summons date. Therefore, about 80,000 fewer citizens per year would need to be summoned for jury duty.

A few final comments bear noting at the beginning of this report: (1) The Committee's recommendations are not geared to save time in jury selection. If anything, in many courtrooms, where the procedure has become very truncated and perfunctory, utilization of the standards will increase the amount of time to pick a jury. (2) The interdependent recommendations of the Committee, if fully implemented, will improve, not impair, the selection of fair jurors. (3) Approval and implementation of the recommendations to reduce the number of challenges will be over the objection of the bar. There is a clear dichotomy here. The judges on the Committee and the judges who have responded to the Committee's solicitation for input have overwhelmingly favored reduction in peremptory challenges, deeming the number presently allowable unreasonable, unnecessary and counterproductive. Just as overwhelmingly, the attorney members of the Committee and attorneys who have responded to solicitations for input oppose any reduction.[2] The bar is of the view that there is nothing in the number of peremptory challenges presently allowed that "needs fixing," that if many peremptory challenges remain unused, that is not a problem, and in some cases, they need all they can get. Thus, the recommended reductions are not the product of a “give-and-take negotiation” resulting in a common ground agreement, although the final numbers were arrived at with a clear consideration and concern by the entire

[2] But see the minority report of the County Prosecutors Association of New Jersey, which "concurs with the recommendation that the number of peremptory challenges should be reduced in all criminal jury trials." (See Appendix M).

Committee of the views expressed by the attorney members. This situation is not unique to New Jersey and has been noted in reports from other jurisdictions and in articles. The reactions reflect the different responsibilities and viewpoints of the two groups. Attorneys are advocates for their clients and it is not surprising that they do not favor reducing what they see as an advantage to those clients.

With these preliminary comments, we proceed to a broader discussion of the Committee's purpose, a description of its work, and a more detailed enumeration and analysis of its recommendations.

II. Introduction

In its charge to the Committee, the Court referred to various proposals it had received over a period of years recommending reductions in the number of peremptory challenges in civil and criminal trials, together with proposals for more effective voir dire. The Court specifically directed the Committee's attention to a proposal contained in a 1997 report from a committee of the Conference of Assignment Judges, commonly known as the "Weiss Report," which is reproduced in Appendix L. The Court also directed the Committee's attention to a recommendation submitted in 2002 in a report of the Conference of Criminal Presiding Judges. In its charge, the Court specifically directed that this Committee review and evaluate the prior reports in considering any further recommendations. (See Appendix A).

After the Weiss Report was submitted, the Court asked the Civil and Criminal Practice Committees to review the proposals advanced and suggest appropriate action. The Court later approved those groups' joint recommendation to amend R. 1:8-3 to include new subsection (f), which became effective September 5, 2000, and required trial judges to conduct a pre-voir dire conference on the record to determine areas of inquiry during voir dire and, if requested, whether and to what extent attorneys would be permitted to participate in the questioning of prospective jurors. Although the Weiss Report recommended substantial reductions in the number of peremptory challenges in civil and criminal trials, no action was taken at that time regarding the number of challenges permitted.

Specifically, the Weiss Report recommended reduction in civil trials to 3 per side or, alternatively, to 2 per party. In criminal, it recommended reduction in trials for the enumerated more serious crimes to 8 per side plus 1 additional to each side for each additional defendant, and for the other less serious crimes reduction to 5 per side plus 1 additional to each side for each additional defendant. The report also recommended that judges be given discretion in criminal trials to allow additional peremptories "when justified."

The Weiss Report also recommended that reductions in peremptory challenges "should be accompanied by a re-examination of the voir dire presently being conducted

by courts. Courts must be cognizant of the need for more meaningful voir dire." The report further recommended that programs on conducting voir dire should be part of judicial education and training and that counsel should be encouraged to submit additional proposed questions. No further specific recommendations along these lines were included.

The 2002 report of the Conference of Criminal Presiding Judges expressed the conclusion that the number of peremptory challenges allowed is excessive, leads to prolonged jury selection without improving the quality of justice, and impacts negatively on the criminal justice system. The negative impacts identified were: (1) Unnecessary prolongation of the jury selection process, often resulting in running out of prospective jurors, thus necessitating a second panel and often spilling over into a second day of jury selection. This not only delays resolution of the particular case but also interferes with the movement of other cases in the courthouse. (2) A negative financial impact by having to summon such a large number of jurors to service. (3) Identified as perhaps the most important negative impact factor, "the Conference believes that jurors observing high numbers of challenges being exercised often leave their jury service term with a diminished or even negative view of the process."

The Conference of Criminal Presiding Judges recommended reduction in accordance with the recommendations contained either in the Weiss Report or other previously submitted reports, such as those emanating from the Supreme Court Criminal Practice Committee. That committee has considered the issue approximately seven times since 1984 and has repeatedly recommended reductions. In 1998, for example, it recommended reduction to 5 for each defendant and 4 for the prosecution, to be accompanied by a more extensive voir dire and more liberal granting of challenges for cause.

With that background and history in mind, and recognizing that its consideration was part of the Court's charge, the Committee proceeded with its work. The Court's charge also directed the Committee to "review other jurisdictions' jury selection processes involving peremptory challenges, review relevant case law, and consider any objective or anecdotal information involving the jury selection process." (See Appendix A). The Committee has identified and considered pertinent information from other

jurisdictions and case law and has developed and considered objective data. Further, all Committee members, who collectively have participated in thousands of jury trials, brought to the table anecdotal information from their diverse backgrounds and perspectives, which the Committee considered as directed in our charge.

We will forego in this report a discussion of the purpose of peremptory challenges. The historical background of peremptory challenges is discussed in the Weiss report and need not be repeated here. Since that report, additional evolving case law has placed further restrictions on the use of peremptory challenges. See State v. Fuller, 182 N.J. 174 (2004). Also of note, in England, from whom we inherited the practice of allowing peremptory challenges, the practice has now been eliminated.

Our current voir dire practices derive from State v. Manley, 54 N.J. 259 (1969). Prior to that time, the attorneys played a substantial role in questioning jurors, and, as the practice evolved, abuses became rampant, with attorneys taking the opportunity to indoctrinate jurors to their point of view. The Court stated:

> The situation in New Jersey is substantially the same as in other states. In many instances it has taken as long or longer to empanel a jury as to try the case. The impression is inescapable that the aim of counsel is no longer exclusion of unfit or partial or biased jurors. It has become the selection of a jury favorable to the party's point of view as indoctrination through the medium of questions on assumed facts and rules of law can accomplish.
>
> [Id. at 281.]

The Court directed that under the newly revised R. 1:8-3(a), "[t]he basic intent is to have the voir dire conducted exclusively by or through the trial judges to the extent reasonably possible," and, although "supplementary questioning by counsel personally is not foreclosed entirely, . . . control over its scope and content is left to the experienced judgment and discretion of the trial judge to be exercised with the history and purpose of the rule in mind." Id. at 282-83. A "guarded exercise of discretion," id. at 283, was prescribed "to restore the fundamental basis for preliminary questioning, i.e., an expedient selection of a fair and impartial jury, ..." Id. at 280 (emphasis added).

Since 1969, trial judges have exclusively or at least substantially questioned jurors in the voir dire process. Many judges conduct the process in a thorough and meaningful way, to the satisfaction of the attorneys and litigants involved. There is, however, a lack of consistency. For some judges, there has been too much emphasis on expedience, and the process has become too truncated, and its vitality has been compromised. There is a perception, and to some extent a reality, that in the three-and-one-half decades since Manley, the pendulum has swung too far, away from an overly-protracted abusive process to one that is too limited. In the context of a capital trial, our Supreme Court has recently described the problem this way:

> In recent years, we have taken occasion to correct the misapplication of Manley by trial courts in capital cases. See, e.g., State v. Biegenwald, 126 N.J. 1, 33, 594 A.2d 172, 188 (1991) (Biegenwald IV) ("Regrettably, we perceive from the records in many of the cases coming before us that trial courts have read Manley . . . to limit voir dire to the bare minimum necessary to qualify a juror."); State v. Moore, 122 N.J. 420, 455, 585 A.2d 864, 882 (1991) ("Although Manley may be read as discouraging [the questioning of prospective jurors concerning their understanding of the burden of proof and presumption of innocence] . . . capital cases require a thorough and searching inquiry in regard to voir dire.") (internal quotations marks omitted). Once again, we do so here. In capital cases, "[c]ounsel must be afforded the opportunity for a thorough voir dire to evaluate and assess jurors' attitudes in order to effectively participate in jury selection. If counsel is unable to screen out prejudice and bias, that inevitably leads to unfair jurors." Williams II, supra, 113 N.J. at 409, 550 A.2d at 1179. We are unwilling to undermine the integrity of the trial process, even where the evidence of guilt is compelling. Ibid. The right to a fair trial does not depend on the nature of the crime charged or the quantum of evidence produced against a defendant. Ibid.
>
> [State v. Fortin, 178 N.J. 540, 577-78 (2004) (emphasis added).]

While the scope of voir dire in non-capital trials is obviously much more limited than in capital trials, the broad principles expressed by the Court in Fortin apply in all jury trials. More than a "bare minimum" is required. Although aware that the following comment was made in the capital context, we nevertheless acknowledge the Court's

admonition in Fortin: "Expedience can never trump the considered and thoughtful selection of jurors whose impartiality and fairness must be beyond reproach. The extra time necessary to empanel twelve dispassionate jurors in this case would have been a small price to pay for the assurance of a fair trial." Id. at 581.

With these considerations in mind, the Committee embarked upon a process to give priority to the portion of the Committee's charge requesting recommendations to improve the voir dire process. It is worth repeating that many judges in the State currently conduct voir dire in a thorough and meaningful manner, with an appropriate level of attorney participation, propounding relevant questions requested by counsel and allowing at least some questioning by attorneys by way of follow up (usually at sidebar). The issues involved in the voir dire process are infrequent subjects of reported decisions (except in capital cases). The Committee believes there are two reasons for this: (1) Because of the large number of peremptory challenges, attorneys can usually cure what they deem to be error in the judge's refusal to grant challenges for cause; and (2) Trial judges are granted very broad discretion in excusing jurors, and there is little chance of success on this issue on appeal. These issues also do not lend themselves to court rules. Accordingly, the Committee embarked upon a process of developing standards which, if approved, will be required to be followed by all judges throughout the State. If so, it is anticipated that this will bring all judges up to the appropriate "high common denominator" now exhibited by those judges who are performing the function well.

On the issue of improving the voir dire process, as might be expected, the attorney members of the Committee were fully supportive. By the same token, the judge members were equally supportive, recognizing that there is room for improvement. This aspect of the Committee's work progressed with a very cooperative effort from all participants.

As will be reflected in the body of the report, below, the Committee was very much interested in members' views, the views of attorneys outside the Committee, information relating to other jurisdictions, and statistical information relating to current New Jersey practices. Early on in its discussions, the Chair invited comment from member attorneys, on behalf of their respective organizations, on ten questions

regarding current voir dire practices, asking specifically about the following issues, as well as any others deemed appropriate (See Appendix E):

- the use of written questionnaires
- jurors responding in writing as opposed to verbally
- trial judges' allowing attorneys to participate in initial questioning of jurors
- use of open-ended initial questions versus those requiring a yes or no answer
- initial questions asked individually rather than *en banc*
- whether trial judges permitted supplemental questions proposed by counsel
- whether the determinations regarding those supplemental questions were made on the record
- whether counsel were permitted to ask follow-up questions in court as opposed to only at sidebar or in chambers
- whether follow-up questions were open-ended
- whether attorney participation was permitted with respect to follow-up questions

Attorneys who were not members of the Special Committee were also invited to comment on those questions through solicitations placed in the NJ Law Journal and NJ Lawyer. (See Appendix C). Presiding judges in the civil and criminal divisions were asked to respond to a questionnaire asking about standard jury selection procedures in their vicinages and, if such existed, to comment on the same questions asked of attorneys. (See Appendix G). Additionally, the Committee obtained approval to send a 25 question survey to trial judges in the civil and criminal divisions asking specific questions about their voir dire practices and their views on both specific questions and on jury selection practices generally. (See Appendix I). Those materials were developed following initial discussions with members and provided significant information that, together with the insights provided by Committee members, provided a strong basis on which to move forward. In addition to the above, the Committee also received information regarding jury selection through the assistance of the trial judges, jury managers, and court clerks, who helped to provide information relating to two

areas: (1) the amount of time required to complete jury selection, and (2) the disposition of jurors at jury selection, i.e., whether the jurors sent to voir dire were challenged for cause by the trial judge, removed by the exercise of a peremptory challenge (and by which party based on case type), seated as a trial juror, or not reached for questioning at voir dire. (See Appendix K). All of the information reviewed by the Committee is discussed in detail below as it relates to the determinations and recommendations set forth by the Committee.

The Committee's consideration of the number of peremptory challenges took into account the numbers presently permitted in New Jersey, the numbers permitted in other jurisdictions throughout the country, and, as required by our charge, the recommendations in the Weiss report.

New Jersey currently provides each party in a civil trial with 6 peremptory challenges and requires that where parties are represented by the same attorney that they be considered one party for purposes of the number of challenges provided. Where there are multiple parties represented by different attorneys but having a substantial identity of interests, the trial judge may, upon application of counsel, provide additional challenges to the adverse party.

New Jersey currently provides a criminal defendant being tried alone with 20 peremptory challenges when tried for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, third degree forgery, or perjury, with the State receiving 12 challenges. When there are multiple defendants being tried for the crimes enumerated above, each defendant shall receive 10 peremptory challenges and the State shall receive 6 challenges for each 10 afforded to the defense. When a defendant, or defendants, are tried for a crime other than those enumerated above, each defendant shall receive 10 peremptory challenges and the State shall receive 10 challenges for every 10 provided to the defense. Where a criminal matter is tried with a foreign jury (i.e., a jury drawn from another county), each defendant shall receive 5 peremptory challenges and the State shall receive 5 challenges for every 5 provided to the defense. The number of peremptory challenges

in civil and criminal trials is set forth in both statute and court rule, N.J.S.A. 2B:23-13 and R.1:8-3, respectively.

In New Jersey, 12 deliberating jurors are required in criminal trials and 6 deliberating jurors in most civil trials, although the trial judge, for good cause, may order that a civil matter be heard by 12 jurors, and the parties may elect, in civil trials, to not select alternates (if more than 6 jurors remain) but to instead allow all remaining jurors to deliberate. In those latter instances, the parties shall also agree on the number of jurors required to return a verdict. In addition, as noted above, section (f) of R.1:8-3 requires that the trial judge, prior to examination of the prospective jurors, "…shall hold a conference on the record to determine the areas of inquiry during voir dire." That rule further requires the trial judge to "…determine whether the attorneys may participate in the questioning of the prospective jurors and, if so, to what extent."

With regard to numbers of peremptory challenges in criminal trials in other jurisdictions, information obtained from a publication of the National Center for State Courts shows that no jurisdiction has as great a number of peremptory challenges in non-capital criminal trials of more serious case types as does New Jersey. (See Appendix B). That information includes fifty-two jurisdictions (the fifty states plus the federal system and the District of Columbia) and is categorized as being for "Felony" and "Misdemeanor" trials, which are considered for purposes of our analysis to be generally equivalent to New Jersey's breakdown between enumerated (deemed more serious) crimes and other crimes. (See n.1, supra). The median number of peremptory challenges authorized for more serious criminal trials in the fifty-two jurisdictions is 6 and the mean number of challenges is 7.4. Considering New Jersey's non-enumerated crimes to be the general equivalent of misdemeanor trials in Appendix B, it can be observed in the National Center materials that New Jersey and only one other state permit 10 challenges and that no other jurisdiction permits more than 6 challenges. For these less serious criminal cases, the median number of peremptory challenges is 4 and the mean number is 4.3. The Weiss Report recommended retaining the current breakdown of crimes and reducing the number of challenges for the enumerated crimes to 8 for a single defendant (with 1 additional challenge for every additional defendant in multiple defendant trials) and 5 challenges for a single defendant for the remaining

crimes (again adding one challenge per additional defendant in multiple defendant trials). The Weiss Report recommended that New Jersey not retain the disparity in the number of challenges provided to the defense and the prosecution. With regard to a disparity between the number of challenges permitted to the defense and the prosecution, forty of fifty-two jurisdictions (77%) provide an equal number of challenges to each side in trials of the more serious cases and fifty of fifty-two jurisdictions (96%) provide an equal number of challenges to each side in trials of the less serious cases.

In civil trials, the information from the National Center for State Courts shows that New Jersey is one of seven jurisdictions that permit 6 peremptory challenges. Only one state permits more challenges, with that number being 8. But of those other six jurisdictions that permit 6 challenges in civil trials, New Jersey is the only jurisdiction that has 6 deliberating jurors rather than 12 in those civil trials. Of the fourteen jurisdictions that have six person civil juries, ten allow only 3 challenges. The median number of peremptory challenges is 3 and the mean is 3.8. The Weiss Report recommended that the number of peremptory challenges in civil trials be limited to 3 per side but also proposed, as an alternative, that the number might instead be set at 2 per party in multiple-party civil trials.

In terms of another national measure, the American Bar Association's Standards Relating to Juror Use and Management (1993) provide in Standard 9(a) that peremptory challenges "…should be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury." Standard 9(e) then states that the number in civil cases with fewer than 12 jurors should not exceed 2 for each side (3 per side where there are 12 jurors in a civil trial; standard 9(c)). Standard 9(d)(ii) provides that the number of challenges should be 5 for each side when the possible sentence may be incarceration greater than six months (excluding capital trials). It is worth noting that the number recommended for capital trials is 10 for each side (Standard 9(d)(i)). The standards also call for allowing an additional challenge for every two alternates that are seated in either civil or criminal trials and for allowing the trial judge authority to allow additional peremptory challenges "when justified". Although not specifically included as a standard, the ABA standards provide for an equal number of challenges

per side in civil as well as criminal trials. (The ABA standards are included as an attachment to the Weiss Report, Appendix L.)

III. Findings

The Special Committee, as part of its review of peremptory challenges, undertook to obtain information from a number of different sources on issues relevant to its mandate. These efforts included seeking comment from attorneys, including attorneys who were Committee members, as well as attorneys not affiliated with the Committee, and from judges, including the presiding judges of the Criminal and Civil Divisions. The Committee, through its early discussions, identified a series of questions relating to ten specific voir dire practices and asked those questions of each of the groups noted above. Analysis of data from various sources was evaluated by a Subcommittee on Statistical Analysis chaired by C. Judson Hamlin, a retired Superior Court judge serving on the Committee as an attorney representing the Trial Attorneys of New Jersey.

Comments on Voir Dire Practices by Member Attorneys on Behalf of their Organizations

In his May 26, 2004 memorandum to members of the Special Committee who were representing attorney organizations, Judge Lisa requested information on voir dire practices, specifically asking these members, in furtherance of discussions at the Committee's May 10 meeting, "…to solicit reaction and comment from your respective constituents…" and report back. The memorandum asked for comment – favorable or unfavorable -- on the following ten voir dire practices, as well as any others deemed appropriate (See Appendix E):

- the use of written questionnaires
- jurors responding in writing as opposed to verbally
- trial judges' allowing attorneys to participate in initial questioning of jurors
- use of open-ended initial questions versus those requiring a yes or no answer
- initial questions asked individually rather than *en banc*
- whether trial judges permitted supplemental questions proposed by counsel
- whether the determinations regarding those supplemental questions were made on the record

- whether counsel were permitted to ask follow-up questions in court as opposed to only at sidebar or in chambers
- whether follow-up questions were open-ended
- whether attorney participation was permitted with respect to follow-up questions

The responses from attorneys were helpful in further identifying issues and working towards development of positions. The responses of attorney members are reproduced in Appendix F. With regard to the specific questions, the responses showed some interest in use of written questionnaires, but also a recognition that the attorneys would like to observe jurors' verbal replies to questions. There was not significant interest in attorney participation in initial questioning but there clearly was interest in attorney participation in follow-up questions and with regard to supplementing voir dire questioning. Responses reported varying experiences regarding judges' approval of supplemental questions. One report included a constituent comment that supplemental questions are approved so infrequently that the attorney now considers it to be "…a waste of time…" to continue to submit them. Attorneys noted significant interest in greater use of open-ended questions generally and certainly with respect to follow-up questioning. Several attorneys commented that some judges move voir dire too quickly and it was noted, in that regard, that such interest could also influence requests for open-ended questions, attorney participation, or other efforts to expand voir dire. The handling of challenges for cause prompted comments as well – noting that there is little uniformity among judges, even within vicinages, that judicial efforts to "rehabilitate" a juror are sometimes too extensive, and that time should not be wasted in convincing jurors to serve who have indicated a hardship in serving, or a substantial disinterest. The attorney comments also note an interest in greater uniformity in voir dire statewide, greater attorney participation, particularly in follow-up questioning and use of supplemental questions.

Comments on Voir Dire Practices by Attorneys

In addition to the request to attorneys representing organizations, the Committee also placed a solicitation for comment in the NJ Lawyer and NJ Law Journal asking about the same specific areas addressed to the organizations and the presiding judges

(See Appendix C). Sixteen attorneys responded. Most demonstrated a connection to ATLA and their responses were included within Abbott Brown's report, as ATLA-NJ's representative, to the Committee at its June 14, 2004 meeting and in his written response to Judge Lisa.

The individual responses included those made by the organizations but also included additional comments, such as: requesting equal numbers of challenges, per side, in multiple party civil trials; placing jurors under oath when they are questioned on areas of potential bias; asking voir dire questions intended to assist attorneys in exercising peremptory challenges, not just identify bias; and not having the trial judge participate in jury selection, as is the practice in federal court; asking "straight forward questions" about jurors' beliefs and notions about the civil justice system; and a comment from an attorney who disfavors the use of written questionnaires because the attorney: "…wants to hear a juror talking as much as possible." (See Appendix D).

Several letters from attorneys that were not submitted in response to the published notices were also received by the Committee Chair, and some letters to the editor from interested members of the bar appeared in legal publications. These were also considered.

Comments from Presiding Judges to the Chair's Question about Voir Dire Practices

The Chair also wrote to the presiding judges of the Civil and Criminal Divisions to ask the following question: "Has your Vicinage established standard voir dire and jury selection procedures which trial judges are required to follow?" (See Appendix G). Each of the responding judges noted that no standard practices had been established that were required to be followed, i.e., mandatory. There were two vicinages in which the Criminal presiding judge reported that there were standard procedures that had been developed in the vicinage over time and that were being substantially followed by the judges – but that they were not required. One of those responses included questions asked about jurors' newspapers, sports, and hobbies, and a summary question about any other reason why the juror could not serve in that case. (See Appendix H).

Amount of Time Required for Jury Selection

One of the issues raised in early Committee discussions was the impression of some attorneys that some judges rushed through voir dire out of concern for how long it would take. Judges noted that there was no pressure with regard to jury selection but noted an overall interest in efficiency and not taking unnecessarily long to complete jury selection. In order to address this issue, the Committee reviewed information regarding the amount of time required for voir dire, with that information coming from two sources: (1) data from actual jury selections that was obtained from court clerks by jury managers, with the cooperation of operations managers and trial judges; and (2) estimates provided by trial judges in response to questions on a survey of voir dire practices that was developed and distributed by the Special Committee with the approval of Judge Richard J. Williams, Administrative Director of the Courts. (See Appendix J and K).

The survey of judges regarding their voir dire practices included the following two questions that asked the judges' estimates of how much time was required to complete jury selection – both as to civil and criminal matters that were less complex as well as those that were more complex:

Question #20: In a relatively simple civil trial or a single defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the jury is empanelled)?

Question #21: In a complex civil trial, or a multi-defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the jury is empanelled)?

The Committee reviewed the responses to these questions, broken out by case type and by whether the case was relatively simple civil / single criminal defendant or complex civil / multiple criminal defendants. Question #20 produced valid responses from 73 judges assigned to the civil division and 47 judges assigned to the criminal division. Question #21 produced valid responses from 68 judges assigned to the civil division and 42 assigned to the criminal division. The median and mean responses times are provided below:

- Relatively simple civil trial

Median response was 90 minutes (1.5 hours)

Mean response was 91 minutes (1.5 hours)

- Single defendant criminal trial

  Median response was 150 minutes (2.5 hours)

  Mean response was 151 minutes (2.5 hours)

- Complex civil trial

  Median response was 210 minutes (3.5 hours)

  Mean response was 263 minutes (4 hours and 23 minutes)

- Multiple defendant criminal trial

  Median response was 300 minutes (5 hours)

  Mean response was 499 minutes (8 hours and 19 minutes)

In addition to the survey responses from trial judges, the Committee obtained information on jury selections as they occurred, beginning in July, 2004, through court clerks reporting that information to jury managers who then provided it to Committee staff. That information was reported when there was information from 263 civil trials (without a characterization of whether relatively simple or complex) and 142 criminal trials (without categorization of whether the trial involved one defendant or multiple defendants). The information available from that source showed the following:

- Civil trials

  Median response was 90 minutes (1 hour and 30 minutes)

  Mean response was 125 minutes (2 hours and 5 minutes)

- Criminal trials

  Median response was 165 minutes (2 hours and 45 minutes)

  Mean response was 224 minutes (3 hours and 44 minutes)

The Committee found that the information from the two sources was not only sufficiently similar but was in line with the general experience of members, including attorneys, although there clearly were instances in which jury selection took more time or less time than the results indicated above. In light of this information, and the fact that there were a decreasing number of trials in both divisions, the Committee determined that the amount of time required for jury selection should not be an issue with regard to ensuring that a thorough and complete voir dire is completed in each trial.

Judges' Responses to Voir Dire Survey

The Committee, as noted above, obtained approval to ask trial judges assigned to the criminal and civil divisions to complete a twenty-five-question survey pertaining to their voir dire practices. A copy of the survey and complete survey results are included in the appendix to this report. The survey was significant in a number of ways because the responses helped to direct the efforts of the Committee. For example, judges were asked to submit copies of standard questions that they were currently using for certain case types and the common questions among those selections, by case type, formed the first draft of the uniform jury selection questions. The responses also provided information on how judges conducted initial questioning of jurors, follow-up questioning and whether the judges permitted direct questioning by attorneys. The survey also provided estimates on how often attorneys exhausted their allotted peremptory challenges and judges' responses on the impact of R.1:8-3(f), requiring a conference regarding voir dire questions and attorney participation, made effective in September, 2000. Responses were received from 132 judges, which was 55% of the number of judges assigned to those divisions at the time that the survey was distributed. The responses were reviewed by the Committee, including by division and by category of response, and the key findings that helped drive Committee determinations and recommendations include those shown below:

- In response to Question #3 about displaying or providing a print copy of the standard questions to jurors, 64% of the responding judges stated that they never display the standard set of questions nor provide a print copy. The breakdown by division was that 68% of civil judges and 56% of criminal judges responded that they never display or provide printed copies of the questions. Overall, 26% of the responses indicated that they always take that action.
- In response to Question #4 about having jurors answer jury selection questions in writing, 81% of the responding judges stated that they never request voir dire responses in writing.
- In response to Question #9 about whether the judge reviews the complete set of questions with each juror (if not providing a print copy or displaying them), 52% stated that they always reviewed the questions with each juror. The responses

included that 61% of civil judges said that they always take that action but 45% of responding criminal judges stated that they never ask each juror each question.

- In response to Question #10 about how they initially questioned jurors, the civil and criminal judges each had a combined 85% response for the "*en banc*" and "individually in open court responses, with criminal judges' responses being 10% greater for *en banc.*
- 86% of judges (92% of criminal, 82% of civil) responded to Question #10 by stating that they always ask jurors a summary question such as "Given all you've heard, is there any reason why you believe that you cannot serve as a juror in this trial?
- In response to Question #13 asking about the nature of follow-up questions that are asked at voir dire, 67% of responding judges identified their questions as open-ended.
- Responding judges estimated, in response to Question #14, asking for an estimate of the percentage of trials in which attorneys propose supplemental questions, that they do so in 50% of trials – but that includes 75% of civil trials and 20% of criminal trials.
- In response to Question #15, the judges responded that where attorneys propose supplemental questions that they allow at least one of the questions in 90% of the trials.
- In response to Question #16, asking how often they allow attorneys to ask questions to jurors, after first approving supplemental questions, 74% of judges stated that they never permit attorneys to ask questions directly to jurors.
- Question #17 followed-up by asking how often attorneys declined to ask direct questions, when offered the opportunity, and the judges' responses were that in the limited number of such instances (35) no attorney had declined the opportunity.
- Question #22 asked – "If you were presiding over trials prior to the [R.1:8-3(f) amendment], have you experienced any change in practice as a result of the amendment?" and 92 judges responded (indicating they had trial experience before and after the rule amendment). Of those responding, 95% stated that

they had experienced no change. There were 35 criminal judges who responded to that question and none reported a change in practice as a result. However, 10% of civil judges did state that they experienced change following the enactment of the rule.

IV. Recommendations

Purpose -- These recommendations are presented to the New Jersey Supreme Court in response to the Court's mandate to the Special Committee. They are submitted for approval for the purpose of implementing procedures that will improve the quality of jury selection in a uniform and consistent manner for the benefit of trial judges, attorneys, litigants, jurors, and the justice system generally.

Recommendation 1

The Special Committee has developed proposed Jury Selection Standards for the purposes of improving jury selection and making it more uniform statewide. The Committee recommends that the Supreme Court approve these proposed standards. Upon approval, they should be distributed to all trial judges as a separate document in the following form, with the approved standard questions attached.

APPROVED STANDARDS FOR JURY SELECTION

Approved by the Supreme Court _____, 200_

The Supreme Court Special Committee on Peremptory Challenges and Jury Voir Dire has developed these standards. Part of the charge of the Committee is to make recommendations on ways to improve current jury selection practice. The Committee has discussed the issue extensively and elicited input from trial judges, organized bar association groups, and individual members of the bar. The Committee has reviewed case law, but, other than in capital cases, jury selection issues are infrequently the subject of reported decisions. From our discussions and review of information received, the Committee is of the view that jury selection practices now vary significantly from courtroom to courtroom and county to county.

The purpose of jury selection is to obtain a jury that can decide the case without bias against any of the involved parties, that will evaluate the evidence with an open mind, and that will apply the law as instructed by the judge. Voir dire practices must be geared to eliciting meaningful information from prospective jurors so those with a real potential for bias can be excused. The process should be designed to provide the

attorneys and judge with sufficient information to appropriately excuse jurors for cause. The process should also provide the attorneys with sufficient information to intelligently exercise peremptory challenges.

It should be noted that in many courtrooms, judges are currently conducting voir dire in a thorough and meaningful manner. However, some judges conduct the process in a more perfunctory manner, that is not properly geared to achieve the purpose of voir dire. In those courtrooms, a more expansive practice is required. The role of counsel in proposing questions and participating in the voir dire process should not be unduly restricted. Judges and counsel should be mindful that the jury selection process is an important part of the trial. Indeed, in the eyes of many attorneys, it is the most important part of the trial. Attorneys have also noted that they are more familiar than the court with the cases prior to trial and that their requests regarding voir dire should be duly considered for that reason.

Over the last decade or more, there have been in New Jersey several Committees and task forces that evaluated the number of peremptory challenges allowed in our trials. Recommendations have been made in each study to reduce the number. Each study has also recommended that improvements be made in the voir dire process, which would, in turn, reduce the need for the number of peremptory challenges currently permitted. Judicial education programs have been conducted, and some strides have been achieved in improving the process. But we believe that more should be done, although as stated, many judges conduct the process in an exemplary manner, which has been recognized by practicing attorneys.

The Committee has developed these standards for use in all civil and non-capital criminal trials. The standards incorporate and require use of features that are deemed reasonably suited to achieving a meaningful and thorough voir dire process. The standards will establish uniform practices, but retain a reasonable measure of flexibility and allow for an appropriate exercise of judicial discretion in the jury selection process. This process is a fluid one, and utilization of a rigid "script" would be counterproductive. There must be an ability for the trial judge and attorneys to deal with circumstances as they evolve during the process. Some degree of latitude to allow for variation in style is

acceptable~~,~~ so long as the essential ingredients of a thorough and meaningful voir dire are included.

Compliance with the standards requires accountability. Assignment judges and presiding judges shall be responsible for implementing, monitoring and assuring continued compliance with the standards.

The Committee believes that adherence to these standards will provide a sufficient measure of uniformity and predictability to the jury selection process throughout the State, will assure that the process is thorough and meaningful, and will allow for reasonable flexibility and exercise of judicial discretion. The Committee further believes that compliance with these standards will not add significant time to jury selection. Finally, compliance will further the interests of justice because jurors will be selected in a process that elicits sufficient meaningful information about jurors, their background, relevant views, opinions and life experiences to assure, as best we can, that they will be able to decide the case before them in a fair and impartial manner; and it will be a process which attorneys, litigants, and citizens called to jury service will recognize as sensible, serious, meaningful, and geared to its purpose, selection of a fair jury.

The Committee was also charged with recommending whether the number of peremptory challenges presently allowed should be changed. After careful consideration of the issue and much discussion and debate, the Committee has recommended substantial reductions, especially in criminal trials. A significant factor informing that recommendation is the anticipated improvement of the quality of the voir dire process that will be achieved by the implementation of these standards. The two work hand-in-hand. With improved and more expansive voir dire and more liberal excusals for cause, the need for peremptory challenges will be significantly diminished.

STANDARD 1. VOIR DIRE METHOD

> **The method chosen to conduct voir dire must assure a thorough and meaningful inquiry into jurors' relevant attitudes so the court and counsel can identify jurors who may possess a bias, prejudice, or unfairness with regard to the trial matter or anyone involved in the trial.**

Unlike some other jurisdictions, in New Jersey, the trial judge presides over and is responsible for the conduct of the jury selection process. The judge is vested with discretion in the manner in which the process is conducted. That discretion, however, is not unbridled and must be exercised in a manner that will achieve the important purpose of the process.

Our practice provides, in non-capital cases, that jurors shall be examined as follows: "For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion." R. 1:8-3(a). Two basic practices have evolved. Some judges, after calling the required number to the box, question those jurors en banc, with jurors raising their hands to respond in a particular manner as directed by the judge. Where appropriate, follow-up questions are posed to those jurors. Other judges, after calling the required number to the box, address each juror in turn, asking specific questions. Either method may be utilized, subject, however, to the following.

No method may rely on jurors' memory of questions previously posed to other jurors. Such a practice is unreliable in eliciting the required information from each juror. Each juror must be asked each question, either individually, en banc, or a combination of the two. Judges may, in their discretion, reduce the questions to written form (hand-out or easel) or projected form as an aid, but this may not serve as a substitute for orally asking each question to each juror.

Thus, for example, the originally-seated panel may be questioned en banc, with appropriate follow-up questions posed to those who respond affirmatively to particular questions. Additionally, as discussed in Standard 2, each juror who gets through the initial screening should be asked at least one or more open-ended questions intended

to elicit narrative responses. These questions, of course, must be directed to and answered by each juror individually. Also, each juror should be asked individually whether there is anything about the nature of the case or the participants in the trial that would make it difficult or impossible for that juror to judge the case fairly or impartially or whether there is anything in the juror's mind (whether or not covered by the questions) that the juror thinks the judge or attorneys ought to know about before deciding whether that juror should serve.

As jurors are excused, the newly-seated jurors must be questioned in the same manner. If, for example, three new individuals are seated at the same time, it is permissible to question those three as a group, with the same two exceptions as noted in the preceding paragraph. It is not permissible, however, as the sole basis for eliciting responses, to simply ask whether the newly-seated juror(s) heard the questions asked of previous jurors and would answer any of them differently. There is nothing wrong with posing that type of question as an initial inquiry, because it might elicit a response that results in an expeditious disqualification and thus conserve time. But if the question is utilized and does not result in disqualification, all of the questions must be posed.

The judge shall not pose the questions to the entire array, before seating the original panel in the box. The one exception to this prohibition is that for a particularly long trial, the judge may address the issue of hardship excusals to the entire array before seating the initial panel in the box. When addressing the array, the judge should inform jurors that it is important that, when called to the box, they answer all questions truthfully, accurately, and fully. The jurors should be told that if any question is of a personal or sensitive nature, they can simply ask that they discuss it with the judge (and attorneys) at sidebar.

After making the introductory comments to the array, including the remarks approved by the Supreme Court, the initial panel should be drawn and called to the box. At that point, the judge should instruct those remaining in the gallery to listen closely and carefully to the questions so that if one of them is called upon to replace an excused juror they will be able to bring to the court's attention the questions to which they would have answered yes. Then the judge should begin questioning the jurors seated in the box. As stated, under no circumstances should the questions be posed to

the entire array as a substitute for asking the questions to each juror in the box, nor may the asking of each question to each juror in the box be dispensed with before that juror is qualified.

Left to the judge's discretion is the extent to which sidebar discussions are conducted. Of course, when requested by a juror because of the sensitive or personal nature of the question, sidebar should be utilized. Sidebar should also be utilized when deemed appropriate to avoid discussion of subject matter that has the capacity to taint the remainder of the panel. Generally, however, the give-and-take in the process should be conducted in open court. Challenges for cause should be conducted at sidebar if requested by counsel.

The use of written questionnaires - i.e. those answered in writing by prospective jurors – is a permitted practice but should be used only in exceptional circumstances. This practice is routinely used in capital trials, where an extremely thorough voir dire is required to evaluate death-eligibility. These trials are very lengthy and the voir dire process usually spans several weeks or months, with jurors scheduled to return for voir dire on a specific date. The judge and attorneys typically receive and review the answered questionnaires in advance to enable them to prepare for the voir dire of each juror. In non-capital criminal trials and in civil trials, the time required and administrative burdens attendant to this practice are not generally warranted. If the process is rushed, without allowing the attorneys and judge time for advance review of the answered questionnaires, the process is inefficient and ineffective. In addition, the effort involved can be made unnecessary if counsel still want to observe the jurors responding verbally to questions in order to get a better “feel” regarding the jurors. The Committee has not received a widespread request for the use of this practice in routine cases. The practice should be used, in the judge's discretion, only in substantial, complex cases that require unusually probing voir dire and only where, in relation to the overall trial, the time and administrative burden are warranted.

STANDARD 2. STANDARD QUESTIONS

> **When questioning prospective jurors, the judge must include the model jury selection questions approved by the Supreme Court for that type of trial, which are attached hereto.**

The approved questions provide a common basis for voir dire questioning but are not intended to constitute all of the questions asked of jurors. These questions are intended as a base and are provided, at this time, for (a) all criminal trials, (b) all civil trials, and (c) additional questions for civil trials relating to (1) slip and fall cases, (2) auto cases, and (3) medical malpractice cases. Included within the model questions are inquiries of each juror whether he or she meets the juror qualifications set forth in N.J.S.A. 2B:20-1. Even though these questions are contained on the qualification questionnaire returned by prospective jurors and generally asked of jurors while in the juror assembly area, they are included here as a further safeguard to ensure that all trial jurors are fully qualified.

The model questions have been developed after extensive debate and discussion, and with particular attention to the specific wording utilized. In developing the model questions, the Committee had the benefit of standard questions that were submitted by trial judges in response to the Committee's survey of judges' voir dire practices.

As we have stated, judges are not required to follow a rigid "script." Therefore, while some deviation would not be objectionable, judges are encouraged to utilize the wording prescribed in the model questions. It is important that, as part of the process, each prospective juror who gets through the initial screening and appears to be potentially qualified must be asked one or more open-ended questions. Before being qualified, each juror has to be asked questions intended to have them open up and talk about such things as their background, their attitudes about the subject matter of the trial, their feelings about the court system generally, and the like. The jurors, in responding in narrative fashion to the variety of subjects presented in the question, will also provide important information by self-selecting what they choose to talk about. If a juror is not responsive, it is expected that the judge will again attempt to elicit a response to the summary question.

It is also important to ask appropriate follow-up questions where a "yes" response is given to standard questions. Intrusive questions, which unnecessarily invade the privacy interest of jurors, should be avoided.

The Committee recognizes that in some civil cases, the parties may wish to expedite the voir dire process, either because the nature of the case, in their view, does not warrant an extended process, because they are near settlement, or for any other reason. These are private disputes, and, with the consent of counsel and the approval of the judge, full use of the model questions in civil trials may be waived. Of course, the waiver discussion and determination should be on the record.

STANDARD 3. SUPPLEMENTAL QUESTIONS

> **Counsel shall be encouraged to submit relevant supplemental questions for the court's consideration at the pre-voir dire conference; the judge shall review all proposed questions and determine whether to include each one, setting forth the determination on the record.**

Supplemental questions are those not included in the model questions but relevant to the particular trial, including questions about trial issues, the parties, or other relevant issues. Supplemental questions should be submitted in writing and discussed and ruled upon at the pre-voir dire conference. R. 1:8-3(f). See also R. 4:25-7(b) (requiring in civil trials written submission of proposed voir dire questions.)

Supplemental questions should be balanced and neutral, should not be geared to "conditioning" the jury to a party's position in the case, and should not be duplicative or of limited relevance. However, it is desirable to include supplemental questions, proposed by the parties or by the court, which will assist in selecting a fair jury.

Many judges have accumulated a stockpile of supplemental questions they ask in particular circumstances. For example, in criminal trials, judges typically have certain questions they ask in trials involving drugs, sexual assaults, instances where the defendant and victim are of different races, etc. Such supplemental questions, of course, are appropriate and should be included. Attorneys, with knowledge of the

expected evidence, may be aware of issues of which the judge is not aware and which should be explored in the voir dire. This circumstance often leads to important supplemental questions. The other side of the coin is that attorneys sometimes present to the court a long list of boilerplate proposed supplemental questions, many or most of which are repetitive, of little significance or relevance to the case, etc. When presented with such proposals, judges are understandably not receptive. Attorneys should tailor their proposed supplemental questions to the case, with a view to model questions to avoid repetition, and they should keep the questions neutral and balanced.

STANDARD 4. ATTORNEY PARTICIPATION

> **At the discretion of the trial judge, if requested by counsel, at least some participation by counsel in the questioning of jurors should be permitted.**

Since 1969, the conduct of jury voir dire, which had previously allowed extensive attorney participation, has been primarily in the hands of the trial judge. State v. Manley, 54 N.J. 259 (1969). There is no suggestion that we should revert to the pre-Manley practices or anything close to them. During the Committee's work, there has been no outcry from the bar to allow attorney participation. Some practitioners have requested at least some involvement. R. 1:8-3(a) allows attorney participation, and R. 1:8-3(f) requires discussion of the practice, if requested by counsel, during the pre-voir dire conference.

The admonitions of the Court in Manley are as true today as they were thirty-six years ago. The undue consumption of time and the undesirable practice of juror indoctrination as consequences of attorney participation must be avoided. The judge should continue to exercise the primary role in questioning jurors.

The Committee encourages the allowance of some attorney participation if requested. But whether to allow it and, if allowed, the manner and scope of the practice remain discretionary with the trial judge. The most common aspect of attorney participation utilized by some judges involves follow-up questions. This occurs mostly

at sidebar, but sometimes also in open court. When a prospective juror is called to sidebar, it is typically to discuss an issue that calls for follow-up questioning. This fluid process makes subsequent questions appropriate based upon answers given by the juror. Attorneys should be permitted, if they wish, to participate in these sidebar discussions with jurors. Typically, sidebar discussions are more conversational and much less formal than colloquy that is conducted in open court. With the court's permission, they should also be permitted limited participation in follow-up questioning in open court.

Greater restraint should be placed upon requests for attorney participation in initial questioning. In this regard, all of the initial questions will have been resolved in the pre-voir dire conference, and there is no demonstrable reason why the questions would be better posed by counsel than by the judge. This remains a discretionary issue, but the Committee does not envision widespread use of attorney participation in initial questioning.

STANDARD 5. CHALLENGES FOR CAUSE

> **Jurors should be excused for cause, either by the court sua sponte or upon a party's request, when it appears that it will be difficult or impossible for the juror to be fair and impartial in judging the case.**

The Committee has found that in courtrooms where judges liberally grant challenges for cause, the jury selection process moves along more quickly, the use of a large number of peremptory challenges is avoided, and the parties' satisfaction with the final composition of the jury is high. While the appropriate legal standard should be applied for excusing a prospective juror for cause, liberality is encouraged. Judges should avoid extensive efforts to "rehabilitate" a juror or to reject reasons given implicitly or explicitly by the juror for not serving, recognizing that such efforts indicate that there are significant issues about that juror. When there is something particular about the juror that raises a red flag in a particular case type (e.g. a police officer in a criminal case, a nurse in a medical malpractice case, etc.), follow-up questioning should be

sufficiently probative to ferret out the ability of the individual to fairly judge the case; merely asking whether, notwithstanding the apparent impediment, he or she could be fair and impartial, with a conclusory answer, is not sufficient. Jurors who express hardship problems (childcare issues, absence from work without pay, etc.) should be liberally excused, particularly where the trial is anticipated to require more than two or three days or extend into the following week.

As noted, the Committee has recommended substantial reductions in the number of peremptory challenges allowed, especially in criminal trials. With fewer peremptory challenges available, excusals for cause are more important. There has been a practice, at least implicitly, in which judges have withheld excusals for cause where the issue is reasonably debatable because the attorney seeking the excusal has a large number of peremptory challenges available. With the reduction in the number of peremptory challenges, this practice must end. "As the defendant approaches the exhaustion of his or her peremptory challenges, the trial court should become increasingly sensitive to the possibility of prejudice from its failure to dismiss the juror for cause. That heightened sensitivity should lead to a more generous exercise of discretion as defendant approaches the exhaustion of his or her peremptory challenges." State v. Bey, 112 N.J. 123, 155 (1987). With the reduced number of peremptory challenges available, judges should be more liberally disposed to excusing jurors for cause where the issue is a close one.

Trial judges are given substantial deference in their determination of the suitability of individuals to serve as jurors. This is because the judge is, in effect, making a credibility determination whenever there is a cause challenge. Obviously, if the juror says that he or she cannot judge the case fairly, the juror will be excused. It is in those cases where the jurors give the "right" answer, i.e., that they can be fair, where the judge must evaluate the reliability of that answer in light of all of the other answers the juror has given, the juror's background, and the juror's demeanor. Judges must not mechanistically accept the "right answer" if it is placed in significant doubt by the other relevant circumstances.

Recommendation 2

> **The Special Committee recommends that the Supreme Court establish a standing committee, suggested to be called the Committee on Jury Selection in Criminal and Civil Trials, to provide continuing oversight of this important area – first with respect to the implementation of any approved Special Committee recommendations and, thereafter, to continue to work to assure uniformity in statewide practices. Several specific standing committee responsibilities are identified in the discussion accompanying this recommendation and in subsequent recommendations.**

The Committee recognizes that the recommendations it is proposing will, if approved, require substantial change in jury selection procedures. It recognizes, as well, that jury selection, as a critical part of a jury trial, will benefit from greater uniformity in practices statewide. For those reasons, the Committee recommends that the Court establish a new standing committee devoted to jury selection. The mandate of the proposed committee will be, initially, the oversight of the implementation of recommendations approved by the Court, and its later efforts will be directed towards continuing that oversight as that process advances, in order to assure statewide uniformity in this area, address new jury selection issues that arise, coordinate its work with related committees, where appropriate, and provide a ready forum for review of any proposed changes that may be generated by court decisions, committee recommendations, or other proposals.

The Committee believes that a new committee, separate from the Criminal and Civil Practice Committees, will provide an appropriate focus on jury selection and assure that any issues relating to this area are able to be addressed in a timely manner by a group that will have the opportunity to develop an expertise with respect to jury selection issues, as well as a relationship among the members. The membership of the proposed committee should include judges and attorneys who have significant jury trial experience, who represent relevant attorney organizations, and whose work covers both the criminal and civil areas. It is recommended that the group be known as the Committee on Jury Selection in Criminal and Civil Trials, a title that will indicate that its scope is not limited to either trial type. It is also recommended that the proposed

committee have close association with the Civil and Criminal Practice Committees so that efforts can be coordinated where practical and so that the groups can prevent duplication of effort where similar issues or interests are involved. The new committee would have no jurisdiction regarding capital trials, which would remain under the auspices of the Trial Judges Committee on Capital Causes.

Recommendation 3

> **The Special Committee recommends that the Supreme Court authorize the development of a jury selection manual that will address the specifics of jury selection for judges and attorneys.**

This Committee believes that it is necessary to create greater uniformity in jury selection procedures being used throughout the state. For that reason, it has made several recommendations for efforts that will assure more uniform jury selection practices. The recommendation for the development of a jury selection manual is another effort that is intended to help develop the greater uniformity in procedures and the greater consistency in practices that was noted so often by attorneys in Committee discussions and comment to survey instruments. The Committee believes that the development of a jury selection manual, drafted in a cooperative way by judges and attorneys, in a manner similar to the development of the Manual for Capital Causes, will significantly advance the greater procedural uniformity and consistency sought by the Committee by providing trial judges and attorneys with guidelines relating to jury selection practices.

It is contemplated that the standing committee will continually update the manual based on experience with implementation of the jury selection standards and use of the standard questions and suggestions from the bench and bar. The manual will also be updated with relevant court decisions and other authorities.

The Committee believes the manual will constitute a valuable reference source for judges and attorneys.

Recommendation 4

> **The Special Committee recommends that the Supreme Court authorize the proposed Committee on Jury Selection in Criminal and Civil Trials (Recommendation 2, above) to be responsible for proposing any revisions to the standard jury selection questions that are included within the Jury Selection Standards proposed in Recommendation 1. That responsibility will include any changes to questions that are approved, as well as expansion to cover additional case types beyond those contained in the standards.**

Much thought and effort went into the drafting and refining of the standard questions, which are included as Attachments 1 and 2. Judge Linda G. Baxter, Criminal Presiding Judge of the Camden Vicinage, chaired the Standard Jury Selection Questions Subcommittee. The subcommittee included criminal and civil judges and attorneys representing plaintiffs and civil defendants and prosecutors and criminal defendants. Judge Lisa also participated in discussions along with Committee staff. The subcommittee met several times and drafted questions addressing the concerns of all elements. It was a cooperative effort, and the questions represent a consensus, common ground agreement.

The entire Committee analyzed and discussed the questions at several meetings, making various revisions before the final versions were approved. The Committee believes the questions are balanced and fair and provide a good baseline to elicit relevant information from prospective jurors. Of course, supplementation is encouraged, and appropriate follow-up questioning is necessary.

Some judges on the Committee used them and distributed them to judges in their vicinages for use. All feedback was very favorable. The Committee believes these standard questions provide an excellent foundation for their intended purpose.

The Committee recognizes that the proposed standard jury selection questions, if approved, will need to be revised, modified, supplemented, or re-evaluated on an ongoing basis – to either address changes necessitated by court decisions, statutory revisions, changes in court rules, or in order to remain viable and effective. Additionally, there may be interest in expanding the current set of specific additional questions to include further civil case types or criminal case types. Subject to approval by the Court, the new standing committee should be assigned the responsibility for this task.

The Committee makes this recommendation at this time in an effort to address this matter at this early point in order to avoid any later confusion or delay.

Recommendation 5

> **The Special Committee recommends that the Supreme Court approve a jury selection training program for judges that will include separate program components covering not only the existing program that is conducted for new judges and programs that may be conducted at the annual New Jersey Judicial College, but also a training program component that will provide for continuing education of judges assigned to the civil and criminal divisions.**

The Special Committee is aware that the Judiciary covers jury selection in the training program provided for new judges and that it sometimes includes courses involving jury selection in its annual Judicial College. The Committee believes, however, that judicial training programs should be augmented and upgraded with regard to jury selection, particularly with regard to specific courtroom practices.

It is recommended that the proposed standing Committee on Jury Selection in Criminal and Civil Trials, proposed above, be charged with the responsibility to make recommendations regarding the materials and other relevant matters relating to judicial training programs, including the program for new judges and Judicial College courses. It is recommended, as well, that the proposed Committee work with those currently engaged in that area within the Administrative Office of the Courts, especially those who organize the annual Judicial College, with regard to courses and course materials. It is also recommended that these ongoing efforts be expanded to include an additional training resource for judges that will provide access to materials during the remainder of the year. In this regard, it is recommended that consideration be given to the development of a program, subject to any technical limitations, that will permit trial judges to review courtroom videotape of their jury selections, or jury selections by other judges, for the purpose of self-evaluation and continuing education with regard to jury selection procedures and techniques.

Recommendation 6

> **The Special Committee recommends that the Supreme Court direct the proposed Committee on Jury Selection in Criminal and Civil Trials to develop a jury selection training program for attorneys.**

Although attorneys have generally indicated a desire and willingness to participate in juror questioning during jury selection, either in initial questioning or in follow-up questioning, many have expressed reluctance because they have not had experience in this area. Judge-conducted voir dire has been in place in New Jersey since State v. Manley 54 N.J. 259, (1969), and most attorneys are not experienced in questioning jurors at voir dire since it has not been done in New Jersey since that time.

This effort can be coordinated with interested groups, such as the Institute for Continuing Legal Education, but it is recommended that the Court direct the proposed Committee on Jury Selection in Criminal and Civil Trials, if approved, to develop the content of the training and its general development -- in recognition of the attorneys' role in jury selection. The program would be directed at informing attorneys regarding jury selection information, particularly with respect to new items such as the proposed manual and the proposed jury selection standards.

Recommendation 7

> **The Special Committee recommends that the Supreme Court approve a rule change that will expand the pre-trial voir dire conference required by R.1:8-3(f) to also include:**
>
> - **Submission in writing by attorneys of proposed voir dire questions; and**
> - **Require the trial judge to rule on the proposed questions on the record.**

The current R.1:8-3(f) states the following:

> *(f) Conference Before Examination.* Prior to the examination of the prospective jurors, the court shall hold a conference on the record to determine the areas of inquiry during voir dire. If requested, the court shall determine whether the attorneys may participate in the questioning of the prospective jurors and, if so, to what extent. During to (sic) course of the questioning, additional questions of prospective jurors may be requested and asked as appropriate under the circumstances.

The Committee recommends that the court rule be amended to include a requirement that attorneys submit, in writing, proposed voir dire questions and the judge rule on the questions on the record. The civil rules already contain such a provision, see R. 4:25-7(b), but there is no such provision in the criminal rules. The requested amendment will require the judge to rule on the proposed questions on the record. Although there is no need for an extended dissertation, reasons should be given, see R. 1:7-4. Proposed questions might be rejected, for example, because they are repetitive, irrelevant, unduly inflammatory, unduly intrusive to the jurors' privacy, of limited significance, or any other justifiable reason. Proposed questions may be combined with others, either standard or supplemental. As stated in the proposed jury selection standards, appropriate requests should be granted. If there is an objection, the reasons for allowing the questions should be stated.

In making this recommendation, the Committee is responding to members' interests in specifying that attorneys submit proposed questions no later than at the conference and that trial judges memorialize the determinations they make at the conference by stating them on the record at its conclusion. Attorneys, including members, commented that judges do not always note their conference determinations on the record. Some attorneys commented that the lack of response to the proposed

questions and general lack of approval of questions created a reluctance to continue to submit questions at the conference.

The Committee has drafted proposed language to accomplish the changes that it has proposed be made to R.1:8-3(f):*

> *(f) Conference Before Examination.* Prior to the examination of the prospective jurors, the court shall hold a conference on the record to determine the areas of inquiry during voir dire. Attorneys shall submit proposed voir dire questions in writing in advance. If requested, the court shall determine whether the attorneys may participate in the questioning of the prospective jurors and, if so, to what extent. During [to] the course of the questioning, additional questions of prospective jurors may be requested and asked as appropriate under the circumstances. The judge shall rule on the record on the proposed voir dire question and on any requested attorney participation.

**Note*: *Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.*

Recommendation 8

> **The Special Committee recommends the reduction of the number of peremptory challenges in criminal trials to 8 challenges for a defendant being tried alone, with 6 challenges permitted to the State. Where there are multiple defendants, each defendant will be permitted 4 peremptory challenges, with the State permitted 3 challenges for each defendant.**

Note: The Committee has drafted proposed new language to accomplish the revisions to R.1:8-3 and N.J.S.A. 2B:23-13 that will be required in order to effect this change. Those proposed revisions are included following the discussion below.

In order to fully address the complexities in the current rule and statute relating to peremptory challenges in criminal trials, including the numbers currently authorized, the Chair appointed the Criminal Issues Subcommittee and asked Judge Frederick J. DeVesa, Criminal Presiding Judge in the Middlesex Vicinage, to chair that group. The subcommittee included three judges (including the Chair), the members representing the County Prosecutors' Association, the Office of the Public Defender, and the New Jersey Defense Association, and requested the assistance of the Assistant Director for the Criminal Practice Division within the Administrative Office of the Courts, Joseph J. Barraco, Esq., who had worked with the Criminal Practice Committee for a number of years. Judge Lisa also participated in discussions along with Committee staff. The subcommittee had the benefit of discussions that had taken place at meetings of the full Committee and, after several meetings, recommended the following to the full Committee: (1) that there should no longer be different numbers of peremptory challenges authorized based on the crime charged; (2) that there should no longer be a disparity between the number of challenges provided to the defense and to the State; and (3) that there should no longer be fewer challenges provided where a foreign jury is ordered. The subcommittee recommended 6 peremptory challenges for each side in a one-defendant trial. In multi-defendant trials, each defendant would get 3 and the State would get 3 per defendant.

When it considered the recommendations of the subcommittee and the underlying issues, the full Committee made the determinations shown below, which are

reflected in Recommendation 8, agreeing with some of the recommendations but coming to a different determination with regard to others.

The number of peremptory challenges in criminal trials merits a reduction, especially in light of the changes proposed by this Committee with regard to how voir dire is conducted.

The Supreme Court clearly identified the focus of the Committee in its mandate as well as its title. It was to focus on peremptory challenges and voir dire – two areas identified by earlier committee and conference reports as being closely linked. The Committee, early in its efforts, identified voir dire as its initial focus and the actions that it has proposed will, if approved, provide for uniform jury selection procedures, including a set of uniform voir dire questions, a set of standards that cover areas such as attorney participation and granting cause challenges, education programs for judges and attorneys, a standing committee devoted to voir dire, and that committee's development of a voir dire manual.

The Criminal Issues Subcommittee, following a strongly contested discussion, recommended that both the defendant and the State, where the defendant is being tried alone, receive 6 peremptory challenges. Discussion of that recommendation at the full Committee resulted in a draft recommendation for 6 challenges for the defendant and 4 challenges for the State when a defendant is tried alone. Because some members were unable to attend the meeting at which these votes were taken, the Chair agreed to provide the opportunity for reconsideration at the next meeting. That reconsideration resulted in this recommendation that the defense receive 8 peremptory challenges and the State 6 peremptory challenges when a defendant is tried alone. It is not surprising that there are opposing views on the issue of whether to reduce the number of peremptory challenges in criminal trials, but it should be stated that the disagreement appears to not be the result of blind adherence to established positions but instead appears to be a sincere difference in viewpoints. Judges noted the numbers of jurors not questioned at voir dire and described the disappointment shown by many jurors who are dismissed through the exercise of a peremptory challenge as well as the numbers who are assigned to voir dire but not reached for questioning. Attorneys have

commented that their concern is with the jurors selected to sit on the trial and not those challenged or not questioned.

Data from judge surveys and actual jury selections are consistent in pointing out that attorneys usually do not exhaust their allotted challenges. Attorneys' opposition to reducing the current number of challenges is rooted in the belief that the system is working well, producing good results, and therefore does not require the proposed change. But judges, when viewing that same data tend to focus instead on the fact that large numbers of jurors are not questioned at voir dire, that those dismissed through the exercise of a peremptory challenge are often angry, disappointed, and view the trial process and the justice system in a negative way. They are concerned about eroding public confidence in the justice system when more jurors experience that part of the trial process than serve on trials. Data from 389 criminal trials from September 2004 through January 2005 shows that there were an average of 26 jurors sent to each voir dire who were not questioned during jury selection. The same data shows that the average number dismissed through the exercise of peremptory challenges (by both sides) was 12. Therefore, 38 jurors were either not questioned or removed by peremptory challenge at the typical trial during this period. Another 21 jurors were challenged for cause in the average trial and 14 were selected to sit as jurors at trial.

The impact of the proposed change will be to reduce the number of peremptory challenges in single defendant trials for enumerated crimes from 32 challenges to 14, a difference of 18 challenges per jury selection. In single defendant trials for other crimes, the number of challenges will be reduced from 20 challenges to 14. There were 1,489 voir dires initiated during calendar 2004 for criminal trials. Because there is no breakdown available that shows which voir dires involved enumerated crimes (18 fewer challenges per voir dire) and which involved trials for other crimes (6 fewer challenges per voir dire) or how many defendants were being tried, the impact of these proposed changes can only be estimated. But even if all trials are assumed to involve a single defendant and half were for enumerated crimes and half were not, an estimated 17,862 fewer juror days would be needed for voir dires in a typical year if the proposed changes were made. Additionally, the proposed reductions will also result in a reduction in the number of persons summoned to report as jurors since approximately 1 out of 3

persons summoned, based on experience, meets the statutory qualification criteria to serve as a juror and can serve on the summons date. Therefore, the above estimate translates to about 54,000 fewer citizens per year who would have to be summoned for jury duty, attributable to criminal trials alone.

There should no longer be different numbers of peremptory challenges authorized based on the crime charged.

There presently is a two-tier system in which the defendant gets 20 peremptory challenges and the State gets 12 for crimes deemed more serious; and the defendant and the State get 10 peremptory challenges each for the less serious crimes. The Committee determined that the two-tier system should be eliminated, and the same criteria should apply for all indictable offenses (except capital offenses, which are not part of the Committee's consideration). Elimination of the two-tier system is appropriate because: (1) with offense-specific and other mandatory sentencing provisions, many of the so-called less serious offenses carry much more substantial penalties than those deemed more serious; and (2) even if an effort were made to establish more rational classifications in each tier, procedures designed to select a fair jury and provide the parties with a fair trial should be equally applicable in all criminal trials. It is incongruous to suggest that the process should be "more fair" in more serious cases. If the process is fair, it is fair. Further, the number of peremptories allowed in New Jersey for the more serious cases is very far out of the national mainstream and most in need of reform by substantial reduction.

There should continue to be a disparity in the number of peremptory challenges permitted the defense as compared to the prosecution.

Notwithstanding the fact that the Committee identified significant changes that evolved within the criminal justice system over the many decades since the numbers of peremptory challenges were originally set, including provision of counsel for indigent defendants, expansion of the jury pool to include additional persons who are more likely to identify with criminal defendants, societal attitudes that are generally less favorable to law enforcement and government than in past times, and greater legal protections for

the accused, such as the inadmissibility of confessions or suppression of evidence, a majority of the Committee held to the view that there remains some residual advantage to the State in a criminal trial. For those reasons, and in recognition that the right to trial is a right possessed by the criminal defendant, the Committee determined that defendants should receive more peremptory challenges than the State.

The lesser number of peremptory challenges provided for trials involving a foreign jury should not be retained.

As noted above, the current court rule provides for 5 peremptory challenges per side where there is a foreign jury. The Committee does not believe that there is a basis for continuing the lesser number provided to defendants when tried with a foreign jury. Further, except in capital trials, the foreign jury practice is rarely utilized. Indeed, no Committee member has ever seen or heard of it being used in a non-capital trial.

Proposed Revisions to N.J.S.A. 2B:23-13b and c:*

Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

[b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized.]

b. Except as provided in c., in any criminal action where a defendant is tried alone, the defendant shall have 8

peremptory challenges and the State shall have 6 peremptory challenges. Where defendants are tried jointly, each individual defendant shall have 4 peremptory challenges and the State shall have 3 peremptory challenges for each defendant being tried.

[c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.]

c. In any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized, the defendant shall have 20 peremptory challenges if tried alone and 10 if tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any such case.

Proposed revisions to: R. 1:8-3(d):*

Number of Peremptory Challenges

(d) Peremptory Challenges in Criminal Actions. [Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants.] In any criminal action where a defendant is tried alone, the defendant shall have 8 peremptory challenges and the State shall have 6 peremptory challenges. Where defendants are tried jointly, each individual defendant shall have 4 peremptory challenges and the State shall have 3 peremptory

challenges for each defendant being tried. Provided, however, that in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized, the defendant shall have 20 peremptory challenges if tried alone and 10 if tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly; and in such cases, the trial court, in its discretion, may increase proportionally the number of peremptory challenges available to the defendant and the State. The trial judge shall have the discretionary authority to increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized. [When the case is to be tried by a foreign jury, each defendant shall be entitled to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.]

**Note: Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.*

Recommendation 9

The Special Committee recommends the reduction of the number of peremptory challenges in civil trials to 4 per party.

Note: The Committee has drafted proposed new language to accomplish its proposed revisions to R.1:8-3(c) and N.J.S.A. 2B:23-13. Those proposed revisions are included following the discussion below.

The issues relating to the number of peremptory challenges in civil trials are not as complex as with criminal trials and the Chair did not establish a separate subcommittee to review issues relating to civil voir dires. The 6 challenges provided in civil trials have, like the numbers in criminal trials, been in place for many years. It was noted that there was no adjustment made to the number of challenges when the court rule was revised to reduce the number of deliberating jurors from 12 to 6 in nearly all civil trials. That revision significantly increased the impact of peremptory challenges in civil trials because a party then had 6 peremptory challenges for 6 seated jurors as compared to formerly having 6 challenges for 12 seated jurors.

Data available for 673 voir dires conducted in civil trials during the period from September 2004 through January 2005 showed that the average voir dire panel consisted of 43 jurors and that 11 were challenged for cause, 6 were challenged through the exercise of a peremptory (3 per side), 8 were seated, and 18 were not questioned. The responses from judges to the Committee's voir dire survey and Committee members' responses also supported the data with respect to the fact that parties rarely exhausted their peremptory challenges. The Committee in its initial vote on the recommended number of peremptory challenges in civil trials set that number at 3 per party but after further discussion and reconsideration, the Committee recommends that the number be set at 4 peremptory challenges per party, regardless of the number of parties. Part of the consideration in this regard was the Committee's recognition of attorney members' assertion that they retain a challenge during jury selection in almost all trials "just in case" and that the data confirmed that they rarely exhaust their challenges. The Committee agreed to provide an additional challenge, moving to recommending 4 per party, in recognition of that point and other issues raised in discussion. According to the National Center for State Courts' information on the

numbers of peremptory challenges (see Appendix B), only 10 of 52 jurisdictions have more than 4 challenges in civil trials. Fourteen jurisdictions currently provide 4 challenges in civil trials; twenty-six jurisdictions provide 3; and two jurisdictions provide 2.

It was also made clear during discussions of the appropriate number that greater uniformity in judges' granting of challenges for cause would make it less necessary to use peremptory challenges to remove jurors about whom they have concerns. The impact of allowing fewer peremptory challenges in civil trials cannot be fully assessed because no data is available on the number of parties participating at trial, but allowing 2 fewer challenges per party, even where there are only two parties at trial, will mean 4 fewer peremptory challenges per trial, or 8,668 fewer challenges in a typical year based on the number of civil voir dires initiated during calendar 2004. Applying the experience-based ratio of approximately 3 summoned jurors to each qualified juror, this translates to about 26,000 fewer jurors who would have to be summoned for jury service, attributable to civil trials alone.

Proposed Revisions to N.J.S.A. 2B:23-13a:*

Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. [In any civil action, each party, 6.] In civil actions each party shall be entitled to 4 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

Proposed Revisions to R. 1:8-3(c):*

Number of Peremptory Challenges

(c) Peremptory Challenges in Civil Actions. In civil actions each party shall be entitled to [6] 4 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

**Note:* *Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.*

Note: If Recommendation 10 is approved, the additional revisions to N.J.S.A. 2B:23-13a and R. 1:8-3(c), as set forth under that Recommendation, will be required.

Recommendation 10

> **The Special Committee recommends that the Supreme Court approve its proposed revision to R.1:8-3(c) that will authorize the trial judge to also be able to decrease the number of peremptory challenges available to the parties (as well as increase that number), when the judge has determined that it is appropriate to adjust the number of peremptory challenges in multiple party trials.**

The language of R.1:8-3(c) is the following:

> *(c) Peremptory Challenges in Civil Actions.* In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

During its discussions relating to the issue of the appropriate number of peremptory challenges in civil trials where there are multiple parties involved, the Committee determined that the portion of the rule that allows the court to provide additional challenges in order to avoid unfairness with regard to the number of challenges that are authorized, in response to a party request, should be amended to also permit the court to reduce the number otherwise provided. The Committee intends this change to provide an alternative. Instead of being limited to addressing unfairness only by increasing the number of peremptory challenges (as currently permitted), the proposed revision would allow the court to also decrease the number of challenges in order to address unfairness. This alternative will give trial judges greater flexibility and will be particularly useful in trials with numerous parties.

The Committee included the following provisions in its recommended revisions to the court rule: (1) that where the court reduces the number of peremptory challenges that it provide an equal number to each party on that side; and (2) that where the court reduces the number of peremptory challenges in order to avoid unfairness, that it not reduce the number of challenges to fewer than three per party.

The Committee makes this recommendation independent of its recommendation to change the number of peremptory challenges authorized in civil trials. The proposed revisions shown below do not presume approval of its recommendation that the number of peremptory challenges authorized to the parties be reduced to four challenges.

The Committee proposes the following revisions to R.1:8-3(c):*

> *(c) Peremptory Challenges in Civil Actions.* In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, [accord the adverse party such additional] increase or decrease the total number of peremptory challenges as it deems appropriate in order to avoid unfairness to the [adverse party] parties. Where the court decreases the number of peremptory challenges, each party on one side shall be accorded an equal number of challenges, which shall not be fewer than 3 for each such party.

The Committee proposes the following revisions to N.J.S.A. 2B:23-13a:*

Peremptory challenges

> Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:
>
> a. [In any civil action, each party, 6.] In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, [accord the adverse party such additional] increase or decrease the total number of peremptory challenges as it deems appropriate in order to avoid unfairness to the [adverse party] parties. Where the court decreases the number of peremptory challenges, each party on one side shall be accorded an equal number of challenges, which shall not be fewer than 3 for each such party.

<u>Note</u>: Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.

<u>Note:</u> If both Recommendations 9 and 10 are approved, the proposed statutory and rule changes shall be combined.

V. Conclusion

The areas of inquiry entrusted to the Special Committee – peremptory challenges and jury voir dire – are not new territory for review, as noted in the Court's mandate. A number of groups have, in earlier reports, recommended reducing the number of peremptory challenges permitted in New Jersey and there continue to be calls for that action. Peremptory challenges are not established constitutionally. They are, however, authorized by both statute and court rule in New Jersey and have been in existence, in the numbers currently provided, for more than one hundred years. Every state provides for some peremptory challenges, but the number of challenges authorized in New Jersey, in both criminal and civil trials, are the highest, or among the highest, in the nation.

The Supreme Court, in directing the Committee's efforts to the evaluation of peremptory challenges and voir dire, recognized that the relationship of challenges and voir dire practices is the one that the Committee would need to address in order to advance its efforts. The Committee, in its initial sessions, focused its efforts on voir dire practices. In order to obtain information, it solicited comment from attorneys and presiding judges on specific voir dire practices, surveyed judges assigned to the criminal and civil divisions on their jury selection methods, collected and reviewed data on how long it took to complete voir dire, and engaged in lengthy discussion among its members about their collective experiences with jury selection. It learned from both judges and attorneys that there are no standard voir dire practices in the vicinages. But it also learned that attorneys, as well as judges, desire greater certainty regarding how voir dire will be conducted statewide. It learned, as well, that attorneys desire more expansive questioning of prospective jurors (including open-ended questions), full consideration of supplemental voir dire questions they submit, more opportunities to participate in jury selection (particularly with regard to follow-up questions), and greater consistency regarding granting of challenges for cause. Attorneys noted that their interest in retaining the current numbers of peremptory challenges is in order to protect their clients against what they see as questioning that may fail to discern juror bias or provide insufficient information on which to base the exercise of peremptory challenges.

In its recommendations, the Committee has addressed the interests of attorneys and judges through recommendations that include: proposed jury selection standards (including uniform questions, some participation by counsel in questioning, and liberal granting of cause challenges within legal standards), establishing a standing Supreme Court committee devoted to jury selection, a jury selection manual, voir dire training for judges and attorneys, expansion of the R.1:8-3(f) conference, and allowing the court to also decrease total challenges in multi-party civil trials. It also recommends reducing the number of peremptory challenges in criminal and civil trials.

The Committee believes that its recommendations will significantly improve jury selection practices statewide, that those practices will offset fewer peremptory challenges, and that the reduced impact on jurors (particularly those who will no longer sit unquestioned in a courtroom) will promote greater juror satisfaction and greater respect for the justice system among those citizens who serve as jurors.

STANDARD JURY VOIR DIRE

(CRIMINAL)

When the trial will last more than a week or two, the Committee recommends that judges consider asking the hardship question (which is #2 below) before any of the substantive questions. This will allow an early excusal of jurors who will be unable to serve on a lengthy trial, thereby enabling them to become available to other courtrooms picking juries. (Otherwise, it can be asked toward the end).

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:
    - Age 18 or older
    - A citizen of the United States
    - Able to read and understand the English language.
    - A resident of _____ county (*the summoning county*)

    Also, a juror must not:
    - Have been convicted of any indictable offense in any state or federal court
    - And must not have any physical or mental disability which would prevent the person from properly serving as a juror.

    Is there any one of you who does not meet these requirements?

2. a. This trial is expected to last for _____ to _____ weeks. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?

   b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

   c. Is there anything that would make it difficult for you to sit, listen or deliberate for two hours without a break?

3. *Introduce the lawyers and the defendant.* Do any of you know either / any of the lawyers? Has either / any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr. / Ms _____?
   Name of defendant

4. *Read names of potential witnesses.* Do you know any of the potential witnesses?

5. I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?

6. Are any of you familiar with the area or address of the incident?

   a. If yes, can you sit and decide this case based solely on the evidence admitted during the trial and the law as explained to you by the Court and not on any impression gained from prior knowledge?

7. Have you ever served on a jury before today, here in New Jersey or in any state court or federal court?

   If yes: Was it a Civil or Criminal trial? When? What type of case was it? Were you a deliberating juror? Was there anything about the trial, the jury deliberation process or anything you may have learned afterward that would interfere with your ability to be fair and impartial as a juror in this trial?

8. Have you ever sat as a grand juror? When?

   If the answer is yes: Do you realize that the duties as a member of a petit jury are vastly different from those of a member of a grand jury? Do you feel that your prior experience as a grand juror would in any way affect or prevent you from sitting on this jury as a fair and impartial juror?

9. Do you know anyone else in the jury box other than as a result of reporting here today?

10. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom, such as friendships or family relationships or the type of work you do?

11. Is there anything about the nature of the charge itself that would interfere with your impartiality?

12. Have you ever been a witness in a criminal case, regardless of whether it went to trial?

13. Have you ever testified in any court proceeding?

14. Have you ever applied for a job as a state or local police officer or with a sheriff's department or county jail or state prison?

15. Have you, or any family member or close friend, ever worked for any agency such as a police department, prosecutor's office, the FBI, the DEA, or a sheriff's department, jail or prison, either in New Jersey or elsewhere?

16. As a general proposition, do you think that a police officer is more likely, less likely. or as likely, to tell the truth than a witness who is not a police officer?

17. Would any of you give greater or lesser weight to the testimony of a police officer merely because of his or her status as a police officer?

18. Have you or any family member or close friend ever been accused of committing an offense other than a minor motor vehicle offense?

19. Have you or any family member or close friend ever been the victim of a crime, whether it was reported to law enforcement or not?
If yes, was anyone arrested? How long ago was it? Where did it occur?

Were you satisfied with the outcome?

20 Would you have any difficulty following the principle that the defendant on trial is presumed to be innocent and must be found not guilty of that charge unless each and every essential element of an offense charged is proved beyond a reasonable doubt?

21 The indictment is not evidence of guilt. It is simply a charging document. Would the fact that the defendant has been arrested and indicted, and is here in court facing these charges, cause you to have preconceived opinions on the defendant's guilt or innocence?

22 I have already given you the definition of reasonable doubt, and will explain it again at the end of the trial. Would any of you have any difficulty in voting not guilty if the State fails to prove the charge beyond a reasonable doubt?

23 If the State proves each element of the alleged offense(s) beyond a reasonable doubt, would you have any difficulty in returning a verdict of guilty?

24 The burden of proving each element of a crime beyond a reasonable doubt rests upon the prosecution and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to prove his / her innocence or offer any proof relating to his / her innocence. Would any of you have any difficulty in following these principles?

25, A defendant in a criminal case has the absolute right to remain silent and has the absolute right not to testify. If a defendant chooses not to testify, the jury is prohibited from drawing any negative conclusions from that choice. The defendant is presumed innocent whether he testifies or not. Would any of you have any difficulty in following these principles?

Note: The defendant has the right to waive this question. The defendant's decision in that regard should be discussed during the voir dire conference.

26. Would you have any difficulty or reluctance in accepting the law as explained by the Court and applying it to the facts regardless of your personal beliefs about what the law should be or is?

27, Is there anything about this case, based on what I've told you that would interfere with your ability to be fair and impartial?

28. The purpose of questioning you as prospective members of the jury is to select a jury which will be fair and impartial. Is there anything, not covered by the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you serving on this jury? If so, please raise your hand so that the attorneys and I can discuss it with you privately?

29. Is there anything else that you feel is important for the parties in this case to know about you?

Biographical

The following questions should be asked of each potential juror, one by one, in the jury box:

You have answered a series of questions about criminal trials and criminal charges. Now we would like to learn a little bit about each of you. Please tell us the type or work you do; whether you have ever done any type of work which is substantially different from what you do now; who else lives in your household and the type of work they do; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e. the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say; what you do in your spare time and anything else you feel is important.

(NOTE: This question is intended to be an open-ended question which will allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: “I notice you didn’t mention [specify]. Can you please tell us about that?”).

STANDARD JURY VOIR DIRE

(CIVIL)

When the trial will last more than a week or two, the Committee recommends that judges consider asking the hardship question (which is #2 below) before any of the substantive questions. This will allow an early excusal of jurors who will be unable to serve on a lengthy trial, thereby enabling them to become available to other courtrooms picking juries. (Otherwise, it can be asked toward the end).

Note: In some civil cases, the parties may wish to expedite the voir dire process, either because the nature of the case, in their view, does not warrant an extended process, because they are near settlement, or for any other reason. These are private disputes, and, with the consent of counsel and the approval of the judge, full use of the model questions in civil trials may be waived. The waiver discussion and determination must be on the record.

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:

    - Age 18 or older
    - A citizen of the United States
    - Able to read and understand the English language.
    - A resident of _____ county (*the summoning county*)

    Also, a juror must not:

    - Have been convicted of any indictable offense in any state or federal court
    - And must not have any physical or mental disability which would prevent the person from properly serving as a juror.

Is there any one of you who does not meet these requirements?

2. a. This trial is expected to last for _____ to _____ weeks. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?

b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

c. Is there anything that would make it difficult for you to sit and listen for two hours without a break?

3. *Introduce the lawyers and the parties.* Do any of you know either / any of the lawyers? Has either / any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr. / Ms _____?

Names of Parties

4. *Read names of potential witnesses.* Do you know any of the potential witnesses?

5. I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?

6. Are any of you familiar with the area or address of the incident?

If yes, can you sit and decide this case based solely on the evidence admitted during the trial and not on any impression gained from prior knowledge?

7. Have you or any family member or close personal friend ever filed a claim or a lawsuit of any kind?

8. Has anyone ever filed a claim or a lawsuit against you or a member of your family or a close friend?

9. Have you or a family member or close personal friend either currently or in the past been involved as a party …as either a plaintiff or a defendant…in a lawsuit involving damages for personal injury?

If yes:

(a) Were you (or did you know) the plaintiff or defendant?
(b) How did the injury occur?
(c) Has the case been resolved?
(d) Were you satisfied with the outcome?
(e) Was there anything about that experience that would prevent you from being fair and impartial in this case?
(f) If yes, please state reasons.

10. A plaintiff is a person or corporation [or other entity] who has initiated a lawsuit.

Do you have a bias for or against a plaintiff simply because he or she has brought a lawsuit?

If the answer to Question No. 10 is affirmative, ask the following question at sidebar:

If so, what are your feelings?

11. (a) A defendant is a person or corporation [or other entity] against whom a lawsuit has been brought.
Do you have a bias for or against a defendant simply because a lawsuit has been brought against him or her?

If the answer to Question No 11 is affirmative, ask the following question at sidebar:

If so, what are your feelings?

Note: If the defendant is a corporation, the following should be asked:

(b) The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual. Would any of you have any difficulty in accepting that principle?

12. The court is aware that there has been a great deal of public discussion [in print and in the media] about something called Tort Reform (laws that restrict the right to sue or limit the amount recovered). Do you have an opinion, one way or the other, on this subject?

If the answer to Question No. 12 is affirmative, ask the following question at sidebar:

If so, what are your feelings?

13. If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or defendant regardless of any sympathy you may have for either party?

14. Based on what I have told you, is there anything about this case or the nature of the claim itself, that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?

15. Can you accept the law as explained by the Court and apply it to the facts regardless of your personal beliefs about what the law is or should be?

16. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?

    If yes: Was it a Civil or Criminal trial? When?
    Were you a deliberating juror?
    Was there anything about the trial, the jury deliberation process or anything you may have learned afterward that would interfere with your ability to be fair and impartial as a juror in this trial? Did the jury reach a verdict? What was the verdict?

17. Do you know anyone else in the jury box other than as a result of reporting here today?

18. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom such as friendships or family relationships or the type of work you do?

19. Have you ever been a witness in a civil matter, regardless of whether it went to trial?

20. Have you ever testified in any court proceeding?

21. New Jersey law requires that a plaintiff has to prove fault of a defendant before he or she is entitled to recover money damages from that defendant. Do you have any difficulty accepting that concept?

22 If the evidence warrants awarding no money damages to the plaintiff, will you be able to return such a verdict?

23. The purpose of questioning you as prospective members of the jury is to select a jury which that will be fair and impartial. Is there anything, not covered by the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury? If so, please raise your hand so that the attorneys and I can discuss it with you privately.

24. Is there anything else that you feel is important for the parties in this case to know about you?

The following questions should be asked of each potential juror, one by one, in the jury box:

You have answered a series of questions about civil trials and civil cases. Now we would like to learn a little bit about each of you. Please tell us the type or work you do; whether you have ever done any type of work which is substantially different from what you do now; who else lives in your household and the type of work they do, if any; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e. the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say? What you do in your spare time and anything else you feel is important.

(NOTE: This question is intended to be an open-ended question which will allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: “I notice you didn’t mention [specify]. Can you please tell us about that?”).

STANDARD JURY VOIR DIRE
(AUTO, SLIP & FALL, MEDICAL MALPRACTICE)

Auto

1. How many of you are licensed drivers?

2. Have you or any family member or close personal friend ever been involved in a motor vehicle accident in which an injury resulted?

   What type of accident?
   Injuries?
   Lawsuit? Settled? Tried?
   Was the resolution of the claim satisfactory?
   Would it affect your ability to be fair and impartial?

3. (a) Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

   (b) Has anyone ever filed a claim or lawsuit against you or a family member or close personal friend?

4. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?

5. Ask if applicable: Have you or a family member or close personal friend utilized the services of a chiropractor?

6. The Court is aware that there has been a great deal of public discussion in print and in the media about automobile accident lawsuits and automobile accident claims. Do you have an opinion, one way or the other on this subject?

If the answer to Question No. 6 is affirmative, ask the following question at sidebar:

If so, what are your opinions about automobile accident cases?

Slip and Fall

1. Is anyone a tenant?

2. Is anyone a landlord? Commercial? Residential?

3. Is anyone a homeowner?

4. Have you or a family member or close personal friend ever been involved …as either a plaintiff or a defendant…in a slip and fall accident in which an injury resulted?

   Type of accident? Location?
   Injuries?
   Lawsuit? Settled? Tried?

   Was the resolution of the claim satisfactory?
   Would it affect your ability to be fair and impartial?

5. Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

6. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?

Medical Malpractice

(NOTE: It is expected that the parties will submit a few specific questions seeking juror attitudes towards particular injury claims, such as pecuniary loss for wrongful death or a claim for emotional distress, if applicable, or juror attitudes about other particular types of claims, such as wrongful birth or informed consent issues. In particular, wrongful birth claims might require a questionnaire or separate voir dire to address attitudes about termination of pregnancy.)

(*Note:* Before asking the questions below, explain that the trial involves a claim of medical negligence, which people sometimes refer to as medical malpractice and that the terms both mean the same thing.)

1. Have you, or family member, or a close personal friend, ever had any experience, either so good or so bad, with a doctor or any other health care provider, that would make it difficult for you to sit as an impartial juror in this matter?

2. If the law and the evidence warranted, could you award damages for the plaintiff even if you felt sympathy for the doctor?

3. Regardless of plaintiff's present condition, if the law and evidence warranted, could you render a verdict in favor of the defendant despite being sympathetic to the plaintiff?

4. Have you, any family member, or close personal friend ever worked for:
   - Attorneys
   - Doctors, Hospitals or Physical Therapists
   - Any type of health care provider
   - Any ambulance / EMT / Rescue

5. Have you, or any members of your family, been employed in processing, investigating or handling any type of medical or personal injury claims?

If so, please describe:

6. (a) Is there anything that you may have read in the print media or seen on television or heard on the radio about medical negligence cases or caps or limits on jury verdicts or awards that would prevent you from deciding this case fairly and impartially on the facts presented?

If the answer to Question No. 6 is affirmative, ask the following question at sidebar:

(b) If so, what did you hear or read?

(c) Did the news coverage affect your thinking about medical malpractice cases in any way?

(d) How?

7. This case involves a claim against the defendant for injuries suffered by the plaintiff as a result of alleged medical negligence. Do you have any existing opinions or strong feelings one way or another about such cases?

If the answer to Question No. 7 is affirmative, ask the following question at sidebar:

If so, what are your opinions?

8. Have any of you or members of your immediate family ever suffered any complications from [specify the medical field involved]?

9 Do you have any familiarity with [specify the type of medical condition involved] or any familiarity with the types of treatment available?

10. Are you, or have you ever been, related (by blood or marriage) to anyone affiliated with the health care field?

If so, please describe:

11. Have you or any relative or close personal friend ever had a dispute with respect to a health care issue of any kind with a doctor, chiropractor, dentist, nurse, hospital employee, technician or other person employed in the health care field?

12. Have you or any relative or close personal friend ever brought a claim against a doctor, chiropractor, dentist, nurse or hospital for an injury allegedly caused by a doctor, dentist, nurse or hospital?

13. Have you or any relative or close personal friend ever considered bringing a medical or dental negligence action but did not do so?

14. Have you or any relative or close personal friend ever been involved with treatment which did not produce the desired outcome?

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

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December 18, 2003

Hon. Joseph F. Lisa, J.A.D.
216 Haddon Avenue
Suite 700
Westmont, NJ 08108-2815

Subj: Special Supreme Court Committee on Peremptory Challenges and Jury Voir Dire

Dear Judge Lisa: Joe

Over a period of years, the Supreme Court has received various recommendations to reduce the number of peremptory challenges in civil and criminal jury trials, together with proposals for more effective jury voir dire. The most recent proposal was offered in a 1997 report from a committee of the Conference of Assignment Judges ("The Weiss Report"). That proposal was forwarded to the Civil and Criminal Practice Committees for consideration, and in 2000 the Supreme Court approved a joint recommendation from those committees to amend Rule 1:8-3(f) concerning voir dire. That earlier Practice Committee recommendation did not address any reduction in the number of peremptory challenges.

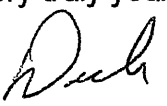
This year, pursuant to the recommendation of the Conference of Criminal Presiding Judges, the Judicial Council asked the Supreme Court to once again consider the recommendations set forth in The Weiss Report to reduce the number of peremptory challenges in civil and criminal cases.

In light of this latest request, the Court has decided to appoint a Special Committee to fully examine the subject of peremptory challenges and jury voir dire. That Committee will advise the Court as to whether there are further steps that need to be taken to improve the jury selection process in both Civil and Criminal. The Committee will review prior New Jersey reports (including The Weiss Report), evaluate the impact of revised Rule 1:8-3 on the conduct of voir dire, review other jurisdictions' jury selection processes involving peremptory challenges, review

relevant case law, and consider any objective or anecdotal information involving the jury selection process or use of peremptory challenges.

The Court would like you to serve as the Chair of this Special Committee, and, as we discussed by telephone, you have indicated that you are willing to do so. The Court is in the process of putting the roster together. Once the membership is set, I will provide you with the complete list so that we can get this project underway as expeditiously as possible. Thank you.

Very truly yours,



Richard J. Williams
Administrative Director

cc: Chief Justice Deborah T. Poritz
Hon. Sylvia B. Pressler
Theodore J. Fetter, Deputy Admin. Director
John P. McCarthy Jr., Director
Steven D. Bonville, Special Assistant

[Prepared by the National Center for State Courts]

Number of Peremptory Challenges Permitted (ranked by center column)

Jurisdiction	Misdemeanor	Felonies - Non-Capital -- Defense	Civil	Jurisdiction
New Jersey	10	20 (state = 12[1])	6	New Jersey
New York	3 (jury = 12[2])	15 (life = 20[3])	3	New York
Georgia	4 (state = 2) (jury = 12)	12 (state = 6)	6	Georgia
Kansas	3 (jury = 12)	12	3	Kansas
Louisiana	6 (non-unanimous[4])	12	6	Louisiana
Alaska	3 (jury = 12)	10 (state = 6)	3	Alaska
California	10	10 (life = 20)	6	California
District of Columbia	3	10	3	Dist. Columbia
Federal Court	3	10 (state = 6)	3	Federal Court
Illinois	5	10	5	Illinois
Indiana	5 (jury = 12)	10	3	Indiana
Maryland	4	10 (state = 5)	4	Maryland
North Dakota	6	10	4	North Dakota
South Carolina	5	10 (state = 5)	4	South Carolina
South Dakota	3	10	3	South Dakota
Texas	5	10	6	Texas
Arkansas	3	8 (state = 6)	3	Arkansas
Kentucky	3	8 (state = 5)	3	Kentucky
Maine	4	8	3	Maine
Tennessee	3	8 (state = 4)	4	Tennessee
Wyoming	4	8	3	Wyoming
Pennsylvania	5	7	4	Pennsylvania
Alabama	3	6	6	Alabama
Arizona	6 (jury = 12)	6	4	Arizona
Connecticut	3 (jury = 12)	6 (life = 15) (jury = 6)	3	Connecticut
Delaware	6	6	3	Delaware
Florida	3	6 (jury = 6)	3	Florida
Idaho	6	6	4	Idaho
Iowa	4 (jury = 12)	6	4	Iowa
Mississippi	6 (jury = 12)	6	4	Mississippi
Missouri	2	6	3	Missouri
Montana	6	6	4	Montana
Nebraska	3	6	3	Nebraska
North Carolina	6	6	8	North Carolina

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[1] (state =) indicates # of peremptories alloted to the state; column shows # alloted to defendant.

[2] (jury = 12) indicates that fewer than 12 jurors are necessary to render a verdict; where that # is known, it is stated, for example, as "(jury = 8)".

[3] (life =) indicates the # of peremptories where the defendant faces the possibility of a life sentence.

[4] (non-unanimous) indicates that the verdict is not required to be unanimous.

Oregon	6 (jury 12[2]) (non-unan.)	6 (non-unanimous[4])	3	Oregon
Rhode Island	3	6	2	Rhode Island
Vermont	6	6	6	Vermont
Washington	3	6	3	Washington
West Virginia	4	6 (state 2[5])	4	West Virginia
Colorado	3 (jury · 12)	5	4	Colorado
Michigan	3	5	3	Michigan
Minnesota	5 (state 3) (jury · 12)	5 (life 15[6]) (state 3)	2	Minnesota
New Mexico	5	5 (state 3)	5	New Mexico
Oklahoma	3 (jury · 12)	5	3	Oklahoma
Massachusetts	4	4	4	Massachusetts
Nevada	4	4	4	Nevada
Ohio	3 (jury · 12)	4	3	Ohio
Utah	3	4 (jury = 8)	3	Utah
Virginia	3 (jury · 12)	4	3	Virginia
Wisconsin	4	4 (life 6)	3	Wisconsin
Hawaii	3	3	3	Hawaii
New Hampshire	3	3	3	New Hampshire

(Source is the NCSC; October, 1996)

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[1] (jury · 12) indicates that fewer than 12 jurors are necessary to render a verdict; where that # is known, it is stated, for example, as "(jury = 8)".

[4] (non-unanimous) indicates that the verdict is not required to be unanimous.

[5] (state ·) indicates # of peremptories alloted to the state; column shows # alloted to defendant.

[6] (life) indicates the # of peremptories where the defendant faces the possibility of a life sentence.

NOTICE TO THE BAR

NEW JERSEY SUPREME COURT SPECIAL COMMITTEE
ON PEREMPTORY CHALLENGES AND JURY VOIR DIRE

The Supreme Court created the Special Committee on Peremptory Challenges and Jury Voir Dire so that it could conduct a thorough review in those areas, with its efforts leading to recommendations on ways to improve current jury selection practice. The Committee membership includes attorneys representing various organizations, including attorney associations. These attorney members will provide information and input to the Committee on behalf of their constituents. The Committee also welcomes information and input from individual members of the bar.

If you wish to comment, please reply to:

Michael F. Garrahan, Esq.
Administrative Office of the Courts
P. O. Box 988
Trenton, NJ 08625

Please identify the county or counties in which you primarily practice. Please specify whether your practice is primarily civil or criminal and whether you primarily represent plaintiffs or civil defendants or the State or criminal defendants.

The Committee is interested in learning your reactions to the way in which voir dire is most often conducted in New Jersey, which voir dire practices you believe provide sufficient information for juror selection practices, your experiences regarding the conference mandated by R.1:8-3(f), and, generally, which voir dire practices you prefer.

We invite your comments on specific voir dire practices that you have encountered. As part of your response, please comment, whether favorably or unfavorably, on the following issues or practices, as well as any others that you deem appropriate:

1) The use of written questionnaires;
2) Jurors answering questions in writing as opposed to verbally;
3) A trial judge permitting the attorneys to participate in initial questioning;
4) Initial questions that are open-ended versus those requiring a yes / no response;
5) Initial questions posed to jurors individually versus en banc;
6) The outcome when judges determine whether to permit requested supplemental questions;
7) Obtaining an on-the-record response to each requested supplemental question;
8) Posing any follow-up questions in open court as opposed to at sidebar / chambers;
9) Follow-up questions that are open-ended versus those requiring a yes / no response;
10) Attorney participation in asking follow-up questions.

Joseph F. Lisa, J.A.D., Chair

Administrative Office of the Courts
Interoffice Memorandum

To: Hon. Joseph F. Lisa, J.A.D.

From: Michael F. Garrahan

Subject: Special Committee – Responses from Individual Attorneys

Date: July 15, 2004

I have received sixteen responses from individual attorneys in response to the request for comment that was published in the NJ Lawyer and NJ Law Journal. It has now been more than a month since the June 7, 2004 publication of the notice and I've not received any recently, so I assume that we won't receive additional responses.

Most of the sixteen respondents demonstrate a connection to ATLA, with nine responses consisting only of completed versions of the survey that Abbott Brown had distributed in preparation of his report to the Committee and another five responses consisting of letters from attorneys to which the Abbott Brown's survey is attached or Abbott Brown is copied on the letter. The remaining two responses show no such connection, but one is from a Certified Civil Trial Attorney and the other is from a former Certified Civil Trial Attorney. I've provided, below, a summary of the responses, including the letters that are attached to surveys. I will forward copies of the attorneys' responses by Judiciary messenger. I have noted, below, the attorneys' responses to the survey questions, including the responses of those who also wrote letters and their responses, where provided, to the ten specific items noted in the request for comment. Please note that the responses from apparent ATLA members are likely already noted within in the report that Abbott Brown submitted to the Committee at its June 14 meeting. In that report he notes that: "I received 36 completed surveys. 35 of these were returned by civil trial attorneys, and most of these were from members of ATLA-NJ." I just wanted to ensure that you had all of the information provided by attorneys in response to the request for comment.

1. Alan M. Lands

He notes that his area of practice is civil rights cases. His office is in Pleasantville. His concern is with the unequal number of peremptory challenges permitted when there is a single plaintiff but multiple defendants. He recommends "…that any new rule mandate equal challenges for the plaintiff's side and the defense side regardless of the number of parties." He would also like a way to accurately predict – before the suit is filed -- the number of challenges that will be allocated to the parties.

Mr. Land also notes that written questionnaires are very helpful because "…most people are more inclined to disclose their true feelings in writing, rather than in front of 50 strangers." He would like the written responses to be available to counsel before jury selection.

2. Paul J. Jackson

He is a Certified Civil and Criminal Trial Attorney whose office is in Nutley. He provided a survey response to Abbott Brown but wanted to supplement it with this four-page letter. He believes "…that the Voir Dire process is inadequate in most trials." He suggests placing jurors under oath when they are questioned on areas of potential bias in order to achieve more accurate responses and to impress upon the jurors the seriousness of their role. He would like more extensive questioning of jurors with regard to possible bias and believes that he does not get enough information on which to base his peremptory challenges – since he cannot do so based on race, ethnicity, gender, etc. He encounters judges who do not allow questions about jurors' opinions – which they are entitled to hold while serving so long as they can be fair and impartial – but he believe that the issue is not whether the juror can be fair and impartial (which would be a cause challenge if they cannot) but information on bias on which a peremptory can be used. He also believes that it would not be "unduly time-consuming" to expand questioning and that the process should be looking for "frank and honest responses."

3. John A. Sakson

He is a Certified Civil Trial Attorney whose office is in Lawrenceville. He believes that written questionnaires, to which counsel would receive responses prior to juror selection, "…would be a great improvement." He suggests that responses be received a day prior to juror selection and that counsel be permitted to supplement a set of standard written questions. He has participated in questioning in the Eastern District where the judge was not present for juror questioning and that "…it may not be necessary for the trial judge to participate in the questioning process."

4. James Hely

He is a Certified Civil Trial Attorney whose office is in Mountainside. He believes that jury selection will go faster if written questionnaires are used and some attorney participation is permitted. He states that attorneys will need to rely less on the use of peremptory challenges if voir dire is more "meaningful" and that counsel will be more confident in the jurors in the box if they know more about them. He includes a trial brief that he has used when requesting the use of written questions and open-ended questions to be asked by the attorney. His brief includes the six written questions he'd like jurors to respond to and the three questions that he'd like to ask of jurors. The six juror questions allow responses from Strongly Agree to Strongly Disagree and about whether society should encourage reasonable conduct, whether "wronged persons" should be compensated by those responsible, whether most lawyers are dishonest, whether the concept that "…a person who is injured should get money is silly", whether juries can be trusted to make fair evaluations of fault and damages in personal injury cases, and whether most people who bring lawsuits for injuries fake or exaggerate their injuries. The three questions for which he would seek a "short narrative response" involve the juror's occupational history, their sources of news (television stations watched and magazines / newspapers), and the juror's "recreational interests and hobbies."

5. Roy D. Curnow

He is a Certified Civil Trial Attorney whose office is in Spring Lake Heights. He first wrote on June 23 and provided additional information in a July 2 letter. He believes that NJ jurors "…are being more and more influenced by the insurance industry media blitz." He cites television commercials by Allstate, radio ads asking listeners to report insurance fraud, and billboards also relating to insurance fraud. He likens the commercials to jury tampering and states that:

> **If we cannot ask these individuals straight forward questions as to their beliefs and notions about our civil justice system and weed out those who have intractable opinions then fairness and a level playing field will not apply to injured victims who seek nothing more than justice.**

He states that he has been practicing for 25 years and has never seen an environment like that which currently exists.

In his July 2 letter, he states that voir dire needs to be more uniform and that there should be attorney questions or follow-up and includes the following as an example of how judges ask questions in a way that almost guarantees that a juror will respond that they can be fair and impartial no matter what the circumstances:

> **You understand that this case must be decided on its own merits from the evidence that you hear in this courtroom. Having said that, can you put aside the fact that _____ (e.g., you were in a previous**

> **accident, you were previously sued, you were once a claims adjuster, etc.)**

He then states that the sanctity of the civil justice system continues to be "watered down" citing the lack of court reporters and sheriff's officers as examples of such steps that have already occurred.

6. R. Gregory Leonard

He is a former Certified Civil Trial Attorney whose office is in Morristown. He states that he let his certification lapse because the re-certification process was burdensome. He provides responses to the ten areas that were set forth in the notice to attorneys and concludes with the following: "A greatly expanded and open voir dire is a litigant's last chance to get a fair hearing." He earlier states that he has witnessed 20 years of media assaults that are "…anti-lawsuit, anti-plaintiff, [and] anti-lawyer…" and that the cumulative effect is "devastating."

His responses to the ten areas state support for written questionnaires, but not written responses to non-routine questions, attorney participation, open-ended questions, posing initial questions to individual jurors rather than en banc, on-the-record responses to each requested supplemental question, and allowing attorneys to ask open-ended follow-up questions in open court.

7. James A. Vasios

He is a Certified Civil Trial Attorney whose office is in Union. He stated his primary area of practice as medical malpractice defense. He has only experienced the use of a written questionnaire once and did not think that it added anything to the process. Plus, he is concerned that written questionnaires would be used as a means to speed up the jury selection and eliminate verbal questioning. He stated that he "…wants to hear a juror talking as much as possible." He favors open-ended questions, standard questions asked en banc but liberal use of side-bars for questions to individuals about possible bias. He concluded by stating that:

> **Jurors are really the most important people in the courtroom. Anything that gives the parties an insight into their thinking furthers the entire process.**

He also noted that he favors allowing jurors to ask questions for witnesses because in his experience the jurors' questions have been "intelligent and right to the point," they help to develop the facts, and they provide immediate feedback to the attorneys regarding how the trial is progressing.

Respondents' Answers to Abbott Brown Survey Questions
(Where there were a sufficient number of responses from attorneys.)

2. How many juries have you actually selected within the past 3 years?

The median of 11 responses was 6 juries.

The average of the 11 responses is 8 juries.

The range of the 11 responses was: 0 to 10.

5. In regard to conducting voir dire to what extent do judges permit you to participate face to face with prospective jurors?

Seven of the 11 responses were: Never.

Three of the 11 responses were: Rarely.

One response was: Sometimes.

7. Do you submit case specific suggested voir dire [questions] to the Court prior to jury selection?

Eight of the 11 responses were: Always.

Three of the 11 responses were: Most of the time

10. In the juries you have selected in the past three years has the Judge conducted voir dire of the panel in what manner?

Six responses noted that it was a combination of methods.

Three responses indicated that the judge conducted voir dire en banc.

Two responses indicated that the judge conducted individual voir dire of jurors seated in the box.

11. Have you been generally permitted to supplement requested voir dire if a juror provides an initial response that might lead to disqualifying factors?

Nine of 11 responses were: Yes.

One response was: Sometimes.

One response was set forth as a percentage: 50 - 60%.

12. Is there a consistent or predictable pattern between judges or vicinages regarding the granting of challenges for cause?

Five of 9 responses were: Yes

Four of 9 responses were: No

(No response indicates whether it applied to a judge or a vicinage, or both.)

14. In the civil juries you have selected in the past three years please tell us how many times you exhausted all your peremptory challenges.

Four of 10 responses were: some trials.

Three of 10 responses were: every trial.

Three of 10 responses were: no trial.

18. Have you asked for additional peremptory challenges in the past three years in either civil or criminal trials?

Two of 11 responses were: Yes.

Nine of 11 responses were: No.

20. Do you favor a uniform voir dire process either within a vicinage or statewide?

Seven of 11 responses were: Yes (one limited to basic questions).

Four of 11 responses were: No (one noting it depends on the case)

21. Do you favor a reduction in the number of peremptory challenges?

All of the 11 responses were: No

Four of the respondents also indicated whether they approved or disapproved of the ten enumerated voir dire items set forth in the request for comment, although (as shown below) all four did not respond to every item.

Questions	Favorable	Unfavorable
1. use of written questionnaires	4	0
2. written juror responses, not verbal	1	3
3. attorneys participate in initial questioning	4	0
4. initial voir dire questions are open-ended	4	0
5. individual questioning, not en banc	4	0
6. the outcome when judges rule on supp. questions	2	0
7. on-the-record response to each requested supp. ques.	3	0
8. Follow-up ques. in open court, not side-bar / chambers	2	1
9. Open-ended follow-up questions, not yes / no questions	2	2
10. Attorney participation in asking follow-up questions	4	0

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JOSEPH F. LISA
JUDGE

SENTRY BUILDING
216 HADDON AVENUE
WESTMONT, NEW JERSEY 08108-2815

May 26, 2004

To: Carlos H. Acosta, Jr., Hispanic Bar Association of NJ
Abbott S. Brown, Association of Trial Lawyers of America – NJ
John C. Eastlack, Jr., New Jersey State Bar Association
Judith B. Fallon, Association of Criminal Defense Lawyers of New Jersey
C. Judson Hamlin, Trial Attorneys of New Jersey
Glenn Jones, Department of Law and Public Safety
Joseph E. Krakora, Office of the Public Defender
Raymond E. Milavsky, County Prosecutors Association of New Jersey

From: Hon. Joseph F. Lisa, J.A.D., Chair

Subject: Request for Information from Attorneys re: Voir Dire Practices

At the May 10, 2004 meeting of the Supreme Court's Special Committee on Peremptory Challenges and Jury *Voir Dire*, we discussed efforts to obtain information and input on voir dire practices in New Jersey and decided to pursue collection of that information in several ways. One of those avenues for collecting information will be by requesting that each of you, as representatives of attorney associations, solicit reaction and comment from your respective constituents, and provide a written response on behalf of your organization. That effort will be in addition to a planned survey of judges and a proposed solicitation for individual attorney comment (to be published in New Jersey's legal newspapers).

In canvassing your members and issuing your report, we ask that you comment specifically on particular voir dire practices. Of course, the comments may be favorable or unfavorable. Please include in your report comments on these particular practices, and any others you and your members deem appropriate:

1) The use of written questionnaires;
2) Jurors answering questions in writing as opposed to verbally;
3) A trial judge permitting the attorneys to participate in initial questioning;
4) Initial questions that are open-ended versus those requiring a yes / no response;
5) Initial questions posed to jurors individually versus en banc;
6) The outcome when judges determine whether to permit requested supplemental questions;
7) Obtaining an on-the-record response to each requested supplemental question;
8) Posing any follow-up questions in open court as opposed to at sidebar / chambers;

9) Follow-up questions that are open-ended versus those requiring a yes / no response;
10) Attorney participation in asking follow-up questions.

The Special Committee on Peremptory Challenges and Jury *Voir Dire* encourages any additional information through your membership that might provide methods by which the voir dire process might be improved.

Thank you for your assistance and cooperation. The compilation of this information will be an integral part of the Special Committee's effort.

c: Members, Supreme Court Special Committee on Peremptory Challenges and Jury *Voir Dire*
Michael F. Garrahan, Committee Staff

Mescall & Acosta

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†Also admitted in New York
Reply to: [ ] West Orange **[X] Union City**

June 16, 2005

The Honorable Joseph F. Lisa, J.A.D.
Superior Court of New Jersey - Appellate Division
216 Haddon Avenue
Sentry Building - 7th Floor
Westmont, New Jersey 08108-2815

Re: Report on Voir Dire Practices from the Hispanic Bar Association

Dear Judge Lisa:

Pursuant to your request, an informal survey was conducted of Hispanic Bar Association members with regard to voir dire practices. Using your earlier memo as a template, respondents were asked specific questions pertaining to the voir dire practices that they have experienced in recent trials.

From the responses, it appears that the use of written questionnaires is very limited throughout the State. Respondents could only cite the practice in a few vicinages. Uniformly, they agreed that verbal responses were favored over written responses to questions. The most common reason given was that the verbal responses and body language of the prospective juror afforded the attorneys a better feel for the individual.

With regard to attorney participation in questioning, the experience was again very limited. This experience varied from just some initial questioning to full follow-up to answers given by a prospective juror. However, most respondents did favor full attorney participation similar to the voir dire practiced in New York. Also, respondents favored the use of open-ended questions and the questioning of jurors on an individual basis. Again, the primary reason given was that both permitted the attorneys to get a better feel of the individual juror.

With regard to supplemental questions, most attorneys stated that they prepare a list of supplemental questions which is submitted to opposing counsel and the trial judge prior to jury selection. In civil actions, the attorneys cited the pre-trial exchange as required by R. 4:25-7 as the forum used for supplement voir dire questions. Some acknowledged that many of the questions were redundant to those that the trial judge was prepared to ask.

However, it was revealed that most judges are open to supplemental questions provided that counsel can articulate a reasonable justification for the additional questions. Depending on the nature of the supplemental question, all agreed that the proper venue should be side bar outside of the purveyor of the other prospective jurors. Finally, all agreed that responses should be on the record.

I hope that Your Honor and the other members of our committee find these findings useful. If you should have any further questions, please feel free to contact my office.

Very truly yours,

Carlos H. Acosta, Jr.

Response from the American Trial Lawyers Association -- New Jersey to Committee Request for Information on Voir Dire Practices

I respectfully submit the following as a summary and analysis of the responses to a survey of civil trial lawyers regarding the conduct of civil voir dire and the use of peremptory challenges. I received 36 completed surveys. 35 of these were returned by civil trial attorneys, and most of these were from members of ATLA-NJ.

Q1: The attorneys who responded to the survey practiced throughout the state, including Atlantic, Bergen, Burlington, Camden, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset and Union Counties.

Q2: These attorneys picked an average of 7.65 juries in the last three years, with a 50% of the attorneys picking between 4 and 10 juries.

Q3: The average time needed to select a jury was just over 2 hours. The middle 50% of attorneys spent between 1.25 hours and 2.5 hours on the jury selection process. However, a small percentage of attorneys indicated that they had spent up to 1 day, or more, to select some of their juries.

Q5: 31 of the 35 attorneys (88.5%) who responded to this question stated that there was either no or rarely any "face-to-face" contact with prospective jurors. 4 of the 35 (11.5%) stated that they experienced such contact "always" or "most times."

Q7: Approximately 75% of the attorneys who responded to the survey submitted case specific voir dire to the court. Several attorneys noted that they felt that case specific voir dire was not needed in auto cases or other similarly uncomplicated matters.

Q9: However, 21 of 30 attorneys (70.0%) said the Court rejected case specific voir dire when submitted by these attorneys. Several of the attorneys who answered affirmatively added that the Court only sometimes accepted proposed questions or indicated that the judge modified their questions.

Q10: In response to this question which inquired about how the Court conducted voir dire, 4 attorneys out of 34 (11.8%) said "En banc," 3 attorneys (8.8%) said "Individually in the box, " no attorneys said

"Individually at side bar" or "Individually in chambers," and 27 attorneys (79.4%) responded "Combination of the above."

Q11: 30 attorneys out of 34 (88.2%) stated that they generally were permitted to obtain supplemental voir dire if the initial response by the juror indicated a potential cause to disqualify the juror.

Q12: 24 attorneys out of 34 (70.6%) stated there was no "consistent or predictable pattern between judges or vicinages regarding the granting of challenges of cause?", and 10 attorneys (29.4%) opined to the contrary.

Q14: 5 attorneys out of 35 (14.3%) reported that they exhausted all of their peremptory challenges "In every case "; 16 attorneys (45.7%) said that they did so "In some cases" and 14 attorneys (40.0%) said "In no case."

Q15. 14 attorneys out of 16 (87.5%) who responded "In some cases" to Q14 said they used either 4 or 5 challenges in such cases.

Q18: 16 attorneys out of 35 (45.7%) had requested additional peremptory challenges and 19 attorneys (54.3%) said they had never done so.

Q19: Of the 16 attorneys that answered "Yes" to Q18, 4 (25%) said their request was "Always granted," 10 (62.5%) said that their request was "Sometimes granted, " and 2 (12.5%) said their request was "Never granted."

Q20: 30 attorneys out of 34 (88.2%) favored a uniform voir dire process either within a vicinage or statewide; and 4 attorneys (11.8%) did not. Of those that responded "Yes" to Q20, the majority indicated they preferred statewide uniformity over uniformity within a vicinage.

Q21: 32 attorneys out of 34 (94.1%) opposed a reduction of the number of peremptory challenges, 2 attorneys (5.9%) favored a reduction.

Q22: The two attorneys that answered "Yes" to Q21 both opined that 3 to 4 peremptory challenges are necessary.

Q23. The additional comments included the following:

Requests for an equal number of challenges per side, rather than per party;

The opinion that voir dire is "a joke," or "an empty exercise,"

The request that voir dire specifically deal with bias arising from efforts at "tort reform;"

Many requests for substantially more detailed written voir dire; and

Several requests for attorney participation in voir dire as in New York.

I will be prepared to discuss these results at our meeting tomorrow night.

Finally, I would like to acknowledge and thank my son, Daniel, for his assistance in crunching the numbers.

Respectfully submitted,

Abbott Brown

MEMORANDUM

TO: Hon. Joseph F. Lisa, J.A.D.
Members of the New Jersey Supreme Court Committee on Voir Dire and Peremptory Challenges

FROM: Judith B. Fallon
Association of Criminal Defense Lawyers-New Jersey Representative

RE: Membership Survey

DATE: June 14, 2004

I have reviewed Joseph Krakora's report of behalf of the Office of the Public Defender and concur in his findings. There is a good deal of overlap between his organization and the ACDL; no surprise then that the concerns raised are the same. I would just like to add a few thoughts to Joe's memo.

The absolutely consist refrain in every response is that judges are willing to sacrifice a probing voir dire in the interest of time. Again and again, respondents felt that the overriding interest being served under our current system is judicial economy. There was broad agreement that open-ended questions are imperative to elicit meaningful responses, both for cause and peremptory challenges. The perception of the defense bar is that this is rarely done, despite the Supreme Court's stated preference for it, because it wastes time. Rather, the practice is to "rehabilitate" the vacillating juror. Many attorneys resent having to use a peremptory challenge on a juror whose true feelings, freely expressed, would result in a cause challenge. The suggestions to remedy this include follow up questions by the attorneys (which some judges do not currently permit) and allowing more case specific questioning.

Many respondents noted that some judges are extremely reluctant to ask case specific questions. One respondent told of a judge who will not ask case specific questions even when jointly requested. As to additional background questions, e.g., what TV shows do you watch, what magazines do you read, it seems some judges routinely allow these questions, and some completely forbid them. I agree with Joe's comment that there appears to be a marked judicial reluctance to probe the issue of racial or ethnic bias. The discomfort so many people feel about this topic makes it more, not less, necessary to sound the jury on this topic.

The observation was made more than once that law enforcement officers should be cause challenges in all cases, protestations of fairness notwithstanding. Even the most fairminded police officer brings a specialized knowledge into the jury room that is likely to cause jurors to defer to his/her judgment. This same point was brought up regarding lawyers and judges.

I would like to share the following thoughts from one of our members:

> "I like Judge Simandle's approach in the Federal Court. He constructs a questionnaire from the attorney's submissions, which is given to every juror. He gets the basic cause challenges taken care of on the entire panel before a single juror goes to the box, then each juror placed in the box gets up and answers the questionnaire- the attorneys are allowed to follow up after they are finished. It is a wonderfully efficient process."

Other respondents praised the practice of freely granting cause challenges. All felt that it ultimately saves time and results in a more focused voir dire.

June 14, 2004

Via E-Mail
Honorable Joseph F. Lisa, J.S.C.
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
216 Haddon Avenue
7th Floor
Westmont, NJ 08108-2815

Re: TANJ Questionnaire

Dear Judge Lisa:

Responding to your suggestion at our last meeting I drafted a brief questionnaire to the TANJ membership. After its distribution it seems to have been reproduced and utilized by other groups. I enclose the cover note. I received 31 valid responses. I do not pretend to be a statistician or have special training in the art of surveys. I tried to frame a reasonably short questionnaire that could be easily answered by busy practitioners. Since the questionnaire calls upon memory and deals with general issues I do not contend that it will be absolutely accurate in all respects. If the nature of the questions are imprecise or confusing it is my error. While there may be limitations upon the interpretation of the responses I do think it accurately reflects the general experience and perceptions of the trial bar. Whether we may agree or argue with those perceptions they are there and must be considered in any process going forward. Not everyone answered every question. In some cases the responses added categories I had not included and I have so indicated in my summary below. I have taken the liberty of including only some comments that bear on the process rather than personalities or particular judges. While I have promised not to identify specific attorneys I can tell you the responses come from some of the largest most respected law firms in the state representing both plaintiffs and defendants in civil litigation. I received no responses from anyone practicing criminal law. I do not propose to interpret or argue any position based on this limited survey at this time. I perceive our immediate task as fact gathering. I will be prepared as we move forward to take specific positions and set forth the view of a substantial segment of the trial bar when the committee has specific alternatives before it. My summary of the responses is set out below. I apologize for

being unable to attend tonight's meeting but there is a County Bar Function, and as a Trustee of the association I have active participation.

(1) Please indicate the vicinage(s) in which you conduct the bulk of your trial practice.

RESPONSE: The respondents have tried matters in all vicinages in the state with a predictable emphasis in the larger counties.

(2) How many juries have you actually selected within the last 3 years?

RESPONSE: Asked to report on their level of completed trials over the last three years the respondents report a low of three (3) trials and a high of twenty-two (22) which averages to 10.5 for the period or a yearly average of 3.5 yearly completed trials per respondent.

(3) Tell us how long it has taken to select a jury in a routine civil matter.

RESPONSE: Respondents reported jury selection to be completed as quickly as 15 minutes in two cases and long as 4 days in an extreme case. In general the respondents report the vast majority of civil jury selection to be completed in 1 ½ to 2 hours. The reported 4 day selection process was reported by a southern county defense counsel who noted that the judge in that case adopted a plaintiff submitted questionnaire and process of some length.

(4) Tell us how long it has taken you to select a criminal jury (exclude capital cases).

RESPONSE: No Response

(5) In regard to conducting Voir Dire to what extent do judges permit you to participate face to face with prospective jurors?

RESPONSE: As to permitting an attorney to directly conduct Voir Dire of prospective jurors there appears to be a general practice to allow only limited attorney participation. Respondent's report their direct participation in Voir Dire as follows:

Always – 0
Most times – 1
Some times – 6
Rarely – 5
Never – 19

(6) If you can quantify your answer to number five please do so.

RESPONSE: Only two respondents answered this question and described their direct participation as happening in 10% to 50% of their trials.

(7) Do you submit case specific suggested Voir Dire to the Court prior to jury selection?

RESPONSE: When asked as to their practice in submitting Voir Dire questions to the court before jury selection it appears that the vast majority do submit requested Voir Dire.

Always – 27
Most times – 3
Some times – 1
Rarely – 0
Never - 0

(8) If you do not regularly submit suggested Voir Dire to the Court in advance of trial please tell us why.

RESPONSE: When asked why they might not have submitted Voir Dire questions two respondents gave the following responses:

"I have recently stopped doing it because the court does not use the questions."

"Waste of time."

(9) To what extent does the Court accept or reject your proposed Voir Dire questions?

RESPONSE: When asked about the extent to which the court has dealt with their requests. I received the following comments:

"Rarity" "Once in last 5 years"

"70% accepted" "varies with each judge but generally receptive" "Limited but frequent" "Usually accepts one or two questions."

"100% acceptance with relevant modification"

Note: In the absence of knowing the nature of the Voir Dire proposed the responses are not meant to reflect on the correctness of the court ruling but was designed to note the nature and frequency of a contested form of Voir Dire.

(10) In the juries you have selected in the past three years has the Judge conducted Voir Dire of the panel in what manner? Quantify if possible.

RESPONSE: In regard to method of Voir Dire this question was designed to identify the prevalence and practice of courts in jury selection. Some respondents answered multiple categories which would be consistent with reported practice:

En banc – 22
Individually in the box – 12
Individually at side bar – 12
Individually at chambers – 0
Combination of above - 8

(11) Have you been generally permitted to supplement requested Voir Dire if a juror provides an initial response which might lead to disqualifying factors?

RESPONSE: If a prospective juror provided a potentially disqualifying answer most respondents report being permitted to propound more specific follow up questions. Their answers to the court's action in dealing with follow supplemental question was as follows:

Yes – 27
No – 3
Rarely - 1

(12) Is there a consistent or predictable pattern between judges or vicinages regarding the granting of challenges for cause?

RESPONSE: This question sought to determine what uniformity or standard was being applied to challenges for cause by judges either statewide or by vicinage. The majority of the respondents report no discernible uniformity in ruling on challenges for cause.

Yes – 6
No - 25

(13) If the answer to the above is "no" please describe the most disparate practices you have experienced.

RESPONSE: Comments on the court's standard for granting / denying challenges for cause:

"No uniformity in same jurisdiction"
"No predictable pattern"
"Every judge is different"
"Some judges require consent others evaluate each challenge on merit"
"In Camden the court rejected almost all excuses from jurors and argument from the attorneys"

"Some judges are tougher than others"
"Some judges deny challenges for cause to force you to use your peremptories"

(14) In the civil juries you have selected in the past three years please tell us how many times you have exhausted all your peremptory challenges.

RESPONSE: In our study of Voir Dire and the exercise of peremptory challenges this question seeks to learn how frequently trial counsel utilize all of their peremptory challenges in civil cases. Respondents indicated their exercises of all 6 peremptory challenges as follows:

In every case – 0
In no cases – 7
In some cases – 21
Only in one matter - 3

(15) If you have answered (c) to the above please tell us how many peremptory challenges you generally did use.

RESPONSE: While the number of peremptory challenges generally used were described as 1 to 5 most respondents indicated their practices of always keeping one or two challenges unused.

(16) In the criminal juries you did select in the past three years please tell us how many times you have exhausted all your peremptory challenges.

RESPONSE: No responses.

(17) If you have answered (c) to the above please tell us how many peremptory challenges you generally did use and how many you left unused.

RESPONSE: No responses.

(18) Have you asked for additional peremptory challenges in the past three years in either civil or criminal trials?

RESPONSE: While a substantial minority of respondents reported not asking for any additional challenges the majority reported seeking additional challenges especially in multi party cases. Additional challenges were reported as having been request by reporting counsel.

Yes – 21
No -10

(19) If the answer to the above is yes please tell us how the Court ruled on your requests.

RESPONSE: Apparently the courts recognized the propriety of the requests in a significant number of cases.

Never granted – 1
Always granted – 2
Sometime granted - 17

(20) Do you favor a uniform Voir Dire process either within a vicinage or statewide?

RESPONSE: When asked if they favored some sort of uniform Voir Dire process either by vicinage or statewide the respondents demonstrated a split of opinion and added a category not included in the survey. They answered to this question thusly:

Yes – 9
No – 13
Uncertain – 3
If satisfied by the adequacy of any new process – 3

(21) Do you favor the reduction of the number peremptory challenges?

RESPONSE: The respondents were unanimous in opposing any reduction of the number of peremptory challenges.

Yes – 0
No - 31

(22) If you answered yes to the above what number of peremptory challenges in civil and criminal matters would you deem appropriate?

RESPONSE: No Responses.

(23) If you have any additional comments, suggestions or observations please indicate below.

RESPONSE: While there were a number of comments I have not included comments that related to an experience in a specific case or reflecting upon a specific judge. I include below representative comments. They emanate from counsel doing both plaintiff and defendant work.

"The failure of general jury questions is clear. The judges do not know the case the lawyers do – it is only when we can explore fact specific issues from a case to juror experience that a fair panel can be ensured."

"The jury selection process is already very limited and really takes very little time. A litigant is entitled to know something about jurors."

"The concept of Voir Dire should be directed at getting a fair jury not a fast jury. Most judges either don't understand the bias that a juror brings to a trial or don't care."

"This whole issue is probably the result of the ATLA seminars and the efforts of its local members to change the jury selection process into political science (with a liberal tilt) classes."

"The assumption that the court (i.e. judge) is better able to carry out that function has no basis in fact. The overwhelming majority of judges have had little or no experience trying cases before their appointment. Picking a jury as a judge is not experience. It's purely a function based solely on a desire to move cases."

"The current civil system works well. Deviations occur depending on the individual judge's quirks. In most personal injury cases it takes an hour to an hour and a half. This is hardly a reason to scrap an entire system."

"Uniformity in some questions make sense. The standard set is adequate. There is no need to change."

"Please do not create another "best practices" disaster. Can we do justice and not just statistics?"

"The lawyers know their cases and are in the best position to address concerns rather than the court."

"No juror wants to be perceived as prejudiced and a court can always get a satisfactory answer if a juror feels confronted. The system isn't broken, leave it alone!! (sic)"

Very truly yours,

s/ C. Judson Hamlin

C. JUDSON HAMLIN

CJH:cm
Cc: Michael Garrahan (AOC) (Via E-Mail)

STATE OF NEW JERSEY

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
MEMORANDUM

DATE: Thu, Jun 16, 2005

TO: Supreme Court Special Committee on Peremptory Challenges and Jury Voir Dire

FROM: Glenn R. Jones, Assistant Attorney General, Division of Law

SUBJECT: Survey of the Division of Law Concerning Voir Dire Practices

This memorandum is a preliminary summary of my finding as derived from the survey of the Division of Law's experience with the current voir dire practice in the State. In addition to posing the same questions that were contained in the Notice to the Bar, I supplemented my survey with four additional questions: 1. Are you satisfied with the current voir dire practice? If so, why? If not, why not?: 2. What aspect of voir dire practice needs to be altered? Why?: 3. What aspect of voir dire practice should not be altered? Why?; And 4. Additional Comments? (Survey form attached.)

The survey findings are as follows:

1. There is no uniform voir dire practice in the state. Most responses to the Notice to the Bar questions fell into two categories, either the practice was not allowed by the Court or if it was allowed, it was sometimes used.

2. There is general dissatisfaction with the current practice.

3. Nearly every response thought that the practice should be changed to allow greater attorney input, usually in the form of the judge asking more of the questions submitted by counsel.

4. There was an overall opinion that voir dire is not given enough time or attention by the Court and that it is seen as more incidental than vital to the process.

5. Most favored the use of written questions in some form. Most frequently, it was suggested that jurors answer the rote questions in written form prior to the actual

selection process, so that the counsel can review them and the juror does not have to depend on his or her memory.

6. There was a consistent desire for more side bars use, rather than questioning in open court, as a means of avoiding the possibility of “poisoning the panel.”

7. There was also a consistent desire to have the court be more responsive to requests to strike for cause.

8. Lastly, while nearly every response suggested some change, nearly all those responding suggested that judges keep control of the process and that New Jersey does not adopt the practices of New York or Pennsylvania where the attorneys more or less control voir dire.

In short, the message from the survey is that attorneys desire that the court loosen its control of the voir dire practice but there is not a desire to eliminate the court’s role as gatekeeper and impartial arbitrator. I am also attempting to survey the Criminal Division and will supplement this memorandum with that additional information.

G.R.J.

STATE OF NEW JERSEY
OFFICE OF THE PUBLIC DEFENDER
MEMORANDUM

From: Joseph E. Krakora, Esq., Assistant Public Defender

To: Hon. Joseph F. Lisa, J.A.D., and members of the New Jersey Supreme Court Special Committee on Peremptory Challenges and Voir Dire

Re: Reporting of information and feedback from Regional Offices of the New Jersey State Office of the Public Defender

Date: June 14, 2004

Pursuant to the request of the Committee at our last meeting, I have sought and obtained feedback from our Regional Offices on the issues we have identified as bearing on our mission. I have reviewed all of them and will try to summarize the themes and concerns as best I can.

The single biggest concern expressed by our attorneys state-wide is that judges compromise thorough and fair voir dire in order to pick the jury as quickly as possible. There is a perception among our attorneys that judges are under pressure not to spend "too much time" on jury selection. This manifests itself in decisions judges make about how to go about the process. For example, many of our attorneys complain about judges who do not repeat all of the questions to each juror. Instead, some judges will merely say to the next juror, "You heard all of the questions I asked the others. Would you have an affirmative answer to any of them?" This is a time saving device but assumes that each juror has total recall and the ability to formulate answers without the specific question before him or her. Our attorneys also feel that the pressure to pick juries quickly also manifests itself in the reluctance of judges to ask as many follow-up questions as the attorneys would like or to allow the attorneys themselves to conduct some additional voir dire.

In this connection, it should be noted that the number of criminal trials state-wide is very low when you consider how many judges are assigned to criminal cases. For example, in Essex County, there were 209 jury trials in 2003. There are approximately 16 to 18 judges at any given time trying criminal cases so that is only about 12 or 13 trials per judge. Our attorneys feel that with so few cases actually being tried there should not be any concern over how long jury selection takes.

Another commonly expressed concern is the tendency of judges to ask what amount to leading or closed-ended questions that simply require a yes or no response and that make the "right" answer obvious. It is human nature for jurors to want to be perceived as fair and impartial and this is particularly so when they are responding in front of the entire panel. Our attorneys would like to see an emphasis placed on the use of open-ended questions (as required in capital cases) and a greater willingness by judges to conduct juror interviews individually, particularly when any kind of sensitive issue is involved.

It is not clear based on the responses I received how common it is for our attorneys to submit case specific proposed voir dire questions to the judge before trial. Attorneys who have done so indicate that judges are generally receptive to incorporating them into the process. That has been my personal experience. The wording of the specific questions may become the subject of some debate but this merely goes back to the issue of leading vs. open-ended questions. In addition, judges are often reluctant to ask questions in certain areas, racial / ethnic bias being the one most frequently cited. They are uncomfortable asking questions in this area and reluctant to acknowledge the risk that a juror may be biased absent an outright confession by the juror.

The consensus among our attorneys is that the best judges during jury selection are those that do not waste time on jurors who do not want to sit and are claiming some form of hardship. By quickly excusing those that clearly are looking to get out, more time can be spent on getting meaningful information from the rest so that the Court can uncover juror biases and the attorneys can make informed decisions about the use of their peremptory challenges. This is a common theme from our attorneys.

Finally, our attorneys do not believe that the manner in which trial judges decide on applications to excuse jurors for cause should be a function of how many peremptory challenges the attorneys do or do not have. We have heard judges say that they might be more liberal in their granting of cause challenges if the attorneys had fewer peremptory challenges at their disposal. The feedback I received was that judges should evaluate the applications using the same standard regardless of how many peremptory challenges remain for the attorneys.

To: SUPREME COURT COMMITTEE ON PEREMPTORY CHALLENGES/VOIR DIRE

From: Philip Lezenby

Re: Questionnaire Response from New Jersey Defense Association Members

I sent out the attached questionnaire by e-mail to all NJDA members & by mail to a lesser sampling of NJDA trial attorney members, as a second effort to obtain responses. Twenty-five responses were received from trial attorneys. The questionnaire is attached. The attorneys who responded come from counties throughout the state and include attorneys with statewide practices as well as more local practices. The average among the respondents is 14+ trials/juries selected over the last three years.

As to the use of written jury questionnaires, 11 found the practice helpful; 7 had unfavorable opinions of it, with 5 (including some from each of the first two groups) saying written questionnaires were best suited to complex cases. Two attorneys had never had cases in which written questionnaires were used.

A large majority (14) were opposed to having jurors respond in writing, preferring verbal responses to written questions. Six had never experienced written juror responses. Only 2 were in favor of written responses as a general proposition, 3 in favor of written responses if verbal follow-up was done and 2 in favor of written juror responses only in complicated cases.

With regard to attorneys participating in initial juror questioning there was no clear consensus. Thirteen attorneys were opposed to this; 11 were in favor. Eight attorneys commented that they had no experience with this practice (includes some who expressed an opinion). Repeated comments included that allowing attorney participation in the initial questioning would be too time consuming and could increase the risk of mistrials.

A majority (17) were in favor of the initial questions being open-ended. Seven clearly preferred yes/no initial questions. Five people felt that open ended initial questions risk prejudicing the jury pool.

There was a split of opinion on whether the initial questioning should be done individually or en banc, with 12 preferring individual and 10 preferring en banc. People on both sides of the question did comment that individual questioning can be too time consuming.

Eighteen lawyers said that trial judges did allow supplemental questions with high frequency; 7 said low frequency. A clear majority felt that the results and information obtained from supplemental questions was good Three felt that there was insufficient follow-up

The experience was that trial judges take on the record responses to follow questions (20 of 21, with 3 ambiguous responses). Thirteen said that supplemental responses were always or predominately taken at side bar. Three said judges they appeared in front took

these responses in open court, and, on the other side, two said the responses were heard in chambers. Six attorneys commented that they had experienced all three methods.

A clear majority said that follow-up questions were open-ended and seemed to approve of this (14). Five said judges used yes/no follow-ups and two felt that this was wrong. Six attorneys had seen both forms of follow-up questions.

There was no clear consensus on whether attorneys were allowed to participate in follow-up questioning with 11 respondents saying they were not; 9 saying they were and 6 saying it varied. It seemed from comments that most judges took attorney input into framing the questions but that there was great variance in whether further attorney participation in actual questioning was allowed. Four expressed a preference that this be allowed.

Attorney were asked whether the current number of peremptory challenges were adequate, too many or two few. The response was overwhelming that the current number was adequate (23 responses). Two said there were too few peremptories and no one said there were too many. Seven commented that they opposed reducing the number of peremptories per party in multiple defendant cases.

The average number of peremptory challenges actually exercised by the responding attorneys was 4.12 . Eleven respondents indicated that they frequently used five or more peremptory challenges.

With regard to challenges for cause, the conclusion from the responses suggests that the treatment of such challenges varies greatly from judge to judge. Six respondents specifically added this comment. Furthermore 10 attorneys said that trial judges tend to deny requests to challenges for cause while 7 said judges tend to grant them liberally and 4 said “other”.

It is difficult to discern any generalizations from the additional comments made. There seems to be a general satisfaction about how the system is working. There were some comments that voir dire is too truncated and pro-forma, especially in complex cases. On comment was that jury selection in complex or high value cases should take a full day.

There seems to be a real divergence of opinion among attorneys who are familiar with New York practice. Some favored the heavy attorney involvement of that practice; others felt it encouraged abuse and consumed too much time. There were comments (roughly 5-7) that favored more attorney involvement in the questioning, with some of those saying not as extensive as in New York.

One repeated comment, even among those who felt the current practices are working well was the need for more uniformity among judges in conducting voir dire. I did not sample the NJDA on the average length of time taken up by voir dire. My sense in discussions is that the prior survey results showing an average time of 1 ½ to 2 hours in the routine case is accurate. No one commented that the current voir dire practice took too much time. This is clearly not a concern or a problem in the minds of civil defense trial attorneys.

From: Raymond Milavsky, Esq., First Assistant Prosecutor, Burlington County

To: Hon. Joseph F. Lisa, J.A.D., and members of the New Jersey Supreme Court Special Committee on Peremptory Challenges and Voir Dire

Re: Report, as Representative of the County Prosecutors Association of New Jersey, to Committee Questions Regarding *Voir Dire* Practices

Date: June 14, 2004

#1- The use of a written questionnaire should be pursued for addressing basic biographical information of a prospective juror. Information from prospective jurors for topics such as residence, marital status, age, employment, level of formal education, children and ages can be obtained in advance by written questionnaire. Obtaining this information in advance will translate to some time saving during the jury selection process. The time saved by using the written questionnaire could allow for some supplemental questioning of jurors on topics that the jurors can respond to with open ended questions. This will result in the attorneys obtaining more meaningful information about prospective jurors. Practical experience indicates that little is gained in observing a juror's verbal response to these basic biographical questions. Therefore, the written questionnaire should be utilized.

#2- In conjunction with #1 above, yes, written responses to routine biographical questions is a practice to be encouraged.

#3-This is a practice which should be avoided. Attorney conducted voire dire is neither practical or realistic in selecting jurors in non-capital cases.

#4-The use of **some** open-ended questioned would be valuable to the attorneys to gain better insight into juror attitudes. Open-ended questions, on certain limited topics, could benefit both sides in trying to arrive at a determination whether a juror should be challenged for cause or excused with a peremptory challenge. However, many of the more traditional questions should be posed to the jurors in a manner which would require a "yes" or "no" response.

#5- Certain initial questions should be posed to the group en banc. This is a more efficient method to select a jury. The entire panel should be reminded to listen carefully to all questions so that if they are placed in the jury box, they will be asked if they would have responsed to any question. For example, reading to the panel en banc the list of witnesses; the introduction of the attorneys and defendant; questions such as whether the prospecutive jurors have ever been the victim of a crime; or charged with a crime. These types of questions should be posed to the panel en banc and jurors then can be asked if they would have responded affirmatively to any of these general questions if they are selected to seat in the jury box. If this practice is eliminated, the time required to select a jury will significantly increase.

#6- This is a discretionary matter for the Court. Experience dictates that the trial judge will frequently agree to ask some supplemental questions, but not always in the specific phraseology requested by counsel.

#7- All juror responses should be on the record, whether in open court, at sidebar, or in chambers.

#8- This matter should lie within the discretion of the Court depending on the nature of the question or topic. Obviously, if there is either the potential to embarrass a prosepctive juror or the potential to prejudice the entire panel with an inappropriate remark, the juror's response should be conducted at either side-bar or chambers. Otherwise, many follow-up questions should be posed in open court.

#9- Follow-up questions are a better means to assess whether a prospective juror can be fair and impartial. The Court should determine in advance, after consultation with the attorneys, which open-ended questions will be posed to the prospective jurors. As discussed in #1 above, the attorneys will better be able to assess a juror's demeanor and suitability to sit if the juror is required to respond with a narrative answer as opposed to a "yes" or "no". The number of open ended questions should be limited. Depending on the nature of the case and the issues involved, the Court should use its discretion in allowing questions of this nature.

#10- This should be a discouraged practice. The only exception could conceivably be at a side-bar conference with a juror where the Court has made specific inquiry and then asks counsel if there is a need to follow-up with any additional questions.

NEW JERSEY SUPREME COURT SPECIAL COMMITTEE ON PEREMPTORY CHALLENGES AND JURY *VOIR DIRE*

QUESTION FOR CIVIL PRESIDING JUDGES RE:

STANDARD *VOIR DIRE* PRACTICES

Name: _____

Vicinage: _____

Division: _____

Question: Has your Vicinage established standard *voir dire* and jury selection procedures which trial judges are required to follow?

Yes ☐ No ☐

If you answered Yes, please explain (on a separate sheet), for the benefit of the Committee, the nature of those standard procedures. Please make specific reference to the following characteristics, as well as any others you deem appropriate. Thank you for your participation.

1) The use of written questionnaires;
2) Jurors answering questions in writing as opposed to verbally;
3) A trial judge permitting the attorneys to participate in initial questioning;
4) Initial questions that are open-ended versus those requiring a yes / no response;
5) Initial questions posed to jurors individually versus en banc;
6) The outcome when judges determine whether to permit requested supplemental questions;
7) Obtaining an on-the-record response to each requested supplemental question;
8) Posing any follow-up questions in open court as opposed to at sidebar / chambers;
9) Follow-up questions that are open-ended versus those requiring a yes / no response;
10) Attorney participation in asking follow-up questions.

Please send to: Michael F. Garrahan, Committee Staff
Administrative Office of the Courts
P. O. Box 988
Trenton, NJ 08625

NEW JERSEY SUPREME COURT SPECIAL COMMITTEE ON PEREMPTORY CHALLENGES AND JURY *VOIR DIRE*

QUESTION FOR CRIMINAL PRESIDING JUDGES RE:

STANDARD *VOIR DIRE* PRACTICES

Name: _____

Vicinage: _____

Division: _____

Question: Has your Vicinage established standard *voir dire* and jury selection procedures which trial judges are required to follow?

Yes ☐ No ☐

If you answered Yes, please explain (on a separate sheet), for the benefit of the Committee, the nature of those standard procedures. Please make specific reference to the following characteristics, as well as any others you deem appropriate. Thank you for your participation.

1) The use of written questionnaires;
2) Jurors answering questions in writing as opposed to verbally;
3) A trial judge permitting the attorneys to participate in initial questioning;
4) Initial questions that are open-ended versus those requiring a yes / no response;
5) Initial questions posed to jurors individually versus en banc;
6) The outcome when judges determine whether to permit requested supplemental questions;
7) Obtaining an on-the-record response to each requested supplemental question;
8) Posing any follow-up questions in open court as opposed to at sidebar / chambers;
9) Follow-up questions that are open-ended versus those requiring a yes / no response;
10) Attorney participation in asking follow-up questions.

Please send to: Michael F. Garrahan, Committee Staff
Administrative Office of the Courts
P. O. Box 988
Trenton, NJ 08625

Administrative Office of the Courts
Interoffice Memorandum

To: Hon. Joseph F. Lisa, J.A.D.

From: Michael F. Garrahan

Subject: Special Committee – Responses from Presiding Judges

Date: September 21, 2004

As part of its data collection efforts, the Special Committee asked Presiding Judges of the Civil and Criminal Divisions to respond to the following question:

> **Has your vicinage established standard voir dire and jury selection procedures which trial judges are required to follow?**

The responses from each Conference are discussed separately below.

Responses from Civil Presiding Judges

Thirteen Civil Presiding Judges returned the single question survey and each responded "No" to the question asking if the vicinage had established standard voir dire procedures which judges were required to follow.

Responses from Criminal Presiding Judges

All but one Criminal Presiding Judge responded to the survey and that vicinage underwent a change in Presiding Judges at about the time that the survey was distributed. All but two judges answered "No" to the question asking if the vicinage had established standard voir dire procedures which judges were required to follow. Although examination reveals that each of those judges indicated that vicinage judges were not required to follow the established procedures, I discuss each below with the hope that the discussion will be helpful.

Judge Schlosser, from Burlington, responded "Yes" to the question but noted in his comments that use of the standard procedures was not mandatory. With respect to the ten voir dire areas included in the survey, he provided the following information:

- juror responses are obtained verbally
- attorney participation in questioning is rarely allowed – either at initial questioning or in follow-up questioning
- most initial questioning does not use open-ended questions
- jurors are questioned en banc
- supplemental questions are almost always permitted
- proposed supplemental questions are addressed on the record
- follow-up questions are sometimes done at side bar and are sometimes open-ended.

The set of standard questions that was attached included biographical inquiries as well as case-specific questions (e.g., does the juror know the attorneys, parties, or witnesses; has the juror been the victim of a crime, etc.). In addition, there is a summary question about any other reason why the juror could not serve. In addition to those basic inquiries, however, there are also the following questions:

- "sports, hobbies you do on a regular basis"
- "newspapers, periodicals you read regularly"
- "any children, ages and occupations"

Judge Baxter also noted that use of the standard procedures are not required but that they have been in place for some time and are generally followed. The procedures used by the Camden judges include the following:

- questioning is done orally, not in writing
- jurors answer verbally
- attorneys do not participate in initial questioning
- almost all initial questions require a yes / no answer
- initial questions are posed en banc
- supplemental questions proposed by attorneys are generally asked when they are case specific, although half the judges indicated that they often allow questions about membership in organizations, television shows that are watched, and magazines that are read.
- it was noted that side bar will be used if the follow-up question relates to a sensitive issue and where the response has the potential to possibly prejudice the panel
- it was noted that open-ended questions are more likely to be used at side bar because the effects of a possibly prejudicial response are addressed
- attorneys are generally not permitted to question jurors, unless it's at side bar

Judge Baxter further indicated that the Camden judges would begin experimenting with the use of printed sets of standard questions that would be left on each seat in the jury box.

NEW JERSEY SUPREME COURT SPECIAL COMMITTEE ON
PEREMPTORY CHALLENGES AND JURY VOIR DIRE

SURVEY ON JUDGES' *VOIR DIRE* PRACTICES

The Supreme Court created the Special Committee on Peremptory Challenges and Jury Voir Dire with the mandate to conduct a review of the number of such challenges authorized in New Jersey as well as a review of *voir dire* practices and recommend ways in which to improve current practice with respect to those two items. The Committee determined during its initial meetings that it would direct its preliminary review to learning more about trial judges' current *voir dire* practices, although recognizing that *voir dire* practices and the use of peremptory challenges are necessarily linked. The attached survey requests information on issues that relate primarily to *voir dire*. It is anticipated that later Committee efforts will involve other issues, including those relating more directly to peremptory challenges.

Please note that the focus of the survey is on the average case and not complex civil litigation, except where specifically noted. Because *voir dire* in capital trials is so different, it is not intended to be part of this survey. Although the Committee asks specific questions, it is very interested in any additional comments or insights -- gained through your experience with jury trials -- that you would like to bring to its attention. The final question asks for those additional comments. Providing your name is optional but we request that you provide the county to which you are assigned because that information will be helpful in analyzing the responses that are received.

Please send completed surveys to:
(by Judiciary Messenger)

Michael F. Garrahan, Committee Staff
Administrative Office of the Courts
P. O. Box 988
Trenton, NJ 08625

Name: _____ (optional)

County to which assigned: _____

1. Do you currently handle jury trials?

   a. Yes, civil only _____

   b. Yes, criminal only _____

2. How many trials have you conducted during the past 12 months?

   a. Number of civil trials _____

   b. Number of criminal trials _____

3. If you use a standard set of questions, do you provide or display a printed copy of the

questions for the jurors?

a. Always ____

b. Sometimes ____

c. Never ____

4. If you use a standard set of questions, do you ask the jurors to answer the questions in writing?

a. Always ____

b. Sometimes ____

c. Never ____

5. Besides the standard set of questions you ask prospective jurors, do you ask specialized *voir dire* questions for certain kinds of cases (e.g., drug cases or personal injury cases)?

a. Always ____

b. Sometimes ____

c. Never ____

d. If you do, what kind of cases _____

what percentage of cases _____ %

Note: Please provide a copy of any voir dire questionnaires that you regularly use. Thank you.

6. If you ask specialized *voir dire* questions for certain kinds of cases, do you provide or display a written copy of the these questions for the jurors?

a. Always ____

b. Sometimes ____

c. Never ____

7. If you ask specialized voir dire questions for certain kinds of cases, please identify, below, the kinds of cases in which you use them.

_____

_____

_____

_____

8. If you provide or display a written copy of questions to jurors, please check off how questions are provided:

   a. Each juror is provided with a written copy of the questions _____

   b. Questions are displayed on an easel in the court room _____

   c. Other (please list how questions are provided) _____

9. If you do not provide or display a written copy of the questions, when you review the questions with the first prospective juror, do you review the complete set of questions with each juror?

   a. Always ____

   b. Sometimes ____

   c. Never ____

10. For the initial *voir dire* how do you most often question the jurors? (Please check the one response that is most appropriate.)

   a. En banc _____

   b. Individually in open court _____

   c. Individually at side bar _____

   d. Outside of courtroom (in chambers) _____

   e. Other (please explain) _____

11. How do you most often ask any follow-up questions? (Please check the one response that is most appropriate.)

a. En banc _____

b. Individually in open court _____

c. Individually at side bar _____

d. Outside of courtroom (in chambers) _____

e. Other (please explain) _____

12. Do you ask a summary or concluding question (such as: "Given all you've heard, is there any reason why you believe that you cannot serve as a juror in this trial?)?

a. Always ____

b. Sometimes ____

c. Never ____

13. Are follow-up questions open-ended or do they require a "yes or no" response.

a. Follow-up questions are open-ended _____

b. Follow-up questions are not open-ended _____

14. In what percentage of trials do attorneys propose supplemental questions?

_____ %

15. In what percentage of trials, do you permit questions submitted by the attorneys to be used to supplement the *voir dire* questions?

_____ %

16. If you supplement voir dire with questions submitted by attorneys, how often do you allow the attorneys to ask those questions directly to jurors?

a. Always ____

b. Sometimes ____

c. Never ____

17. If you allow attorneys to directly ask jurors voir dire questions, in what percentage of those instances do the attorneys decline that opportunity and instead ask you, as trial judge, to ask those questions?

_____ %

18. If you allow attorney *voir dire*, under what circumstances do you permit it?

a. I allow attorneys to conduct all *voir dire* questioning _____

b. I allow attorneys to ask supplemental questions only _____

c. I allow attorneys to ask follow-up questions only _____

d. I allow attorneys to ask supplemental & follow-up questions _____

19. If you allow attorney *voir dire*, how do you allow it?

a. In open court _____

b. Only at sidebar or in chambers _____

20. In a relatively simple civil trial or a single defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the selected jury is empaneled)?

_____ hours _____ minutes

21. In a complex civil trial, or a multi-defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the selected jury is empaneled)?

_____ hours _____ minutes

22. Effective September 2000, subparagraph (f) was added to R. 1:8-3, which provides:

"(f) Conference Before Examination. Prior to the examination of the perspective jurors, the court shall hold a conference on the record to determine the areas of inquiry during voir dire. If requested, the court shall determine whether the attorneys may participate in the questioning of the perspective jurors and, if so, to what extent. During the course of the questioning, additional questions of perspective jurors may be requested and asked as appropriate under the circumstances."

If you were presiding over jury trials prior to the amendment, have you experienced any change in practice as a result of the amendment? _____ Yes _____ No

If so, please describe:

_____

_____

_____

_____

23. In what percentage of trials do you estimate that the parties exhaust their allotted number of peremptory challenges?

a. Prosecution _____ %

Defendant _____ %

b. Plaintiff _____ %

Defendant _____ %

24. In what percentage of trials do you grant additional peremptory challenges?

_____ %

25. Your responses to the questions presented above provide detailed information on your current *voir dire* practices. The Committee would also appreciate any additional

information you would like to provide concerning *voir dire* practices, including which *voir dire* practices you prefer, as well as any recommendations that you believe will assist the committee in its full review of *voir dire* practices in New Jersey.

THANK YOU FOR YOUR PARTICIPATION.

Administrative Office of the Courts
Interoffice Memorandum

To: Hon. Joseph F. Lisa, J.A.D.

From: Michael F. Garrahan

Subject: Special Committee – Judges' Responses Survey on *Voir Dire* Practices

Date: September 23, 2004

I've listed summary information, below, on the responses from civil and criminal division judges to the survey on voir dire practices that was prepared for the Special Committee. I received 132 completed surveys. In reviewing the responses and trying to categorize the results in ways that might best assist the work of the Special Committee, I placed the 25 questions into the following categories – with the intent that separating the issues and the judges' responses to those issues provide a better focus for the review. Please note that questions #8 and #9, included with review of the standard set of questions (section B) might also be reviewed with the specialized questions (section C).

A. Background – questions 1 and 2
B. Standard Set of Voir Dire Questions – questions 3, 4, 8, 9,10, and 12
C. Specialized Voir Dire Questions – questions 5, 6, and 7
D. Follow Up Questions – questions 11 and 13
E. Supplemental Questions – questions 14 and 15
F. Direct Questioning by Attorneys – questions 16, 17, 18, and 19
G. Length of Jury Selection – questions 20 and 21
H. Exhaust / Grant Additional Peremptory Challenges – questions 23 and 24
I. Impact of R.1:8-3 Amendment – question 22
J. Individual Judge Comments – question 25

A Background

Question #1 – Do you currently handle jury trials (designate civil or criminal)?

- We received 132 completed surveys, which is a response rate of 59% based on the 2004-2005 General Assignment Order placing 225 judges in the Civil and Criminal Divisions of Superior Court.

- Of those 132 responses, 78 (59%) are from civil judges and 48 (36%) are from criminal judges. Six judges (5%) did not provide adequate information to determine their assigned division.

- The 78 responses from civil judges represents 63% of the total assigned to civil and the 48 responses from criminal judges is 48% of the total assigned to criminal.

Question #2 – How many trials have you conducted during the past 12 months?

- The median response from responding judges was that they'd handled 18 trials during the past 12 months. The median for civil judges is 20 trials and the median is 15 trials for the criminal judges.

- Overall, 77% of respondents in both trial types reported handling 10 or more trials in the past 12 months. Only 14% of the responding civil judges reported having handled 5 or fewer trials. That figure was only 4% for responding criminal judges.

B. Standard Set of Voir Dire Questions

Question #3 – If you use a standard set of questions, do you provide or display a printed copy of the questions for jurors?

- 64% of the responding judges stating that they NEVER display the standard set of questions nor provide a print copy. The breakdown by division is 68% of civil judges said NEVER and 56% of criminal judges responded that way as well.

- Overall, 26% of the responses indicated that they ALWAYS take that action.

Question #4 – If you use a standard set of questions, do you ask the jurors to answer the questions in writing?

- Of the 127 judges who responded, 81% stated that they NEVER request voir dire responses in writing.

- It's worth noting that 15% of responding criminal judges responded that they ALWAYS ask jurors to respond in writing. It was only 5% for civil judges.

Question #8 – If you provide or display a written copy of the questions to jurors, please check off how questions are provided.

- Only 50 judges responded, likely because they do not display the standard set of questions or do not provide a print copy.

- 70% of those who did respond stated that they provided a print document to jurors and another 6% stated that they gave jurors a print document in addition to displaying the questions for jurors.

Question #9 – If you do not provide or display a written copy of the questions, when you review the questions with the first prospective juror, do you review the complete set of questions with each juror?

- 52% of responding judges state that they ALWAYS review the questions with each juror

- 26% state that they NEVER review the questions with each juror

- 21% state that they SOMETIMES review the questions with each juror.

- The breakdown of the Never responses is interesting because 45% of criminal judges answered in that way -- but only 20% of responding civil judges.

- 61% of the civil judges responded that they ALWAYS review the questions with each juror.

Question #10 – For the initial voir dire how do you most often question the jurors? (Please check the one response that is most appropriate.)

- Both civil and criminal judges had an 85% response when the "en banc" and "individually in open court" responses are combined – although the en banc response is 10% greater from criminal judges than civil judges and civil judges favoring individually in open court by 10% over criminal judges. (The lesser use of individual questioning in criminal trials may relate to the greater number of jurors seated (and therefore questioned) in criminal trials.

Question #12 – Do you ask a summary or concluding question (such as: "Given all you've heard, is there any reason why you believe that you cannot serve as a juror in this trial?

- 86%, overall, stated that they ALWAYS use a summary question – broken out as 82% of civil judges and 92% of criminal judges.

- Only 4% of responding judges stated that the NEVER use a summary question.

- 10% answered as SOMETIMES.

C. Specialized Voir Dire Questions

Question # 5 – Besides the standard set of questions you ask prospective jurors, do you ask specialized voir dire questions for certain kinds of cases (e.g., drug cases or personal injury questions).

- Although 99% of overall responses indicate that judges use specialized questions at least sometimes – 57% ALWAYS and 42% SOMETIMES, the percentage that provided an ALWAYS response is 71% for civil judges and only 28% for criminal judges.

- 72% of criminal judges responded that they SOMETIMES use specialized questions.

Question #6 – If you ask specialized voir dire questions for certain kinds of cases, do you provide or display a written copy of these questions for the jurors?

- 69%, overall, indicated that they NEVER display the questions for jurors or provide a printed copy of the specialized questions. The breakdown is 69% of civil judge responses and 65% of criminal judges.
- Only 12%, overall, stated that they ALWAYS display the specialized questions or provide a printed copy of the specialized questions for the jurors.

- The overall results here are similar to the earlier results when judges were asked the same question with regard to the standard set of questions – 64% of those respondents stated that they do not display or provide the set of voir dire questions.

Question #7 – If you ask specialized voir dire questions for certain kinds of cases, please identify, below, the kinds of cases in which you use them.

- There are 107 responses and 69% identified specific case types.

- Another 19% stated that they used specialized questions in all trials – but did not provide specific case types.

- Another 12% stated that they used specialized voir dire questions when those questions were requested by counsel – but again, no specific case types were identified.

- The 74 judges who identified specific case types named from 1 – 8 separate case types, with 68% naming 4 or fewer case types.

- Only a single criminal judge named more than 3 case types, whereas there were 14 civil judges who named more than four specific case types.

D. Follow Up Questions

Question #11 – How do you most often ask any follow-up questions? (Please check the one response that is most appropriate.)

- Only 13% of the overall responses involved either en banc, outside of courtroom (chambers), or other.

- The remaining responses involved individual questioning – primarily in open court (37%) and at side bar (23%), but also a combination of those two options (10%) or another combined response that included at least one of those two options in the response (17%).

- Of the total of 35 responses that combined options (despite instructions to select the most appropriate response), 54% of those responses were from criminal judges (which comprised 40% of the total criminal responses).

- Only 8% of criminal judges responded that they ask follow-up questions at side bar while 32% of civil judges stated that they ask follow-up questions at side bar.

Question #13 – Are follow-up questions open-ended or do they require a "yes or no" response?

- The overall response was that 67% use open-ended questions, 27% do not, and 7% use both, which means that nearly three-quarters use open-ended questions at least some of the time.

- The civil – criminal breakdown is that 69% of civil use open-ended questions and 63% of criminal judges.

E. Supplemental Questions

Question #14 -- In what percentage of trials do attorneys propose supplemental questions?

- The median response of all judges was that attorneys propose supplemental questions in 50% of the trials.

- The median response from civil judges was that such questions are proposed in 75% of the trials but the median percentage was only 20% from criminal judges.

Question #15 – In what percentage of trials do you permit questions submitted by the attorneys to be used to supplement the voir dire questions?

- The median response, overall, was that such questions are used in 90% of trials.

- The median response from civil judges was 93% and the median response from criminal judges was 88%.

- What is not asked is what types of questions are asked or what percentage of the number proposed are asked – so it is not clear how meaningful these numbers are.

F. Direct Questioning by Attorneys

Question #16 – If you supplement voir dire with questions submitted by attorneys, how often do you allow the attorneys to ask those questions directly to jurors?

- The overwhelming response is NEVER – 74% overall, 80% from civil judges, and 69% from criminal judges.

- 22% of judges stated that they SOMETIMES permit attorneys to directly question jurors with regard to supplemental questions.

- Only 3% of judges responded that they ALWAYS allow attorneys to ask questions directly to jurors (3% from civil judges, 4% from criminal judges).

Question #17 – Where judges allow direct questioning by attorneys, what percentage of attorneys decline that opportunity and ask, instead, that the judge question the jurors?

- There were only 35 responses to this question, which likely means that there are few judges who permit direct questioning of jurors by attorneys (recall that 74% of judges reported that they never allow direct questioning for supplemental questions).

- Of the 35 responses, 40% answered that the attorneys decline the opportunity to directly question jurors in 0% of the instances in which it's offered – meaning that no attorneys declined the opportunity for those judges.

- Most of the remaining responses are in the 50% to 95% range, meaning that attorneys for those judges declined the opportunity in at least half the instances (there were no answers of 100% - that all such opportunities were declined).

Question #18 – If you allow attorney voir dire, under what circumstances do you permit it?

- There were 56 responses to the question which, again, is first asks "if" direct questioning is permitted – which means that only a minority allow attorneys to directly ask questions.

- 54% of the responses state that direct questioning is only allowed for follow-up questioning.

- 11% allow only for supplemental questions and 32% allow only for a combination of follow-up or supplemental questions

Question #19 – If you allow attorney voir dire, how do you allow it?

- 90% of the 58 judges who responded stated that they allow it only at side bar or in chambers.

- 5% allow it in open court and 5% allow it at all locations, including open court.

G. Length of Jury Selection

Question #20 – In a relatively simple civil trial or a single defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the jury is empanelled)?

- The median response for all responses is 90 minutes (1.5 hours). The average overall response is 113 minutes (nearly 2 hours).

- The median response / average response from civil judges is 90 minutes / 91 minutes. The median response / average response from criminal judges is 150 minutes / 151 minutes.

Question #21 – In a complex civil trial, or a multi-defendant criminal trial, how long does it typically take you to complete jury selection (the point at which the jury is empanelled)?

- The median response for all responses is 240 minutes (4 hours). The average overall response is 345 minutes (5.75 hours).

- The median response / average response from civil judges is 210 minutes (3.5 hours) / 263 minutes (nearly 4.5 hours). The median response / average response from criminal judges is 300 minutes (5 hours) / 499 minutes (nearly 8.5 hours).

H. Exhausting / Granting Additional Peremptory Challenges

Question #23a – In what percentage of trials do you estimate that [prosecutors and criminal defendants] exhaust their allotted number of peremptory challenges?

- The median response from 29 criminal judges is that prosecutors exhaust their allotted number of peremptory challenges in 10% of trials.

- The median response from 29 criminal judges is that criminal defendants exhaust their allotted number of peremptory challenges in 40% of trials.

Question #23b – In what percentage of trials do you estimate that [plaintiffs and civil defendants] exhaust their allotted number of peremptory challenges?

- The median response from 53 civil judges is that plaintiffs exhaust their allotted number of peremptory challenges in 20% of trials.

- The median response from 53 civil judges is that civil defendants exhaust their allotted number of peremptory challenges in 20% of trials.

Question #24 – In what percentage of trials do you grant additional peremptory challenges?

- The 120 responding judges stated that, as a median, they grant additional peremptory challenges in 5% of trials.

- The median response from civil judges was also 5% but was 0% from criminal judges.

I. Impact of R.1:8-3 Amendment

Question #22 – If you were presiding over trials prior to the [R.1:8-3(f) amendment], have you experienced any change in practice as a result of the amendment?

- 92 judges responded (indicating they had trial experience before and after the rule amendment) and 95% stated that they experienced no change.

- None of the 35 responding criminal judges reported any change.

- 10% of civil judges did state that they experienced change.

J. Comments from Judges

Question #25 – Judges were asked to provide additional comments if they chose to do so.

- 45% of judges provided some additional comment (60 judges out of 132)

Comments from Civil and Criminal Division Judges to Survey Question #25

> **Question 25. Your responses to the questions presented above provide detailed information on your current *voir dire* practices. The Committee would also appreciate any additional information you would like to provide concerning *voir dire* practices, including which *voir dire* practices you prefer, as well as any recommendations that you believe will assist the committee in its full review of *voir dire* practices in New Jersey.**

The optional comments provided by sixty judges, in response to question #25, are categorized by the nature of the comment -- in order to make them easier to review and to relate the comments to areas in which the Special Committee is interested. The categories focus on the primary thought expressed in the comment, with the exception that several were equally focused on two topics and are, therefore, categorized in that way. The categories suggested by the judges' comments are shown below. The number of comments in each category are shown in parentheses, in bold, following each Roman numeral category. The numbers in parentheses, in regular type, show subtotals where the category has subdivisions.

I Comments Describing Voir Dire Methods **(24)**

II Comments that Make Specific Recommendations **(31)**
- A. Recommend Reducing the Number of Peremptories (19)
- B. Recommend Questioning Only by the Trial Judge (3)
- C. Recommend Both Judge Questioning and Reducing the Number of Peremptories (3)
- D. Recommend Using Open-Ended Questions for Jurors (3)
- E. Recommend Other Voir Dire Practices (3)
  1. Use of Written Voir Dire Questions
  2. Use of Charts or PowerPoint Presentations
  3. Ask Attorneys to Place Peremptory Reasons on the Record

III Comments Indicating Current Practice is Satisfactory **(5)**

Overview

In terms of percentage responses, 40% of the judges' comments described their voir dire methods (or methods they planned to use), 32% recommended that the number of peremptory challenges be reduced, 20% made other specific recommendations (noted above), and 8% indicated that current voir dire practices are satisfactory. It is worth noting that criminal judges provided 74% of the comments that recommend reducing the number of peremptory challenges and the remaining 26% came from civil judges. Additionally, of the 24 judges whose comments described their voir dire practices, 18, or 75%, are civil judges and the remaining 6, or 25%, are criminal judges.

I COMMENTS DESCRIBING VOIR DIRE METHODS

Survey #002
I prefer completing as much voir dire as possible openly, except when the potential juror appears to have an excuse or long answer. In that event, the juror is required to walk up to side-bar so that the discussion is on the record but presumably away from the earshot of other panel members. This is to avoid the other panel members from hearing the excuse or reason and thereby possibly being tainted with ideas for their own possible avoidance of service.

I always inquire with counsel after this "go-around" of questions whether they require a side-bar; this opportunity would have been discussed with them before the panel was brought to the courtroom so that counsel know that they have the opportunity for any follow-up questions.

If I sense that the subject matter is sensitive or personal, I have the juror come up to side-bar and I also inform the panel that they are welcome to request a side-bar in that event.

Basically, I try to move it along speedily, but respectful to jurors, to the parties and to the process.

Survey #004
I prefer voir dire practices as follows: The prospective jurors are questioned "in the box" and individually with all the questions being asked verbally, as a rule. Any answers that need to be pursued are done at side-bar with the attorneys. The attorneys are allowed to assist the court with additional and supplemental verbal questions which are asked of the prospective juror at side-bar only. I will conduct side-bar questioning of the jurors and allow attorneys to purse additional areas of inquiry.

It should be noted that pursuant to rule, I would meet with the attorneys and discuss their submitted voir dire inquiries. I strive to obtain consent on supplemental questions and incorporate them in my voir dire of the prospective jurors.

Survey #030
Voir dire is obviously designed to weed out potentially biased jurors, not to afford attorneys the opportunity to select favorable jurors. Most peremptories, however, are used to excuse jurors who appear unfavorable or ill-equipped for the task. I think it necessary to ask questions that elicit verbal responses and some thought, while at the same time to put jurors at ease. Almost all of my standard questions (which can be extensive) are in writing and circulated to jurors. I go through the form once and thereafter ask individual jurors if they would answer "yes" to the form questions. I then ask a number of different questions of each juror to give the attorneys a sense of the

personalities involved. If applicable (auto, fall down, medical, etc.) I ask about tort reform and capping of damages.

Survey #032
My practice is to ask general standard questions (town of residence, others in household, employment of all, ever sued / been sued, feelings about lawsuits that would keep one from being fair and impartial); anything about the case or any other reason juror could not be fair and impartial – of each juror once seated. Parties and attorneys are introduced and witnesses listed for entire group, to excuse those who know them. Case is briefly described to entire group. Additional questions relate to the case itself, e.g., does the juror or anyone close to him have an ailment similar to the one claimed by plaintiff, ever been in a car accident, ever been treated unfairly by an employer, etc. Jurors are instructed that if any answers require more than a "yes" or "no" they should come to side-bar, where I do further exploration. Attorneys may follow up.

Survey #036
My current voir dire practices are satisfactory. [Respondent provided outline of areas of juror questioning.]

Survey #037
Jurors appreciate it when I tell them, en banc, all of the questions that I intend to ask them when seated in the jury box. I also stress to the jurors, en banc, that any questions which they would rather answer in private, that they may do so at sidebar with only the attorneys present.

Proposed length of the trial is obviously of great concern to most jurors; accordingly, I tend to go over in some detail with the attorneys the number of witnesses and any anticipated delays so that the jury receives an end date that is plausible.

Survey #046
The proper selection of a jury without bias takes time and should not be rushed. The jurors should be engaged in conversation informally so counsel can better evaluate their personalities and be better able to determine how they may impact jury deliberations. Since attorneys do not now participate directly, the trial judge has a special obligation to be thorough. I believe trial judges who rush the jurors are generally either not sympathetic to the jury system or not sufficiently aware of the impact on the attorneys, the prospective jurors, or the parties present in court. Too much speed and so-called efficiency, I believe, creates the wrong atmosphere for a trial.

Survey #050
Typically, 40 jurors are brought to the courtroom. The judge, litigants, and attorneys are in open court. I recap with the prospective jurors how the jury selection process works and tell them that the ultimate goal is to seat a group of fact finders that can be fair and impartial in all respects. I advise the jurors that if I ask any question that appears to be "of a personal nature" that they ask to talk to me and the attorneys at side bar on the record.

I then mark the "proposed voir dire questions", as contained in the attorneys' pretrial exchange, as court exhibits. I note on the exhibits in handwriting which question I will and will not ask. The "marked" exhibits are then given to each counsel to be retained with their other evidence, in case of an appeal.

I tell the panel how long I expect their jury service to last. I then read to the jurors a statement (that was prepared by the attorneys) informing them about the case. The attorneys and litigants are then introduced to the panel. The names of all the witnesses are read to the panel.

Once the initial jury is seated, I begin asking the voir dire questions in open court. As each replacement juror is called, I question that juror to the extent needed to qualify that juror up to the point of the other seated jurors.

The process works fine. Jury selections are quick and the attorneys appear to be happy. I have had no appeals based on the jury selection process.

Survey #052
1. The entire voir dire is provided to each juror. A "yes" answer to any question requires additional inquiry. I go over each question with juror #1 and then ask the remaining jurors if "they have heard the questions and do they have any answers for discussion. Yes answers go to the sidebar and attorneys are always allowed to ask questions at sidebar.

2. I freely allow the attorneys to supplement the standard questions.

3. It would be helpful if we had standard voir dire questions for case types.

Survey #060
I require attorneys to present complete pre-trial disclosures under Rule 4:25-7(b), Appendix XXIII, which includes proposed voir dire. I rule, on the record, on all voir dire requests, Rule 1:8-8, prior to juror selection. At side bar, I permit the attorneys to suggest any follow up to any juror and after hearing from attorneys at side bar, I decide and then I ask any follow up. I conduct all hardship requests at side bar, and in personal injury cases, if the jurors answer: no – that they were satisfied with the results of any prior

resolution of their personal injury claims or suits, the follow up is done at side bar. This system works well. To date, no attorney has ever requested to participate in voir dire. My educated guess is that none are familiar with the rule change because no one has ever asked to participate under Rule 1:8-3.

Survey #069
When I conduct voir dire, I try to identify jurors who will be excused for cause as early in the selection process as possible in order to return them to the jury pool so that they will be available for selection in other cases. To accomplish this, I ask all of the jurors, en banc, if they know anything about the case, if there is anything about the type of case which would make it difficult for them to be fair and impartial, and if they know any of the parties, attorneys and witnesses. If any juror answers yes, I will either excuse them immediately, if counsel have so agreed, or I will ask open-ended questions at sidebar to learn the basis for their answers, or I may use a combination of those two approaches, again depending on the agreement reached with counsel with respect to particular questions, such as their knowledge of witnesses. I find that very experienced counsel just prefer to excuse the juror immediately because experience has taught them that sidebar voir dire results in the retention of few, if any, jurors and simply slows down jury selection. Once I used written questions for this stage of the voir dire due to the numerous parties and witnesses.

Survey #070
1. I ask general questions (e.g., ever been in an accident? Etc.) en banc and obtain only a juror number if they have a response.

Survey #074
My initial voir dire is directed to the 14 seated jurors as a group. These are general questions. I then review with each juror [a set of standard questions].

Survey #079
I ask questions that are not gender specific, or sexual orientation specific, e.g., "who comprises your household?"

Survey #087
I find that the introductory remarks to the panel take 30 minutes. Standard voir dire takes 30 – 45 minutes. Therefore, it usually takes between one hour and one and one-half hours before the State exercises its first challenge.

In my experience, the manner in which the judge conducts voir dire sets the tone for how the jury reacts throughout the trial. I do not support a standardized voir dire practice,

because I find that the ability of the judge to interact with jurors is crucial to the jury's appreciation of its role. Each judge should have discretion to mold voir dire to his / her personality, recognizing that the standard voir dire questions will be incorporated.

Survey #098

1. Sidebar is practically mandatory for me. The jurors are far more forthcoming in private - sidebar – than they are in open court. As an example, I recently had a potential juror, in a case in which the jurors were asked if "…anyone close to them has had a long term illness…". A juror confided at sidebar that his gay partner was dying of AIDS. I do not think that juror would have volunteered that information readily in open court. Further, I have had jurors blurt out in open court "I don't believe in chiropractors" or "That doctor you mentioned saved my mother's life." -- things that I would rather not be heard by the entire panel.

2. I tried written questionnaires once. Although the information supplied was very helpful, it took far too long to distribute, fill out, and photocopy the responses for the lawyers. I would only use written questionnaires in a criminal trial or a very long civil case.

3. I think this survey is a worthwhile project and I hope the results are revealing.

Survey #102

I intend in my next jury trial to place a list of all voir dire questions on each juror's seat so that if a new juror replaces an excused juror, he or she will not have to remember the questions. Instead, he or she will be able to review the list of written questions.

Survey #103

I find that despite complaints by some members of the bar that the courts race through voir dire, more than half of all attorneys fail to submit the pre-trial submission.

Survey #107

1. In long cases where one-half to two-thirds of the panel indicate a hardship, I first interview the jurors who claim hardship individually. It takes about one minute to interview each juror so that if I have 50 jurors and 25 claim hardship, in less than a half-hour I have narrowed the pool to 25 jurors for whom the length of the trial is no problem. This makes the balance of the voir dire go much more smoothly.
2. Whether or not requested, I always ask counsel if there is any voir dire needed on racial or ethnic bias.

Survey #109
I normally give a 4 – 5 minute speech on civic responsibility and I have modified this somewhat over the years and have found over time that a properly worded and referenced speech of this type is important and for the most part eliminates phony excuses as to why people cannot serve.

In addition, I found through experience that it was very important after the attorneys have both passed with the seated jurors, who are now the jurors for the trial, to take a minute or two to explain to the seated jurors, as well as the folks still left in the panel, exactly where the matter stood at that point, i.e., I explain to everyone that we have reached a point where the seated jurors are going to be the jurors for the trial and that I will be excusing the other prospective jurors to return to juror assembly to await further instructions, and before I do that, I indicate "…having heard the Court's comments as to where this matter stands at this moment, is there anything that anyone wants to bring to my attention that would affect your ability to serve before I thank and excuse the other prospective jurors who are still in the courtroom?" The reason I do this is that I found, with some frequency, that I would excuse the balance of the jury panel and then 1 or 2 jurors would raise their hands right before or after they were sworn and relates some problem that interfered with their ability to serve on the jury. It seemed obvious that these individuals had not been paying very close attention to the Court's comments and questions, but, as indicated, this problem has been pretty much eliminated since I take a few minutes to explain where the matter stands at that juncture.

Survey #112
I routinely ask several general questions like hardship to serve to be answered at sidebar if a juror is called to sit in the jury box, before they take their seat to be asked the general voir dire questions.

Survey #114
In cases expected to last more than 2 weeks, I give the jury panel some information regarding the case, then invite jurors to come to sidebar if they wish to be excused on a hardship basis or if they have information regarding the case. I prefer to hear hardships at sidebar so jurors are not educated as to what reasons result in excusal. The rest of jury selection proceeds more quickly and smoothly if you do not need to deal with hardship and prior knowledge questions.

Survey #119
I try to involve counsel for both sides in formulating questions peculiar to the case, e.g., where I have a convicted felon suing a police officer(s) for civil rights violations. I balance the need for jury selection to be done in a reasonable time with the overriding need to assure that the final jury is open-minded, diverse, fair and willing to serve and be attentive.

I believe that I should do neither too little nor too much, with the objective that the panel is one which will produce a fair, impartial trial and verdict. I also recognize that lawyers must be assured that the Court respects their need to be heard on voir dire questions, and with the Judge's obligation to be open-minded.

Survey #121

As my answers to questions 20 and 21 indicate, I tend to spend less time in jury selection than the average judge. This is probably the only area in which I am an outlier. One reason I spend less time on jury selection is that I generally get a good deal of information from the following open-ended question that I ask of all prospective jurors: "If you met the trial lawyers, how would you describe yourself and your life?" Almost every prospective juror provides useful information – useful not only for what is said but also for how it is said what is emphasized, what is de-emphasized, etc. Counsel and I are constantly surprised by the answers we receive, such as: "My favorite hobby is constructing model airplanes.", "I am a deacon at my church.", "My friends and I drag race." (This admission is generally followed by an admonition from the court not to drag race in the streets.), "I nurse injured birds back to health." We also learn of prospective second careers (we've already been told of current careers) – "I am studying at night to become a (nurse, computer programmer, therapist)." When the answer is that the juror spends a good deal of time watching television or reading, the natural follow-up questions also provide interesting information: "I watch Law and Order several times a week.", "My favorite is Judge Judy." (One tends to inform the prospective juror (and, not incidentally, the panel) that we believe we have a better justice system than does Judge Judy.), "I watch the History Channel a great deal.", "I read the Star-Ledger sports section a lot." Some prospective jurors talk a lot about their families ("I'm the proud mother of three children who…) while others emphasize their careers ("I work 60 hours a week at my job and take great pride in what I am doing there."). Obviously, what a prospective juror doesn't say may be as important as what she does say.

I may be wrong, but my two and a half years experience as a civil judge leads me to believe that these open-ended questions and the natural follow-ups, lead to prospective jurors being more at ease and, therefore, more likely to provide honest and useful answers for the lawyers to utilize. Finally, and at most a secondary or tertiary benefit, the panel generally finds the answers to the open-ended questions to be interesting (one usually finds smiles, laughter, nods, etc.) which might lead to a more cooperative attitude.

I hope the above comments are useful to your Committee.

II COMMENTS THAT MAKE SPECIFIC RECOMMENDATIONS

A RECOMMEND REDUCING THE NUMBER OF PEREMPTORIES

Survey #008
1. limits on peremptory challenges – e.g., 3 in civil; 6 in criminal

2. ability to reduce (as opposed to just enlarge) peremptory challenges in multi-defendant cases.

3. ability to use visual aides in voir dire e.g., standardized basic questions on InfoNet along with ability to modify easily and reproduce visually in court.

Survey #010
I strongly recommend reducing the number of peremptory challenges. The right to peremptory challenges is allowed in a way that discredits the image and integrity of the justice system. The court conducts an extensive voir dire resulting in a substantial number of jurors being excused for cause.

Survey #012
My primary experience with jury trials in the past four years has been in criminal. I have selected about 80 criminal juries in that time. The number of peremptory challenges is definitely too high for many trials (12 state, 20 defendant). I believe most judges readily grant challenges for cause, thus reducing the need for a large number of peremptories. Ten for each side would be fine.

As to voir dire, each case is handled individually. Questioning is based on notes and memory from going through the process so many times. Written questionnaires for more complex or serious charges, such as homicide cases, take more time and effort but provide much more information about jurors than oral voir dire.

With respect to civil jury trials, my experience dates back primarily to 1995-99. I know of no problems or need for change.

Survey #013
I prefer raising the issue of jurors seeking to be excused for cause and hearing these jurors, with counsel, at side-bar – then questioning remaining jurors in open court. Otherwise, jurors "develop" problems which resulted in excuse for another juror.

Frankly, I believe a reduction in the number of challenges would be more efficient and serve the interests of justice just as well. Perhaps 4 – 4 in civil trials? Having heard criminal trials until 1999 I definitely believe a reduction in the number of challenges is

appropriate – so many jurors were excused for cause at side-bar as a result of a detailed questionnaire that the challenges – often resulting in the need for an additional panel – were excessive.

Survey #020
The number of challenges should be greatly reduced. A large number of jurors are excused for cause.

Survey #044
There are too many peremptory challenges allowed. 5 – 7 for each side is more than adequate.

Survey #054
For the majority of cases I find that peremptory challenges are abused by the trial attorneys. Perfectly capable jurors are excused for no reason at all. The most important function of this committee should be to reduce the number of peremptory challenges. The majority of my experience is in criminal, and the system would function adequately if at least half the current peremptory challenges were eliminated.

Survey #056
There are too many peremptory challenges. In non-specified criminal trials, it is suggested that there be 8 peremptory challenges per side. In the specified "serious" charge it is suggested that the State have 8 challenges and the defendant have 14.

Survey #058
The number of criminal peremptory challenges should be reduced.

Survey #066
I first question the panel as a whole. I then call jurors into the jury box. I ask the jurors seated in the box individual questions and I then ask questions collectively of the jurors seated in the jury box. If I speak with a juror at sidebar, I ask the attorneys at sidebar if they have any follow up questions before releasing the juror back to the jury box. The attorneys must direct the question to me first so that I may determine if it is an appropriate question before the juror answers.

I am supportive or reducing the number of peremptory challenges. In expedited jury trials, where each side agrees to three challenges each, I see no disadvantages to the parties when compared with trials where the parties have six challenges each. I often see the challenges used unnecessarily.

2. Clerk calls names; if juror had a response, juror comes to side bar for open-ended follow up. I also allow attorneys to ask follow up after me.

3. Then, while juror is seated, I use my sheet of additional questions.

Survey #071
I find that given my liberally allowing lawyers' participation, coupled with an open policy of excusing jurors for cause with consent of attorneys, the number of challenges should be reduced. I believe most courts would agree.

Survey #084
I strongly recommend that the committee consider reducing the number of peremptory challenges in criminal cases. The current rule grants the defendant 20 challenges and the prosecution 12 challenges for some third degree crimes, e.g., burglary and aggravated assault. The challenges should be reduced for these third degree crimes. Furthermore, 20 challenges is a large amount of challenges, much greater than provided in other states. Even in the case of first and second degree crimes, a reduction in the number of challenges should not prejudice either party in the effort to select a fair jury.

Survey #086
Certain defense attorneys inevitably use all or very close to all of their challenges. In first degree and second degree cases, they, of course, are generally allotted 20 challenges. I request that the committee review the number of challenges with an eye to reducing them to 10 regardless of the degree in as much as the quality of the jury changes little with the exercise of 13 to 20 challenges, particularly where the court is liberal in granting excuses from service. The number of challenges may be modified by the court, of course, if there are exceptional circumstances in the case.

Survey #088
The only comment would be regarding peremptory challenges – I get the impression in most cases defense attorneys especially use them all just because they have them and to protect themselves from criticism from their clients. Limiting or reducing the number of challenges would not, in my view, prejudice any party – and doing so would expedite the tedious process.

Survey #092
1. too many peremptory challenges in criminal
2. we should pass out questions to jurors before selection begins and provide pencils to mark up sheet to make easier to remember if called upon.

Survey #093
There are too many peremptory challenges in criminal cases. If the court does a proper job at questioning and excusing jurors for cause, the number should be reduced.

Survey #105
In my view there are too many peremptory challenges. I think counsel feel they have to use a large percentage because they are available. I also feel if there were less challenges counsel would be equally satisfied with the jurors selected without giving up any rights the parties may be entitled to.

Survey #123
I recommend limiting and reducing the number of peremptory challenges in more serious cases from 20 and 12 to 14 and 12. I exclude a lot of jurors for cause so the need for a larger number of peremptories does not exist. We could reduce peremptories in other cases to 6 and 6 also.

Survey #124
Peremptory challenges should be reduced.

B RECOMMENDS QUESTIONING ONLY BY THE TRIAL JUDGE

Survey #014
I am convinced that jurors are more willing to serve and better understand the need to be fair and impartial if the Judge is the only person speaking directly to the jurors.

On the rare occasions when there has been direct juror / attorney voir dire contact, it is evident through verbal and body language that each is trying to "please" the other instead of jurors adhering to their oath to be fair and impartial and focus on the parties and issues.

Alternatively, if attorneys are permitted to ask questions on voir dire, I presume there would be threshold review and approval by the Judge as well as procedural safeguards such as:

1. Judge to ask all preliminary questions and address the array on their duties to serve.
2. only case specific questions to be asked from counsel table
3. equal distribution of questions among counsel
4. no spontaneous questions; Judge review of proposed follow-up questions.

I have observed attorney voir dire of a full panel of jurors in an underpopulated state. It is a virtual theatrical trial by attorneys – in other words, leaving voir dire to the attorneys doubles the time necessary for each trial and taints by overly attempting to persuade the jurors before jurors ever see a witness.

Survey #028
I support voir dire being conducted by the judge because attorneys are not experienced enough in jury selection and its variations. Jurors (by and large) take their role / job very seriously and, to the best of their abilities, put aside their opinion about the system, issues. Judge-conducted voir dire adds to that seriousness and imbues the selection process with dignity and impartiality. Attorney-conducted voir dire would give further belief that lawyers try to "spin" a case only.

I favor written questionnaires (with enough time for jurors to complete them in writing) which give – sometimes – an explanation of a juror's response without the embarrassment / focus of coming up to the bench to explain personal feelings / experiences.

I believe that courts should be given opportunity to discuss voir dire – selection process – use of questions – with jurors! They can give greater insight into the process – how it feels – whether it works – are questions eliciting the result (which is different to court, prosecutor, defendant).

Survey #049
I believe that we save time by conducting the voir dire without allowing jurors to ask questions directly to jurors. In simple civil cases, the system works fine.

C RECOMMENDS BOTH JUDGE QUESTIONING AND REDUCING THE NUMBER OF PEREMPTORIES

Survey #062
Attorneys sometimes have their own case specific agenda and attempt to have answers to questions that are fact sensitive to issues in a case such as in a criminal case with intoxication. "Just because a person drank alcohol and they committed a crime, should they be excused from criminal responsibility?" These type questions are inappropriate, waste time. They are not open-ended and are self serving. This is why I would cover the topic of intoxication in voir dire with each juror individually and not allow the attorney to ask the question. At a sidebar, I would ask the attorney on follow up what is the question and then give approval or not and also give choice to attorney to ask it or for me to do it.

We are highest in the country in allowing voir dire and then peremptory challenges when challenges are maxed out it is usually at insistence of the litigation and rarely done on attorney intuition.

Survey #104
I do not know what you mean by what practices I prefer having answered the questions previous to this one. What I do is basically what I prefer. I do not want to see a return to the old practice of allowing attorneys to conduct voir dire, and use the process as a means of persuasion, and indoctrinating the jury to their way of thinking.

I do favor limiting the number of peremptory challenges, particularly in multi-party cases.

Since I was at one time assigned to the criminal division, and thus can speak from some experience, I could never understand the rationale in allowing more peremptory challenges in multi-defendant less serious cases (such as drug cases) than in multi-defendant cases involving most of the more serious crimes (such as most 1st degree crimes).

Survey #128
It often occurs to me during jury selection that the lawyers can't see the exasperated looks on the faces of the jury panel members, or how they roll their eyes and shift restlessly in their seats as the challenges seem to go on endlessly. The practice of excluding people for seemlingly no reason or what often appears to be inappropriate reasons doesn't go over well with the public. Less challenges available or used would be a better option and less likely to "sour" the jurors.

Allowing attorney conducted voir dire would be, in my opinion, a mistake. The jurors would feel as though they are on trial, the process would lengthen considerably and the courtroom would be beyond the control of the Court.

D RECOMMENDS USING OPEN-ENDED QUESTIONS FOR JURORS

Survey #009
When standard questions are asked, there are always follow-up questions asked by me if juror does not expound enough information. By using more open-ended questions, you can get a better feeling for the personality, intelligence, and experience of the prospective juror.

Survey #095
I prefer an informal approach to jury selection. Because jurors are now permitted to participate in civil trials by asking questions, I also review the old system by sharing with them the three-minute film "Order in the Classroom". The film relaxes the jurors. They appear to be very excited about the prospect of asking questions. At this point they tend to – or at least appear to – take more of an "ownership" attitude towards what they are doing.

There is a school of thought that questions about hobbies, bumper stickers, previous military service, regularly read newspapers, etc. are not helpful. I disagree. More than anything, jurors' reaction, in open court, to these seemingly neutral questions can prove quite helpful to counsel. The court and counsel are ultimately left with the hope that jurors are answering questions truthfully. Injecting a little levity into the questioning by asking them to share with you the last good or bad move they saw, or what is the juror's favorite television show may reveal more than specific questions designed to ferret out bias or prejudice.

Finally, it is important to put the concepts of bias or prejudice in perspective in order to avoid knee-jerk reaction by jurors when they hear that a purpose of the voir dire is to address potential bias or prejudice. Thus, these concepts are often explained, in more simplistic terms, in the context of sports fans – be they misguided Eagle / Giant fans or that elite group of fans who love America's team, the Dallas Cowboys.

Survey #099
Open-ended questions are vital. Speed in completing the process should not be considered a virtue. Selecting a jury that is likely to be fair and impartial in a given case cannot be done in a fixed mechanical manner.

E RECOMMEND OTHER VOIR DIRE PRACTICES

1. Use of Written Questionnaires

Survey #033
I believe voir dire with written questionnaires is more efficient / effective than other methods of which I am aware.

2. Use of Charts or PowerPoint Presentations

Survey #047
We may benefit of the AOC might produce acceptable demonstrative uniform charts or power-point presentations for the jury's benefit.

3. Asking Attorneys to Place Peremptory Reasons on the Record

Survey #116
Peremptory challenges are often misused by the defense attorneys. Racial profiling is alive and well in jury selection. In almost 100% of the civil cases that I've handled, when the plaintiff is a minority, jurors of the same group are peremptorily challenged. I've commenced asking attorneys to place their reasons on the record to ensure some fairness.

III COMMENTS INDICATING CURRENT PRACTICE IS SATISFACTORY

Survey #055
I believe the system works well as it currently exists. The more cumbersome the process, the less likely that prospective jurors will want to serve.

Survey #065
I believe the current system works well, for me at least. I have received no complaints from counsel.

Survey #111
The current system happens to have worked very well for me. I do allow the attorneys great latitude at sidebar questioning of prospective jurors in cases where there may be a problem.

Survey #122
I am generally satisfied with existing practice in both civil and criminal. Supplemental voir dire by counsel should be subject to control by the court and out of the presence of the panel and jurors assembled in the courtroom.

Written voir dire should be limited to complex and / or criminal cases (capital, RICO, etc.) and prepared by the court after hearing input from counsel on the record.

All voir dire questions should be discussed in a conference with counsel and supplements considered by the court and objections or disapproval or suggestions placed on the record.

Survey #127
Frankly, I am quite comfortable with the voir dire practices employed for my courtroom and I believe the attorneys are satisfied as well.

CALENDAR 2004
AVERAGE PANEL SIZE BY COUNTY

COUNTY	AVG CRIMINAL PANEL		AVG CIVIL PANEL
Atlantic	66		69
Bergen	87		41
Burlington	61		51
Camden	80		54
Cape May	69		48
Cumberland	63		57
Essex	81		36
Gloucester	94		59
Hudson	72		42
Hunterdon	56		35
Mercer	76		37
Middlesex	68		35
Monmouth	64		34
Morris	75		56
Ocean	73		38
Passaic	60		36
Salem	69		69
Somerset	53		38
Sussex	113		38
Union	64		40
Warren	71		34

Statewide Average	71 jurors		42 jurors
Statewide Median	69 jurors		40 jurors
Range of Results	53 - 113		34 - 69

JURY SELECTION TIMES – Judges' Estimates and Data from Counties

With regard to the jury selection times, I have received jury selection times for 405 trials, including 263 civil trials and 142 criminal trials. The median and average jury selection times for those trials are the following:

263 Civil Trials	Median time for jury selection is 90 minutes (1hour and 30 minutes)
	Average time for jury selection is 125 minutes (2 hours and 5 minutes)
142 Criminal Trials	Median time for jury selection is 165 minutes (2 hours and 45 minutes)
	Average time for jury selection is 224 minutes (3 hours and 44 minutes)

Judges' Estimated Time for Jury Selection in Simple Civil / Single Defendant Criminal Trial
Question #20 in the judge survey on voir dire practices asked how long it typically takes to complete jury selection in a simple civil / single defendant criminal trial. The median response from 126 judges was that it would take 90 minutes to complete jury selection for that type of trial. The average time based on the judges' responses was 113 minutes. The median and average times for the question #20 trial type, overall and broken down by responses from judges assigned to civil or criminal, are shown below:

All Judges	126	Median time / Average time	90 minutes / 113 minutes
Civil Judges	73	Median time / Average time	90 minutes / 91 minutes
Criminal Judges	47	Median time / Average time	150 minutes / 151 minutes

Jury Selection in Complex Trial
Question #21 in the judge survey on voir dire practices asked how long it typically took to complete jury selection in a complex civil / multi-defendant criminal trial. The median response from 116 judges was that it would take 240 minutes (4 hours) to complete jury selection for that type of trial. The average time based on the judges' responses was 345 minutes (5 and three-quarter hours). The median and average times for the question #21 type trial, overall and broken down by responses from judges assigned to civil or criminal are shown below:

All Judges	116	Median time / Avg time 240 minutes / 345 minutes	(4.0 hours / 5.75 hours)
Civil Judges	68	Median time / Avg time 210 minutes / 263 minutes	(3.5 hours / 4.4 hours)
Criminal Judges	42	Median time / Avg time 300 minutes / 499 minutes	(5.0 hours / 8.3 hours)

JUROR DISPOSITION DATA
CIVIL TRIALS -- STATEWIDE
September 2004 through January 2005

Feb 23 2005
DRAFT

Number of Trials	Number of Jurors at Voir Dire	Dismissed by Trial Judge For Cause	Dismissed by Plaintiff Peremptory	Dismissed by Defense Peremptory	Seated as Trial Jurors	Number of Jurors Questioned at Voir Dire	Not Reached for Questioning at Voir Dire
673	28,817	7,483	1,904	1,985	5,274	16,646	12,171
Avg. per Trial	43	11	3	3	8	25	18

Number of Trials	Number of Jurors at Voir Dire	Dismissed by Trial Judge For Cause	Dismissed by Plaintiff Peremptory	Dismissed by Defense Peremptory	Seated as Trial Jurors	Number of Jurors Questioned at Voir Dire	Not Reached for Questioning at Voir Dire
673	28,817	7,483	1,904	1,985	5,274	16,646	12,171
% of Total Jurors		26%	7%	7%	18%	58%	42%
% of Questioned Jurors		45%	11%	12%	32%		

Points:

1. In the average trial, judges dismissed 11 jurors for cause.
2. Those 11 jurors challenged for cause represented 26% of those sent to the voir dire.
3. Looked at another way, trial judges challenged for cause 45% of the jurors they questioned.
4. Trial judges challenged nearly 2 jurors for each one peremptorily challenged by a party (ratio is 1.92 to 1).
5. The plaintiff, in the average trial, exercised 3 peremptory challenges (7% of all jurors / 11% of questioned jurors).
6. The defense, in the average trial, also exercised 3 peremptory challenges (7% of all jurors / 12% of questioned jurors).
7. In the average trial, 43 jurors were assigned to voir dire -- with 17 challenged, 8 seated, and 18 not questioned.

JUROR DISPOSITION DATA
CRIMINAL TRIALS -- STATEWIDE
September 2004 through January 2005

Feb 23 2005
DRAFT

Number of Trials	Number of Jurors at Voir Dire	Dismissed by Trial Judge For Cause	Dismissed by Prosecution Peremptory	Dismissed by Defense Peremptory	Seated as Trial Jurors	Number of Jurors Questioned at Voir Dire	Not Reached for Questioning at Voir Dire
389	28,422	8,298	1,604	2,890	5,443	18,235	10,187
Avg. per Trial	73	21	4	7	14	47	26

Number of Trials	Number of Jurors at Voir Dire	Dismissed by Trial Judge For Cause	Dismissed by Prosecution Peremptory	Dismissed by Defense Peremptory	Seated as Trial Jurors	Number of Jurors Questioned at Voir Dire	Not Reached for Questioning at Voir Dire
389	28,422	8,298	1,604	2,890	5,443	18,235	10,187
% of Total Jurors		29%	6%	10%	19%	64%	36%
% of Questioned Jurors		46%	9%	16%	30%		

Points:

1. In the average trial, judges dismissed 21 jurors for cause.
2. Those 21 jurors challenged for cause represented 29% of those sent to the voir dire.
3. Looked at another way, trial judges challenged for cause nearly half (46%) of the jurors they questioned.
4. Trial judges challenged nearly 2 jurors for every one peremptorily challenged by a party (ratio is 1.85 to 1).
5. The prosecution, in the average trial, exercised 4 peremptory challenges (6% of all jurors / 9% of questioned jurors).
6. The defense, in the average trial, exercised 7 peremptory challenges (10% of all jurors / 16% of questioned jurors).
7. In the average trial, 73 jurors were assigned to voir dire -- with 33 challenged, 14 seated, and 26 not questioned.

REPORT OF ASSIGNMENT JUDGES COMMITTEE

TO REVIEW THE USE OF PEREMPTORY CHALLENGES

Known as "The Weiss Report"

The goal in jury selection is to obtain persons whom will be fair and impartial, will decide the case based solely on the evidence they will hear in the courtroom and will follow the instructions given by the judge as to the law. In order to accomplish that purpose, the court conducts a voir dire of the panel as a whole and of each person. If the court determines that any particular person can not be fair or impartial or will not be able to render a decision based solely on the evidence presented or follow the court's instructions as to the law, that person is excused for cause. In addition to excusing a prospective juror for cause, N.J.S.A. 2B:23-13 authorizes the parties to exercise peremptory challenges as follows:

> a. In any civil action, each party, 6.
>
> b. Upon an indictment for kidnaping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized.

> c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

The question which this committee has addressed is whether a change should be recommended in either the use or number of peremptory challenges.

In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), in a 6 to 3 decision, the Supreme Court held that the prosecutor's exercise of peremptory challenges which resulted in excusing six African-Americans from the jury panel and the resulting all white jury was not violative of the defendant's right to a fair trial. Justice White, the author of the majority opinion, reviewed the historical background of peremptory challenges. Included with this report as Attachment "A" is a copy of that portion of Justice White's opinion.

In 1986 the Supreme Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) overruled Swain v. Alabama, supra. The Court in Batson held that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to remove jurors based solely on their race or on the assumption that black jurors are incapable of impartially weighing the State's evidence against a black defendant. Justice White wrote a concurring opinion in which he modified his views as to peremptory challenges.

Batson was followed by Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d

411 (1991), where the Supreme Court held that a criminal defendant has standing to raise the equal protection claim of jurors who are wrongfully excluded through race-based peremptory challenges because the defendant is injured by the risk that such discrimination taints the fairness of the entire judicial proceeding. In Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), Batson was extended to civil cases holding that state action exists when private litigants exercise peremptory challenges in a discriminatory manner. As pointed out by the United States Supreme Court, jurors are injured when they are excluded by improper use of peremptory challenges in the courthouse where society expects justice. In Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the Supreme Court extended Batson to prohibit criminal defendant from discriminatorily exercising peremptory challenges. Finally, in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Supreme Court extended Batson to include gender-based peremptory challenges.

In State v Gilmore, 103 N.J. 508 (1986), the New Jersey Supreme Court held that the discriminatory use of peremptory challenges violated the New Jersey Constitution because Article I, sections 5, 9, and 10 guarantee the "right to trial by a jury drawn from a representative cross section of the community." It found that the New Jersey Constitution provides greater protection in that area than does the U. S. Constitution. The Court established a three-step test for determining whether peremptory challenges were used in a discriminatory manner, and in so doing, changed the nature of the peremptory challenge

since the party making the challenge may be asked to articulate reasons for those challenges.

The major argument of those who favor the continued use of peremptory challenges is that when a lawyer cannot sufficiently demonstrate a prospective juror's bias so as to challenge for cause, but whom he/she nevertheless has an intuitive feeling that the prospective juror will not be unbiased in deciding the case, the sole remedy is the exercise of a peremptory challenge. The New Jersey Supreme Court's Ad Hoc Committee on Jury Selection in Criminal Cases examined peremptory challenges as part of its review and stated in its October, 1993 report that: "The elimination from the jury of those individuals about whom the either the prosecution of defense has serious doubts, even if those doubts do not rise to the level of an excuse for cause, furthers the perception and reality of a fair and impartial jury". That group recommended retention of peremptory challenges but did not comment on the number that were authorized. A second argument made is that it gives the litigant a greater sense of fairness if persons whom the litigant feels uncomfortable with are eliminated from the jury. Herald Fahringer, in 10 St. John's J. Legal Comment. 291 (Spring, 1995) reported the following statement from Blackstone: "...how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury..."

On the opposite side, the exercise of peremptory challenges is seen as a negation of the goal of obtaining a jury that is fair and impartial, that will decide the case based on the evidence presented in the courtroom and follow the instructions of the judge as to the law to be applied. We must recognize that everyone is a product of their birth, upbringing,

environment, education and life experiences. The issue in jury selection is whether the individual will be able to set aside any preconceived notions the person may have and decide the case based solely on what the person will hear in the courtroom and will be able to follow the judge's instructions as to the law to be applied. If the person can meet that test, then there should exist no basis to challenge that juror for cause or to arbitrarily eliminate that juror from the jury by the exercise of peremptory challenge.

The question of the continuation of the use of peremptory challenges involves a policy decision. As stated by the United States Supreme Court, there is no constitutional right to peremptory challenges. Swain at 219. The following is stated in Stilson v. U.S., 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919): "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. Peremptory challenges are a creature of the common law and are now governed by statute. Historically, the use of peremptory challenges had some justification in the limited number of persons eligible for jury duty.

However, our legislature has broadened the qualifications for jury service and has substantially enlarged the pool of potential jurors. Exemptions from jury service have been repealed although grounds for excuse exist for certain limited hardship circumstances. With the striking down of artificial barriers to jury service and the elimination of exemptions from jury service, jury pools have been enlarged to include representation by all members of the community. N.J.S.A. 2B:20-2 now provide that the names of persons eligible for jury service

shall be obtained from a merger of the following lists: registered voters, licensed drivers, filers of state gross income tax returns and filers of homestead rebate application forms. The qualifications of jurors are contained in N.J.S.A. 2B-20-1:

> Every person summoned as a juror:
> a. shall be 18 years of age or older;
> b. shall be able to read and understand the English language;
> c. shall be a citizen of the United States;
> d. shall be a resident of the county in which the person is summoned;
> e. shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States;
> f. shall not have any mental or physical disability which will prevent the person from properly serving as a juror.

With the broadening of representation in jury pools, the historical basis for peremptory challenges has lost its justification. The statute mandates that from the randomly selected pool of potential jurors brought to the courthouse each day, the persons to report to a particular courtroom also be randomly selected, thus, attempting to provide a cross section of the community for each case to be tried. By allowing the use of peremptory challenges, the cross section of the jury can be distorted. This in turn could effect the perception of the public as to the fairness of the justice system. Broad societal participation on juries is critical to maintaining public confidence in the fairness of trials. If the jury is composed of a cross section of the community, randomly chosen, acceptance of verdicts and of the justice system will be enhanced. It should be noted that England eliminated the use of peremptory challenges by prosecutors in 1825 (Juries Act 1825 § 29). The use of peremptory challenges

by the defense was reduced from seven to three in 1977 (Criminal Law Act of 1977, 43) and finally totally eliminated in 1988 (Criminal Justice Act of 1988) because defense attorneys were misusing the system to "stack" juries with individuals who favored their side.

We all have witnessed the jury selection process in the O.J. Simpson and Rodney King trials and the subsequent perceptions that the "stacking" of the jury lead to unacceptable verdicts in the mind of the public. We have also read about the former member of the Philadelphia District Attorney's staff who counseled other members of the staff on the use of peremptory challenges to eliminate persons based on stereotype. The committee is sure each Assignment Judge could tell individual war stories about the use of peremptory challenges in an effort by both sides to select jurors whom they believed would be favorable to their side, rather then select persons whom would be fair and impartial in rendering a decision in the case.

There is also the impact upon the citizens whom we call to jury service. When they are eliminated without any reason or when they see others being eliminated by the exercise of peremptory challenges, questions arise in their minds about both the fairness of the justice system and the reason for the inconvenience we cause them when we require them to report for jury duty.

Experience has shown that challenges for cause which have been upheld by the courts falls into one of the following areas:

1. Knowledge by the person of one of the parties, lawyers, potential witnesses or some

one connected with the case;

2. Inability to accept and follow the law as announced by the judge;

3. Has been the victim of a crime or has had a similar experience to that which is in issue in the case or has been a party in a lawsuit and has developed strong feelings as a result of the experience;

4. Has negative feelings about a particular party, group, life style, class or race;

5. Has negative feelings about jury service or the justice system;

6. Has strong feelings about nature of charges involved;

7. Believe that police officers are more credible than ordinary citizens or has a close relationship with a law enforcement agency or law enforcement officers.

The committee is sure that their are other common areas which have formed the basis for challenges for cause which have been upheld.

The current use of peremptory challenges often runs counter to the goal of having impartial jurors. Courts should reject the notion that voir dire should be used to obtain a jury that is pre disposed to one or the other of the litigants. Courts should be ever mindful that the purpose of voir dire is to get jurors who will be fair and impartial, will decide the case based on the evidence produced in the court room and will follow the court's instructions as to the law to be applied to the facts as found by the jury. Although desirable, it is the view of this committee that it would be impracticable to advocate the total elimination of peremptory challenges. The hue and cry which would arise from the Bar could prove an

obstacle to obtaining any changes in the use of peremptory challenges. Although a review of the number of peremptory challenges permitted in other jurisdictions reveals that New Jersey is one of the most liberal states in this regard, it also shows that all other states permit some number of peremptory challenges. Attachment "B." Therefore, this committee recommends the following;

A. In **civil cases**, the number of peremptory challenges should not exceed 3 for each side, regardless of the number of parties on any one side. If the Assignment Judges feel that each party should have their own peremptory challenges, then the committee would suggest the number of peremptory challenges be reduced to 2 for each party. The attached chart shows that 26 of the 52 jurisdictions (it includes Federal courts and the District of Columbia) permit 3 peremptory challenges and another two allow 2 such challenges. The ABA's Standards Relating to Juror Use and Management recommend no more than 3 peremptory challenges in civil cases. Attachment "C."

B. In **criminal cases** now covered by N.J.S.A.2B23-13 b., the number of peremptory challenges should not exceed 8 for each side. In multi defendant cases the committee would have no problem with allowing the defendants 1 additional challenge for each defendant. For each additional challenge given to the defendants, the State would receive 1 additional challenge. Thus, in a 2 defendant case there would be a total of 9 peremptory challenges for the defense and 9 for the State. The attached chart reveals that the median number of peremptory challenges permitted in non-capital felonies is 6 and that sixteen jurisdictions,

including New Jersey, currently allow 10 or more. Reducing the number permitted to 8, as recommended above, represents a significant change, but New Jersey would still be above the median number permitted nationwide. The ABA Standards are more difficult to compare in the criminal area because they rely on the length of possible incarceration, recommending 5 for each side where more than 6 months incarceration may be imposed (10 for each side if it is a capital case). The standards include a recommendation for one additional challenge per defendant in multi-defendant cases.

C. In **all other criminal cases**, the number of peremptory challenges should not exceed 5 for each side, subject to a similar increase of 1 additional peremptory challenge for each defendant in a multi defendant case and a like number for the State. This change, too, would be significant but would still leave New Jersey slightly above the median (4), with 33 of the 52 jurisdictions permitting 4 or fewer peremptory challenges.

D. The trial judge should have the authority to allow additional peremptory challenges when justified, although some guidelines should be established for such justification. The ABA Standards suggest that parity be maintained in the numbers permitted to each side, to the extent possible, and that the courts limit challenges to: "a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury."

The adoption of these recommendations by the Assignment Judges and the Supreme Court and the enacting of these changes by the Legislature should be accompanied by a reexamination of the voir dire presently being conducted by courts. Courts must be more

cognizant of the need for more meaningful voir dire. Programs on conducting voir dire should be part of judicial education and training. In addition, counsel should be encouraged to provide the court with additional questions for the court to include in its voir dire of potential jurors. The use of meaningful voir dire should go a long way to assuring that persons selected as jurors will meet the goal of each litigant receiving a fair trial.

ACTION

The Assignment Judge unanimously approved the recommendations of the committee at its conference meeting on June 19, 1997.

July 3, 1997

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ATTACHMENT A

County, Alabama, it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause * * *.'

The above claim as well as the objection to the prosecutor's exercise of his strikes against the six Negroes in this case was repeated in the motion for a new trial. No further claims were made and no further evidence was taken on any of these motions.

[10][11] In providing for jury trial in criminal cases, Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, [FN7] the system followed in the federal courts by virtue of the Sixth Amendment. As part of this system it provides for challenges for cause and substitutes a system of strikes for the common-law method of peremptory challenge. [FN8] Alabama contends that its system of peremptory *212 strikes--challenges without cause, without explanation and without judicial scrutiny--affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.

The peremptory challenge has very old credentials. In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, [FN9] and **832 the *213 prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). [FN10] Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any * * * Jurors, they shall assign * * * a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. [FN11] Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies. [FN12]

*214 This common law provided the starting point for peremptories in this country. In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. [FN13] In 1865, the Government

was **833 given by statute five peremptory challenges in capital and treason cases, the defendant being entitled to 20, and two in other cases where the right of the defendant to challenge then existed, *215 he being entitled to 10. 13 Stat. 500 (1865). [FN14] Subsequent enactments increased the number of challenges the Government could exercise, the Government now having an equal number with the defendant in capital cases, and six in cases where the crime is punishable by more than one year's imprisonment, the defendant or defendants having ten. [FN15]

The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, [FN16] the prosecution was *216 thought to have retained the Crown's common-law right to stand aside, [FN17] and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant. [FN18] Although there has been **834 some criticism in the twentieth century leveled at peremptory challenges, on the basis of the delays, expense and elimination of qualified jurors incident to their use, [FN19] the system *217 has survived these attacks. In every State, except where peremptory strikes are a substitute, peremptory challenges are given by statute to both sides in both criminal and civil cases, the number in criminal cases still being considerably greater. Under these statutes the prosecution generally possesses a substantial number of challenges. [FN20]

The system of struck juries also has its roots in ancient common-law heritage. [FN21] Since striking a jury allowed *218 both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of 'great nicety' or 'where the sheriff (responsible for the jury list) was suspected of partiality.' 3 Bl.Comm. 357. It is available in many States for both civil and **835 criminal cases. [FN22] The Alabama system adheres to the common-law form, except that the veniremen are drawn from the regular jury list, are summoned to court before striking begins and the striking continues until 12 rather than 24 remain. It was adopted as a fairer system to the defendant and prosecutor and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties. [FN23]

[12] In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. [FN24] The voir dire in American trials tends to be *219 extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. [FN25] The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011. Although '(t)here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges,' Stilson

v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154, nonetheless the challenge is 'one of the most important of the rights secured to the accused.' Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208. The denial or impairment of the right is reversible error without a showing of prejudice. Lewis v. United States, supra; Harrison v. United States, 163 U.S. 140, 16 S.Ct. 961, 41 L.Ed. 104; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 15 S.Ct. 641, 39 L.Ed. 727. '(F)or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' Lewis v. United States, 146 U.S., at 378, 13 S.Ct., at 139.

[13] The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility *220 through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578.

**836 [14][15] The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138, upon a juror's 'habits and associations,' Hayes v. State of Missouri, supra, 120 U.S., at 70, 7 S.Ct., at 351, or upon the feeling that 'the bare questioning (a juror's) indifference may sometimes provoke a resentment,' Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. [FN26] For the question a prosecutor or defense *221 counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. [FN27] It is well known that these factors are widely explored during the voir dire, by both prosecutor and accused, Miles v. United States, 103 U.S. 304, 26 L.Ed. 481; Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054. [FN28] This Court has held that the fairness of trial by jury requires no less. Aldridge, supra. [FN29] Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

ATTACHMENT B

Number of Peremptory Challenges Permitted (ranked by center column)

Jurisdiction	Misdemeanor	Felonies - Non-Capital -- Defense	Civil	Jurisdiction
New Jersey	10	20 (state = 12[1])	6	New Jersey
New York	3 (jury < 12[2])	15 (life 20[3])	3	New York
Georgia	4 (state = 2) (jury < 12)	12 (state 6)	6	Georgia
Kansas	3 (jury <12)	12	3	Kansas
Louisiana	6 (non-unanimous[4])	12	6	Louisiana
Alaska	3 (jury <12)	10 (state = 6)	3	Alaska
California	10	10 (life = 20)	6	California
District of Columbia	3	10	3	Dist. Columbia
Federal Court	3	10 (state 6)	3	Federal Court
Illinois	5	10	5	Illinois
Indiana	5 (jury < 12)	10	3	Indiana
Maryland	4	10 (state 5)	4	Maryland
North Dakota	6	10	4	North Dakota
South Carolina	5	10 (state = 5)	4	South Carolina
South Dakota	3	10	3	South Dakota
Texas	5	10	6	Texas
Arkansas	3	8 (state = 6)	3	Arkansas
Kentucky	3	8 (state = 5)	3	Kentucky
Maine	4	8	3	Maine
Tennessee	3	8 (state = 4)	4	Tennessee
Wyoming	4	8	3	Wyoming
Pennsylvania	5	7	4	Pennsylvania
Alabama	3	6	6	Alabama
Arizona	6 (jury < 12)	6	4	Arizona
Connecticut	3 (jury < 12)	6 (life 15) (jury = 6)	3	Connecticut
Delaware	6	6	3	Delaware
Florida	3	6 (jury = 6)	3	Florida
Idaho	6	6	4	Idaho
Iowa	4 (jury < 12)	6	4	Iowa
Mississippi	6 (jury < 12)	6	4	Mississippi
Missouri	2	6	3	Missouri
Montana	6	6	4	Montana
Nebraska	3	6	3	Nebraska
North Carolina	6	6	8	North Carolina

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[1] (state) indicates # of peremptories alloted to the state; column shows # alloted to defendant.

[2] (jury < 12) indicates that fewer than 12 jurors are necessary to render a verdict; where that # is known, it is stated, for example, as "(jury = 8)".

[3] (life) indicates the # of peremptories where the defendant faces the possibility of a life sentence.

[4] (non-unanimous) indicates that the verdict is not required to be unanimous.

Oregon	6 (jury 12[2]) (non-unan.)	6 (non-unanimous[4])	3	Oregon
Rhode Island	3	6	2	Rhode Island
Vermont	6	6	6	Vermont
Washington	3	6	3	Washington
West Virginia	4	6 (state 2[3])	4	West Virginia
Colorado	3 (jury · 12)	5	4	Colorado
Michigan	3	5	3	Michigan
Minnesota	5 (state 3) (jury · 12)	5 (life 15[5]) (state 3)	2	Minnesota
New Mexico	5	5 (state 3)	5	New Mexico
Oklahoma	3 (jury · 12)	5	3	Oklahoma
Massachusetts	4	4	4	Massachusetts
Nevada	4	4	4	Nevada
Ohio	3 (jury · 12)	4	3	Ohio
Utah	3	4 (jury = 8)	3	Utah
Virginia	3 (jury · 12)	4	3	Virginia
Wisconsin	4	4 (life 6)	3	Wisconsin
Hawaii	3	3	3	Hawaii
New Hampshire	3	3	3	New Hampshire

(Source is the NCSC; October, 1996)

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[2] (jury · 12) indicates that fewer than 12 jurors are necessary to render a verdict; where that # is known, it is stated, for example, as "(jury = 8)".

[4] (non-unanimous) indicates that the verdict is not required to be unanimous.

[3] (state) indicates # of peremptories alloted to the state; column shows # alloted to defendant.

[5] (life) indicates the # of peremptories where the defendant faces the possibility of a life sentence.

AMERICAN BAR ASSOCIATION
Standards Relating to Juror Use and Management

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.

COMMENTARY

The United States Supreme Court declared in *Swain v. Alabama* that the peremptory challenge is essential to achieving a fair trial by jury[1] because it enables parties to eliminate extremes of partiality

1. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

and results in a jury most likely to decide the case on the basis of the evidence.[2] A peremptory challenge is highly subjective and may be "exercised without a reason stated, without inquiry and without being subject to the court's control."[3] Peremptories enable parties to exclude jurors they suspect of bias but of whom they lack sufficient proof of bias necessary to sustain a challenge for cause;[4] however, peremptory challenges may alter the representative character of the jury panel to the point of eliminating entire cognizable groups from jury service.[5] The Supreme Court stated in *Batson v. Kentucky*, "[t]he reality of practice, amply reflected in many state and federal opinions, shows that the challenge may be and unfortunately at times has been, used to discriminate against black jurors."[6] The court held that the use of peremptory challenges by a prosecutor to exclude potential jurors "solely on account of their race" violates the defendant's right to equal protection of the law.[7]

In *Batson*, both the defendant and the prospective jurors excluded by the prosecution were black.[8] In *Powers v. Ohio*,[9] the Court overturned a conviction of a white defendant when the prosecution used

2. *See, e.g.*, *Swain*, 380 U.S. at 219, ("necessary part of a trial by jury"); *Pointer v. United States*, 151 U.S. 396, 408 (1894)("one of the most important rights secured by the accused"); *Lewis v. United States*, 146 U.S. 370, 376 (1892)("essential to the fairness of a trial by jury").

3. *Swain*, 380 U.S. at 220.

4. *See, e.g.*, *Swain*, 380 U.S. at 220 (allows exclusion on the basis of a "real or imagined partiality that is less easily designated or demonstrable"); *Lewis v. United States*, 146 U.S. 370, 376 (1982)(exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another"); American Bar Association, Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts* (Discussion Draft 1991) [hereinafter cited as ABA, *Trial Courts*]; *see also* Barbara Allen Babcock, "Voir Dire: Preserving 'Its Wonderful Power,' " 27 *Stanford Law Review* 545, 553-54 (1975).

5. Jon Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 169 (1977); "The Defendant's Right to Object to Prosecutorial Misuse of Peremptory Challenge," 92 *Harvard Law Review* 1770, 1774-76 (1979); American Bar Association, *Standards for Criminal Justice: Trial by Jury*, 15-2.6 (1986)[hereinafter cited as ABA, *Trial by Jury*].

6. *Batson v. Kentucky*, 476 U.S. 79, 99; and 102 (J. Marshall, concurring).

7. *See, e.g.*, *Swain*, 380 U.S. at 216-17; ABA, *Trial by Jury*, *supra* note 5.

8. *Batson*, 476 U.S. at 82.

9. *Powers v. Ohio*, 111 S.Ct. 1364 (1991).

peremptory challenges to exclude black jurors and said, "[t]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of race."[10] The Court acknowledged a citizen's right to be considered as a juror and gave the defendant standing to assert that right. The Court extended the limitation on peremptories to civil cases in *Edmonson v. Leesville Concrete Company*[11] and to the defendant in *Georgia v. McCollum*[12] thereby completing the issue of prohibiting racially motivated peremptory challenges. State and federal courts have applied *Batson* to other demographic groups.[13] The increase in limitations on the use of peremptory challenges suggests that the courts look with increasing disfavor upon them and strengthens the arguments for limiting their number.[14]

Paragraph (a) *Uniform Practice*

To promote uniform statewide practice in this sensitive area, the standard recommends that both the permissible number of peremptory challenges and the procedures for exercising those challenges be clearly established. Although the number of challenges is usually specified,[15] only a few jurisdictions set forth the order and manner in which peremptory challenges are to be exercised.[16] As a result, practices vary within as well as among the states.

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10. *Id.* at 1365.
11. *Edmondson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991).
12. *Georgia v. McCollom*, 112 S.Ct. 2348 (1992).
13. *See, e.g.*, *United States v. DeGross*, 913 F.2d 1417 (9th Cir. 1990)(females); *United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989)(American Indians); *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987)(Hispanics); *United States v. Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987), *aff'd.*, 853 F.2d 89 (2d Cir. 1988) *cert. denied*, 489 U.S. 1052 (1989)(Italians); *Mallott v. Alaska*, 608 P.2d 737 (1980)(Alaskan Natives); *State v. Gonzalez*, 206 Conn. 391, 538 A.2d 210 (1988)(Hispanics); *State v. Levison*, 71 Haw. 492, 795 P.2d 845 (1990)(females); *Kline v. State*, 737 S.W.2d 895 (Tex. App. 1987)(Asians).
14. *Batson*, 476 U.S. at 82.
15. Van Dyke, *supra* note 5, at 282-85.
16. ABA, *Trial by Jury*, *supra* note 5, at 31.

Paragraphs (b)-(f) *Number of Peremptory Challenges*

The number of peremptory challenges permitted a party varies widely from state to state.[17]

The standard urges that the number of peremptory challenges be limited to the minimum number required to achieve their basic purpose in order to reduce the likelihood that members of a cognizable group will be excluded from a jury, the number of persons who must be called for jury service, the time needed for voir dire, and the cost of operating the jury system.[18]

Paragraph (b) makes clear that the historic purpose of peremptory challenges is "to eliminate the extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[19]

Paragraphs (c) through (f) contain explicit recommendations on the number of peremptory challenges that should ordinarily be permitted. The standard intends that the number of peremptory challenges be equal for prosecution and defense. Paragraph (d)(i) recommends a maximum of ten challenges for each side in capital cases. Thirty-two states permit the defense and the prosecution to exercise the same number of peremptory challenges in capital cases. Seventeen states provide the defense with ten or fewer peremptory challenges, and twenty-three states provide the prosecution with ten or fewer, although some states permit as many as twenty-six per party while others only allow four per party in capital cases. Paragraph (d)(ii) recommends five challenges for each side in felony cases. Thirty-nine states accord the same number of challenges to the defense and the prosecution in felony cases. Seventeen states permit the prosecution to exercise five or fewer challenges, and twelve states permit no more than five defense peremptory challenges in felony cases, although some states permit as many as fifteen per side, and others only allow three per side. Paragraph (d)(iii) recommends a maximum of three challenges for each side in misdemeanor cases. Only ten states permit both the prosecution and defense to exercise

17. *Id.* at 28-29.
18. Van Dyke, *supra* note 5, at 153-60.
19. *Swain*, 380 U.S. at 219.

more than five challenges, and only three states give misdemeanor defendants more peremptory challenges than the prosecution.[20] Some states permit as many as thirteen challenges in misdemeanor cases. Paragraph (c) recommends three challenges for each side in civil cases. As of 1987, twenty-nine states limited the number of peremptory challenges in civil cases to three or fewer for each side, although some states permit as many as eight in civil cases, and some only allow two.

The number of challenges recommended in paragraphs (c) and (d) of the standard refer to cases to be heard by twelve-person juries. Thus, paragraph (e) makes clear that in jurisdictions that use smaller juries in petty offense and civil cases,[21] each side should be permitted to exercise two peremptory challenges.

The standard provides further that when there is more than one defendant in a criminal proceeding, an additional challenge should be permitted for each defendant. The practice in the states varies from giving each codefendant the same number of challenges as are allowed a defendant tried alone, to dividing the peremptory challenges normally accorded a single defendant among all codefendants.[22] Permitting one additional challenge per codefendant appears to be a reasonable middle ground, 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.[23] This is the only exception to the standard's principle of equality of peremptory challenges between prosecution and defense.

Paragraph (f) recognizes that to reduce the overall number of peremptory challenges, accommodation must be made for those cases in which alternate jurors are seated. Hence, a provision is included urging that each side in a proceeding be permitted to exercise one peremptory challenge for every two alternates to be selected if it has exhausted its allotted number in selecting the regular jurors.

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20. Van Dyke, *supra* note 5, at 282-85.
21. *See* Standard 17: Size and Unanimity of Verdict.
22. ABA, *Trial by Jury*, *supra* note 5.
23. *Id.* at 29-30.

When deliberating or voting alternates are allowed as described in the commentary to Standard 17, they are considered as regular jurors for the purpose of this standard. That is, the jury size is considered to be increased by the inclusion of these alternates.

Paragraph (g) *Authority to Permit Additional Challenges*

This paragraph recommends that trial judges be given the authority to permit parties to exercise additional peremptory challenges in exceptional cases. Such flexibility is required to accommodate cases involving multiple parties or considerable pretrial publicity.[24] In determining how many additional challenges to permit in such circumstances, courts should use the principle set forth in paragraph (b) as a guide and to the extent possible maintain parity in the number of peremptory challenges allowed each side.

Paragraph (h) *Procedure for Exercising Peremptory Challenges*

Paragraph (h) recommends the use of the "struck jury system." There are a number of procedural variations of this system, but the basic pattern is as follows:

- A panel is brought to the courtroom equal to the number of jurors and alternates to be seated plus the total number of peremptory challenges available to the parties and the statistically projected number of those likely to be removed for cause;
- The panel is questioned as a whole by the judge and counsel with follow-up questions to individual panel members,[25] and removals for cause are made;[26]

24. American Bar Association, *Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press* 8-3.5 (Amend. 1991) [hereinafter cited as ABA, *Fair Trial/Free Press*].

25. *See* Standard 7: Voir Dire and Standard 3: Random Selection Procedures. A common variation is to seat a group of prospective jurors in the jury box equal to the number to be empanelled plus the peremptory challenges available to counsel. The voir dire examination follows normal procedures and the remaining members of the panel are admonished to give close attention. If one of the prospective jurors is removed for cause, he or she is replaced by an individual from the panel who is in turn questioned by the court and counsel.

26. *See* Standard 8: Removal from the Jury Panel for Cause.

- After the examination has been completed, the parties exercise their peremptory challenges "by alternate striking of juror's names from a list passed back and forth between counsel";
- The jury is empaneled after all sides have passed or exercised their peremptory challenges; and
- If some challenges are passed and more prospective jurors remain than are needed, the unstruck names are called in the order they appear on the list until the prescribed number of jurors and alternates are seated.[27]

This procedure benefits the parties by permitting them to compare all the prospective jurors before striking the most objectionable. Thus, a party will not be caught in the dilemma of accepting a person who may be somewhat partial for fear that his or her replacement may be even more partial,[28] and counsel do not need to hold one peremptory challenge in reserve to guard against the possibility that a particularly partisan panel member may be called into the box after most of the jury has been selected. The procedure benefits prospective jurors by eliminating the embarrassment of being challenged and asked to step down from the jury box for no apparent reason. Strikes are made by drawing a line through a name on the list of panel members rather than orally. The process focuses on the affirmative choice of the final jurors rather than on the disqualification of individuals along the way. In the traditional jury box or sequential method, a *Batson* challenge cannot be sustained without calling a new panel, because prejudice between the prospective juror and the party exercising the challenge has been established. The struck jury method allows such challenges to be made and acted upon without the knowledge of the potential jurors. It also provides an opportunity for more prospective jurors to be considered for service on a jury. Finally, it benefits the court system by shortening the voir dire process.[29] There is no need to repeat questions to each replacement for a person removed for cause, and there is less pressure on counsel to question each prospective juror exhaustively. The comparative choices that have to be made tend to become apparent

27. ABA, *Trial Courts*, *supra* note 4, at 33; *see Swain*, 380 U.S. at 218.
28. ABA, *Trial by Jury*, *supra* note 5, at 31.
29. ABA, *Trial Courts*, *supra* note 4; *Swain*, 380 U.S. at 202.

early, and the parties can limit their questions to the few panel members involved.

One criticism of the struck jury method from practitioners is that it is very difficult to keep track of venire member responses and reactions when dealing with venires of forty to sixty people rather than panels of twelve to fourteen. This problem is lessened, however, when the total number of peremptory challenges is reduced, thereby reducing the number of potential jurors who must be included in each venire.[30]

It should be noted that nothing in this standard is intended to limit the authority of the trial judge to require special procedures in unusual cases to protect the integrity and fairness of the trial process. Thus, in cases in which there has been extensive publicity, for example, the trial judge could still order that prospective jurors be questioned individually, out of the hearing of the other members of the panel.[31]

SUGGESTED STEPS FOR IMPLEMENTATION

1. Determine whether current statutes and rules governing peremptory challenges are consistent with the standard.
2. If they are not, initiate appropriate legislative and administrative changes to limit the number of peremptory challenges and specify the procedures for exercising those challenges.
3. Institute a "struck jury system."

RELATED STANDARDS

American Bar Association, Section of Criminal Justice, *Standards for Criminal Justice*

"Trial by Jury": Chapter 15-2.6

"Fair Trial and Free Press": Silent

American Bar Association, Judicial Administration Division, *Standards Relating to Trial Courts*: 2.12(c)

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30. G. Thomas Munsterman, et al., "The Best Method of Selecting Jurors," 29 *Judges Journal*, Summer 1990, at 13.

31. ABA, *Fair Trial/Free Press*, *supra* note 24.

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May 12, 2005

Via fax and regular mail

Hon. Joseph F. Lisa, J.A.D.
216 Haddon Ave.
Suite 700
7th Floor
Westmont, New Jersey 08108-2815

Re: Prosecutorial Objection to Supreme Court Committee on Peremptory Challenges and Jury Voire Dire - Recommendation #8

Dear Judge Lisa:

Please allow me to take this opportunity to formally join the letter of objection that was recently submitted by Ocean County Prosecutor Tom Kelaher on behalf of the New Jersey County Prosecutors Association. As a Committee member representing the interests of the same Association, my position is identical to the position expressed in Prosecutor Kelaher's recent letter of partial dissent. In all respects, the position articulated by Prosecutor Kelaher is identical to my position as a Committee member. Therefore, I would request that my submission of this letter to Your Honor will serve as the equivalent of adding my signature to the letter of objection sent by Prosecutor Kelaher. In lieu of resubmitting the same letter of objection, please accept Prosecutor Kelaher's letter of objection as the statement of my position as a Committee member.

On a personal note, it was a pleasure to be part of this Committee. I personally feel it was a rewarding experience and that our collective efforts will hopefully result in significant improvements to the jury selection process in both criminal and civil jury trials. I am proud to be a part of this Committee. Even though there is some disagreement with respect to Recommendation #8, I believe we have substantially accomplished many of our goals under your leadership.

Very truly yours,

Raymond E. Milavsky
First Assistant Prosecutor

REM/kam
Cc: Thomas F. Kelaher, Ocean County Prosecutor

County Prosecutors Association Of New Jersey

Thomas F. Kelaher , *President*
Ocean County Prosecutor

John L. Molinelli, *1st Vice President*
Bergen County Prosecutor

Vincent P. Sarubbi. *2nd Vice President*
Camden County Prosecutor

Theodore J. Romankow, *Secretary*
Union County Prosecutor

Michael M. Rubbinaccio, *Treasurer*
Morris County Prosecutor

Edward J. DeFazio, *State Delegate, NDAA*
Hudson County Prosecutor

James. F. Avigliano, *Alternate Delegate, NDAA*
Passaic County Prosecutor

Robert D. Bernardi, *Past President*
Burlington County Prosecutor

May 4, 2005

Hon. Joseph F. Lisa, J.A.D.
216 Haddon Ave.
Suite 700
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Westmont, New Jersey 08108-2815

RE: Prosecutorial Objection to Supreme Court Committee on Peremptory Challenges and Jury Voire Dire-Recommendation #8

Dear Judge Lisa:

Please accept this letter of objection on behalf of the County Prosecutor's Association of New Jersey.

I. Introduction and Overview:

Although this letter is being sent in dissent to Recommendation #8 of the Committee's report, The New Jersey County Prosecutor's Association would initially like to recognize and thank Judge Lisa and his fellow committee members for their diligence and hard work over the last twelve months. The culmination of their efforts is reflected in a well-written and comprehensive report that contains valuable recommendations, which will no doubt improve the quality of the jury selection process in civil and criminal jury trials. There are numerous recommendations contained in the Committee report, which the County Prosecutors Association supports. For example, we concur with the Committee's recommendation that a reduction of peremptory challenges in criminal jury trials is warranted.

However, the New Jersey County Prosecutor's Association respectfully disagrees with portions of Recommendation #8 and would like to have this dissent included in the Committee's report, which will in turn be forwarded to the Supreme Court. The purpose of this letter is to explain why the County Prosecutors Association is opposed to this recommendation. In all other respects we concur with the Committee's conclusions, recommendations, and proposed standards.

II. Dissent to Recommendation #8

R. 1:8-3(d), as currently formulated, establishes a two-tier system as the number of peremptory challenges afforded the State and the defendant is crime dependent. For the more

"serious" offenses[1], R. 1:8-3(d) currently authorizes twenty (20) peremptory challenges for the defense and twelve (12) for the State. However, for the "less" serious crimes[2], the Rule eliminates disparity and in the single defendant trial each party is allotted ten (10) peremptory challenges. Thus, R. 1:8-3(d), in current form, creates an anomaly as the parties are allotted an equal number of challenges in the "less serious" crimes; and for the more "serious" crimes, the defense is afforded a larger number of peremptory challenges. A subcommittee was created to examine these issues (and others) in greater detail. It is apparent that the subcommittee examined the historical reasons for the two-tier approach and simultaneously analyzed the historical reasons for why the defense was afforded more peremptory challenges then the State in the more serious crimes. The subcommittee concluded and recommended to the committee at large that the historical reason justifying disparity no longer exists. Thus, the subcommittee recommended to the committee that both the State and the defense should be allowed the same number of peremptory challenges, regardless of the charge and regardless of the number of defendants. The Prosecutors Association concurs with this position.

However, the full Committee, departed from the recommendation of the subcommittee and by a narrow vote (10-8 vote), the full Committee rejected the recommendation of the subcommittee and concluded that disparity should **not** be abolished. This recommendation is included within Recommendation #8.

The Committee's report addresses the rationale for continuing with disparity. (See pages 52-53) The majority opinion is premised upon undocumented speculation that the State retains some "residual" advantage in criminal trials...and in recognition that the right to trial is a right possessed by a criminal defendant..." The majority is of the belief, therefore that a criminal defendant should have an added advantage by receiving a greater number of peremptory challenges than the State, in both single and multi-defendant criminal trials. By a 10-8 vote, the majority recommended that the defense should receive a greater number of peremptory challenges in **all** criminal jury trials.

The County Prosecutors Association urges that this recommendation should be rejected. The County Prosecutors Association questions the legitimacy of the unsubstantiated belief that the State has a "head start" in jury selection. The majority's view that jurors "tend" to be pro-State in their attitudes and biases has not been supported by any empirical data or documented surveys. This "opinion" is nothing more then an unsubstantiated "suspicion" and should not serve as the basis for this recommendation. Neither the Committee nor the subcommittee reviewed any evidence or documentation substantiating this "belief". To the contrary, the practical reality is that today, many jurors who are summoned to serve, are anti-police and anti-

[1] Specifically, the crimes of kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree, or perjury are crimes authorizing the a disparity in the number of peremptory challenges.

[2] The above-cited rule provides that "in other criminal actions" the State and the defendant are assigned an equal number of challenges. That is, each party is allotted ten (10) peremptory challenges and in multi-defendant cases the State is given an additional ten (10) peremptory challenges for each additional defendant.

law enforcement in their perspective. It is also a reality that these anti-police sentiments are not always disclosed in jury voire dire. The County Prosecutors Association maintains that the historical reasons, which once justified disparity no longer, prevail. The sub-committee, which explored these issues in depth, acknowledged that there is no viable reason today to justify disparity.

Likewise, the criminal defense practitioners serving on the Committee advanced the argument that historically prosecutors have abused the jury selection process by deliberately excluding minorities. The criminal defense attorneys contend that any alleged abuses of the past warrant additional defense peremptory challenges today in order to combat prosecutorial abuses of the past. This position fails to recognize that our highest Courts have addressed past issues in cases such as State v. Gilmore, 103 N.J. 508 (1986) and Batson v. Kentucky, 476 U.S. 79 (1986). The committee heard no evidence, anecdotal or otherwise, which would support the belief that the discriminatory abuses continue. Simply stated, past history which has been corrected should not serve as a basis to "award" the defendant with additional peremptory challenges. Our Courts have addressed any previous abuses and it is clear that sanctions may be administered if prosecutors were to use peremptory challenges to exclude minorities.

Some majority members also maintain that the State has some inherent advantage in the trial process because State statistics reveal that the conviction rate is greater then fifty (50) %. Hence, the defense practitioner argues that additional peremptory challenges are needed so the defendant can "level" the playing field. The Prosecutors Association also disagrees with this position. While statewide statistics may reflect more guilty verdicts than not guilty, this is attributable to a number of factors unrelated to this issue. The State conviction rate is higher then fifty (50)% because assistant prosecutors are trying cases generally with stronger proofs. An assistant prosecutor has the ability to extend a liberal plea offer, downgrade, or dismissal in the cases where the proofs are marginal or likelihood of conviction is less likely. Therefore, the success rate of guilty verdicts is a direct reflection of the strength of the State's case. The simple fact is the State prevails more times then not because the proofs are compelling. It is also well recognized in cases where the State has strong proofs that the State's plea offer will not be as "liberal" resulting in a defendant taking his chances with a jury even though the proofs are overwhelming. Also, the State statistics do not account for jury verdicts where the State does not prevail on the more serious charges. So, for example, if the jury acquits a defendant of the more substantial charge, but finds a defendant guilty of a lesser-included charge, the statistic is still reflected as a guilty determination even though arguably the defense has prevailed at trial.

Finally, a recommendation that authorizes the defense to receive more peremptory challenges is a "setback" to the rights of victims of crimes. Recommendation #8 sends a "message" to victims and the public that the State's interests in seeking and obtaining justice for victims and the public is secondary to the defendant's. This message is in direct conflict with our State Constitution, Article I. Para. 22, which recognizes the rights of crime victims to justice in our Courts in New Jersey and in direct contrast with the constitutional principle that the rights of crime victims should be "equal" to those of a defendant. A message of this nature contributes to relegating the role of the victim as a "faceless stranger" in our justice system.

The majority of the committee supports a view that because the defendant is the individual on trial, he/she should be afforded some advantage. It is respectfully submitted that the Supreme Court should reject this rationale. The victim's right to seek justice and the public's right to hold a defendant accountable for his/her crimes is no less important than the defendant's right to a jury trial.

Finally, the New Jersey County Prosecutors Association takes issue with the portion of Recommendation #8 that also allows for disparity in the multi-defendant jury trials. For the same reasons advanced above, the State and the defense should enjoy equal number of challenges in the multi-defendant criminal jury trial. This request is also consistent with the recommendation of the subcommittee. In the multi-defendant trial, the County Prosecutors Association recommends a Rule change that provides as follows: " In any criminal action (non capital) where a defendant is tried alone, both the defendant and the State shall have eight (8) peremptory challenges. Where defendants are tried jointly, each individual defendant shall have four (4) peremptory challenges. The State's number of peremptory challenges shall be equal to the total number of peremptory challenges provided to the defendants." The chart below illustrates this proposal:

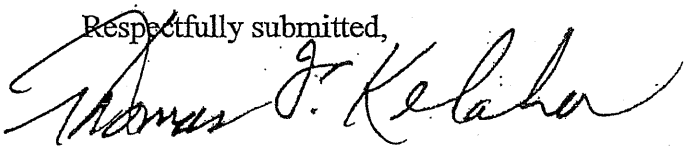
Challenges for Each Multiple Defendant

# Defts.	# Challenges per Deft	Total Deft. Challenges	# Challenges State	# Total Challenges
1	8	8	8	16
2	4	8	8	16
3	4	12	12	24
4	4	16	16	32
5	4	20	20	40
6	4	24	24	48
7	4	28	28	56
8	4	32	32	64
9	4	36	36	72
10	4	40	40	80
11	4	44	44	88
12	4	48	48	96
13	4	52	52	104
14	4	56	56	112
15	4	60	60	120
16	4	64	64	128
17	4	68	68	136
18	4	72	72	144
19	4	76	76	152
20	4	80	80	160

III. Conclusion:

The New Jersey County Prosecutors Association concurs with many of the conclusions, recommendations and standards formulated in the Committee's report. For example, the Association concurs with the recommendation that the number of peremptory challenges should be reduced in all criminal jury trials. Likewise, the County Prosecutors Association agrees with the position that the number of peremptory challenges afforded the parties should not be crime dependent. The number of peremptory challenges should be the same regardless of the crime type. (With the exception being a death penalty trial). However, for the reasons expressed above, the New Jersey County Prosecutors Association vehemently disagrees with the Committee's position articulated in Recommendation #8 concerning the recommendation that the defense should receive a **greater** number of peremptory challenges then the State in all criminal trials. In the final analysis, the defense and the State should receive the same number of peremptory challenges in all criminal trials that are non-capital.

Respectfully submitted,



Thomas F. Kelaher, President
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May 9, 2005

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Re: Final Report of the New Jersey Supreme Court Special Committee on <u>Voir Dire and Peremptory Challenges</u>

Dear Judge Lisa:

Thank you for your efforts as Chair of this Committee and the balanced manner in which you described the process leading to the preparation of the Final Report.

We certainly applaud the Final Report's recommendations to the extent they seek to improve the voir dire process and make the system of jury selection in New Jersey as fair as possible. Consistent with that goal, however, we must respectfully differ with the majority view on the need to reduce the number of peremptory challenges in criminal cases.

We are writing to address our opposition to Recommendation 8 in the Report concerning the proposed reduction in the number of peremptory challenges to be allotted both sides in a criminal case. We view this as a drastic proposal that is unnecessary, unsupported by sound analysis and, at a minimum, premature. It is our sincere belief that this recommendation should be rejected.

In the Report and during the discussions at Committee meetings, a number of reasons were advanced in support of a dramatic reduction in the number of peremptory challenges in criminal cases. At the heart of our objection to Recommendation 8 is our view that none of these reasons, either singularly or collectively, justify its enactment. In fact, we believe that the reasons offered are flawed in a number of respects and do not justify the proposed departure from long-established practice. We will therefore approach the issue by analyzing the alleged reasons individually.

Before discussing the reasons specifically set forth in the Final Report for Recommendation 8, it should be noted that the question of how much time is devoted to jury selection was raised in the context of both voir dire practices and the number of peremptory challenges. We acknowledge that, in the end,

the Final Report indicates that this issue did not drive the recommendations, but we believe some discussion of it is necessary. In this connection, the 2002 Report of the Conference of Criminal Presiding Judges and Criminal Division Managers on Backlog Reduction specifically argues that the number of peremptory challenges should be reduced because it makes jury selection take too long.

During our initial discussions in Committee meetings, we had the distinct impression that judges felt that reducing the number of peremptory challenges was a good idea in part because it would shorten the process. In fact, early on, Committee members were asked to get feedback from their colleagues on issues pertinent to the Committee's work. The single biggest concern expressed by attorneys from the New Jersey State Office of the Public Defender was that judges compromise thorough and fair jury selection procedures in order to pick the jury as quickly as possible. There is a perception among criminal defense attorneys that judges are under pressure not to spend "too much time" on jury selection.

From the outset, we questioned the extent to which this should be a factor if there is any risk that the fairness of the process will be compromised. We noted that there is a tremendous disparity around the State in terms of the amount of time devoted to jury selection in particular cases. The reality is that some judges do it more efficiently than others. We also noted that the number of trials is way down. In 2003, for example, there were 209 jury trials in Essex County. Given that there were 16 to 18 judges trying criminal cases at any given time, the average per judge was only about 12 or 13 cases. In some parts of the State, the average is even lower. We feel with so few cases actually being tried concern over the amount of time it takes to select a jury is unjustified.

A constant theme of those Committee members advocating for a reduction in the number of peremptory challenges in criminal cases was the extent to which other jurisdictions allow far fewer than does New Jersey. The Final Report refers to New Jersey as being "out of the mainstream". It has been our position throughout that this is simply not a reason to change the law in New Jersey absent some showing that to do so would make the system better or fairer in some clearly identified way. Change for change's sake or because others do it differently is not a good reason. The fact that Louisiana or Texas, for example, allow for fewer challenges does not make it a good idea for New Jersey. There is an old expression – "if it ain't broke don't fix it" – which applies here. There has not been a showing by the Committee that the system is somehow in need of overhaul on the issue of peremptory challenges. The Final Report's own data demonstrate that attorneys do not abuse the process by exhausting their peremptory challenges for the sake of it nor is the amount of time spent in jury selection excessive.

The Final Report cites as further justification for the recommended reduction "changes in the criminal justice system". We reject both the reasoning and the assumptions underlying this rationale. Peremptory challenges have long existed for a number of reasons including the elimination of subtle juror biases and the perception of litigants that they have some say in the selection of those who will determine their fate. The kinds of changes in the criminal justice system cited by the Final Report do not relate to those concerns. Neither the right to counsel nor the right to seek suppression of illegally obtained evidence, for example, relates to the right to a fair and impartial jury.

Prior to Gideon v. Wainwright, the number of peremptory challenges was the same for represented and unrepresented defendants. That a defendant is represented by competent counsel who will advocate for his Fourth, Fifth, and Sixth Amendment rights does not mean that the jury that ultimately hears his case is unbiased. Those constitutional guarantees exist to protect the individual from overreaching by the State. Peremptory challenges exist to protect the defendant not from any State conduct but from the biases of potential jurors.

The Final Report also relies on expanded jury pools and what it calls a change in "societal attitudes". It is true that over time efforts have been made to expand the number of citizens called for jury duty. What is unsubstantiated, however, by any empirical data is that the persons called who were previously excluded are somehow less likely to have the same preconceived notions and biases as other citizens. What is also wholly unsubstantiated is that "societal attitudes" have changed so that more jurors are likely to reject law enforcement testimony or be "anti-government" in some sense. Anecdotal information supplied by judges on the Committee is not hard evidence of a real change in "societal attitudes". The reality is that New Jersey is extremely diverse with jurors from all kinds of backgrounds. A blanket statement that people are not as pro-government as they used to be cannot be the basis for changing the method traditionally used to safeguard against ingrained prejudices. If the judiciary's perception of public opinion is to be the basis for deciding the number of peremptory challenges, that number will be subject to adjustment on a county to county basis depending on public opinion polls about crime and law enforcement issues.

The Final Report also points out that the reduction will result in a significant cost savings because the system will require fewer jurors. This is difficult to assess. On one hand, some reduction in the number of jurors summoned might be possible. On the other hand, the judges on the Committee emphasized throughout the process that they would be more inclined to grant challenges for cause if the number of peremptory challenges were reduced and voir dire expanded. In addition, many counties have already tried to render the system more efficient and more convenient for the jurors by permitting them to call in after the first day or requiring only one day of service if not picked for a case. The Final Report notes that the average number of jurors dismissed by challenge by both sides combined is 12 and the average number excused for cause is 21. The latter number will go up under the new standards and the average number of peremptory challenges currently exercised (12) is under the proposed combined total of 14 in Recommendation 8. These numbers suggest that an immediate large scale reduction in the number of jurors summoned would not necessarily be possible.

Another reason offered in the Final Report for Recommendation 8 is that public/juror perception of the criminal justice system is unnecessarily negative as result of the wholesale and unexplained use of peremptory challenges by attorneys, particularly defense attorneys. This is not consistent with our experience. Our experience is that people are not enthusiastic about being called to jury duty and are perfectly happy to be excused and go back to their daily routine. Once selected, there is no doubt that they take the job seriously and do their best to fulfill their responsibilities as jurors. No doubt some potential jurors do not know why they were excused and do not like that they were. The same can be said for those excused for cause. There is, however, no proof that this "negative perception" is a widespread problem. Rather, it is based on anecdotal information provided by judges on the Committee.

At the same time, it is important that the Court carefully explain the concept of the peremptory challenge to the prospective jurors. It would be a simple thing to explain to the jurors that both sides have a great deal at stake in the outcome. One side will disagree with the ultimate verdict. By explaining that one of the purposes of the peremptory challenge is to give the litigants a sense that they had a say in the make-up of the jury, the Court could give the jurors a better idea of the role of the practice.

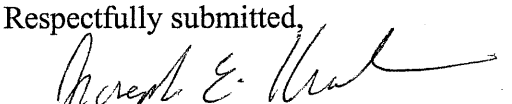
Two final issues need to be addressed. First, at various points, the Committee discussed the impact of the series of decisions by both the New Jersey Supreme Court and the United States Supreme Court restricting the use of peremptory challenges for alleged discriminatory purposes. There is an

obvious tension between the notion that peremptory challenges can be exercised for any or no reason on one hand, but not for a growing number of unlawful reasons on the other. Obviously, if peremptory challenges were eliminated altogether, there would be no risk of lawyers using them in a discriminatory manner. The historical reality, however, is that it was the conduct of prosecutors who engaged in racial discrimination in jury selection that caused this to be an issue in the first place. It would certainly be ironic if this abuse became the rationale for reducing or eliminating peremptory challenges – changes that would work against the very group victimized by the abuse. It is the extent to which prosecutors have unlawfully used their peremptory challenges particularly when African-Americans are on trial that argues in favor of maintaining the current system in New Jersey.

Second, the Final Report emphasizes that the improved voir dire recommended by the Committee along with more liberal granting of cause challenges will to a large extent obviate the need for peremptory challenges. This may or may not be so in the long run but, in any event, it is way too soon to know in the short term. It depends first on the extent to which the proposed changes are adopted and, more importantly, utilized by trial judges around New Jersey. Even assuming the new practices become standard, it is not possible to gauge in advance the impact they will have on the process. From our perspective, any reduction in the number of peremptory challenges would be premature given these considerations.

Thank you for your consideration of these issues.

Respectfully submitted,



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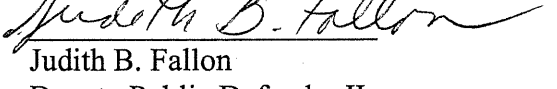

Judith B. Fallon
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cc: Members of the Supreme Court Special Committee
on Voir Dire and Peremptory Challenges