***Writing to Maximize Voir Dire Effectiveness: Using Questionnaires, Motions, and Carefully Crafted Written Questions to Learn About Prospective Jurors***

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***Writing to Maximize Voir Dire Effectiveness: Using Questionnaires, Motions, and Carefully Crafted Written Questions to Learn About Prospective Jurors***

#### Introduction

*"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."*



Thomas Jefferson

Voir dire is taught in law school clinics and trial skills programs throughout the country as something attorneys must learn to do on their feet. While selecting a jury is an invaluable tool that all trial attorneys should know how to do in a skillful and artful manner, the reality is that many courts throughout this country never let the attorney utter a word during this process.

The United States Supreme Court has noted that jury selection is ‘particularly within the province of the trial judge.’[1](#_bookmark0) “ When trial counsel is unable to question the venire, they are at a distinct disadvantage in achieving the goal of getting their client a fair trial. Using written motions is one way to minimize the impact of an unfair process. This outline will provide suggestions for getting the judge to use juror questionnaires, crafting motions that will allow counsel to gather additional information, and writing questions for the judge that align with the defense theory of the case when the court won’t allow the attorneys to spearhead truth-gathering at the initial stage of trial.

1 Skilling v. United States, 130 S.Ct. 2896, 2917 (2010).

#### Jury Questionnaires[2](#_bookmark1)

Death penalty attorneys seem to have significant latitude when it comes to having the court issue a questionnaire before trial. This is likely because the court knows that the condemned will engage in a rigorous appellate process, seeking any and every error in hopes of having the ultimate sentence vacated. Similarly, attorneys in high profile cases seek questionnaires in hopes of learning more about their potential jury pool, and the courts often acquiesce because the threat of a taint to the pool may result in reversal. There’s no reason why attorneys can’t seek a questionnaire in other types of cases.

Seeking a questionnaire in a non-death and/or high profile case follows the same procedure, but counsel must be methodical when approaching the court. Like everything in litigation, counsel starts with a motion to the judge requesting that additional questions be posed to the jury via questionnaire. There will be resistance, and often times formal objections from the prosecutor (because apparently learning all we can about jurors doesn’t benefit all parties). Thus, counsel must first explain to the judge why the form they ordinarily send to jurors is not sufficient. This means counsel must look at the questions on the standard form, evaluate them, and make sure that the questions on the additional form are different and relevant to the case at hand. Submitting a lengthy form with duplicate questions is the quickest way to get the motion denied. If counsel has

2 Attached this outline is a template of a motion seeking a supplemental juror questionnaire.

identified fifteen questions they would like in addition to the standard form, it is best to submit only those questions[3](#_bookmark2).

It is equally important that counsel understand the process that the clerk’s office uses to disseminate the form they already use. This will allow counsel to further explain how the distribution of their form will not further burden the court staff. While there is nothing in the Constitution that cites the convenience of the clerk’s office as a standard for consideration, one can be sure that a failure to explain how the court’s efficiency will not be interrupted will result in a denial of the motion to have the questionnaire submitted. Keep in mind that the average judge that disallows attorney-conducted voir dire often sees no utility in having a juror questionnaire in what they deem to be a run- of-the-mill case, so there are competing interests.

When determining what questions are appropriate for the questionnaire, it is important that counsel consider the number of proposed questions, their relevance to the case at hand, and their perceived intrusiveness. Of course counsel would prefer to submit a long questionnaire examining every aspect of a potential juror’s life. Unfortunately, the court is likely to see this differently. Remember, counsel has already articulated a basis for the questionnaire, so figuring out to meet that objective in a succinct manner will always be better received.

Having a clear, concise theory of the case is critical. What does counsel need to glean to best assist their client. For a court that has consistently denied these requests,

3 One obvious exception here is there should be a space for the juror’s name to ensure that the standard and supplemental forms both came from the same person.

shorten the questionnaire and focus on one or two points. If the case is more complex— multiple defendants with varying theories of defense, trial lasting more than a week, an excessive amount of exhibits, focusing on one to two points may not be possible under the defense theory. There is no magic formula, so counsel should begin thinking about what their ideal questionnaire will look like as soon as there is a workable theory of the case.

#### Motions

Federal Rule of Criminal Procedure 24(a) gives the court discretion over whether the court or attorney conducts voir dire[4](#_bookmark3). [Federal Rule of Criminal Procedure 24(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&amp;pubNum=1004365&amp;cite=USFRCRPR24&amp;originatingDoc=I4656178c9d8311e2981ea20c4f198a69&amp;refType=LQ&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.Search)) states: “(1) *In General.* The court may examine prospective jurors or may permit the attorneys for the parties to do so. (2) *Court Examination.* If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper .” Under this Rule, district courts have broad discretion relating to voir dire, so long as the questions presented by the trial court ensure that the defendants have “a fair trial by a panel of impartial, ‘indifferent’ jurors.[5](#_bookmark4)”

More often than not, the court is content to conduct jury selection under the mistaken notion that they can elicit enough information to help the parties choose an unbiased and impartial jury, thus depriving defense counsel of the opportunity to

4 While each state has its own rules of criminal procedure, I used the federal rules as the default because the majority of federal jurisdictions do not allow attorney conducted voir dire. Further, the language in many of the state rules track the federal language.

5 Irvin v. Dowd, 366 U.S. 717, 722 (1960).

properly assess the pool. What’s more is they can do so knowing that the appellate courts fully support their right to deny counsel proper vetting of the jury. This should not go unchallenged.

If the court does not routinely allow attorneys to ask the questions themselves, requesting that a limited portion of voir dire be conducted by defense counsel is a wise move[6](#_bookmark5). It’s possible that defense counsel will have this motion denied more than once, but when constantly peppered with the requests by multiple attorneys, courts will often give in and finally allow the parties to ask some questions themselves. Remember, counsel can get what counsel doesn’t ask for.

File the Motion for Partial Attorney Conducted Voir Dire early enough to ensure adequate time to prepare. With only fifteen or thirty minutes to talk to the jurors, counsel should not waste time with questions or banter that does not assist them with getting rid of the “bad” jurors.

There are other motions that counsel can file to help get rid of unfavorable jurors, convince the court that the process overall is flawed (bolstering counsel’s claim that attorney conducted voir dire is appropriate) and/or create reversible error (although admittedly reversible error is not likely). While this is not an exhaustive list, it is certainly a good start.

#### Request that all Potential Juror Requests for Extensions, Excusals, or Continuances in the Venire for Defendant’s Trial be Referred to the Trial

6 A memorandum of law supporting a Motion for Partial Attorney Conducted Voir Dire is attached to this outline.

**Judge, Together with Notice to both Parties, and an Opportunity to Object or Offer Proper Solutions:** Depending on the jurisdiction, potential jurors are told they are excused from service by a courtroom deputy or clerk. The excuses for why they can’t show up run the gamut, but often times they are the I- created-some-b.s.-because-I-just-don’t-wanna excuse. This plays, in part, into the dynamic of having no jurors of color in the venire. It’s not science, but it’s a worthy motion and may help set up a future challenge to the court’s method for calling jurors to court.

* 1. **Request to Have All Jurors Requests for Excusals or Continuances be made on the Record with Parties Present**: Filing this motion allows counsel to make a record that potential jurors were improperly dismissed and the dismissal impacted the fairness of the trial. Again, it is possible that counsel will find a pattern in the dismissals. Getting this information on the record will assist appellate counsel, should they choose to challenge this issue.
  2. **Request for Early List of Potential Jurors in the Venire One Week Before Trial:** There is nothing like getting the names of the folks that may determine your client’s fate in enough time to actually make a meaningful analysis of whether they are someone counsel wants off the jury. The obvious ethical constraints apply, but simple Google searches often reveal key information. It helps to know if there’s a vocal anti-Semitic juror in the venire for your Jewish client’s trial. Sure he/she will say they can be “fair and impartial”, but would wise counsel leave that to chance? People seem far more willing to profess

their true feelings on the internet. Counsel simply can’t gather the amount of information needed to make the best for cause challenge when searching from their phone the morning of trial. Courts have this information in advance, and sharing it simply requires that they click the print button one Friday earlier than they ordinarily would have.

* 1. **Request for Voir Dire on Race and Jury Certification of Fairness:** In the Northern District of Iowa, Judge Mark Bennett has each of his jurors watch the “What Would You Do” stolen bicycle video[7](#_bookmark6) showing glaring differences in the way a black male, white male, and attractive white female are treated when attempting to steal a bicycle in a park. After they watch the video, there is a discussion and each juror signs a certification vowing to act without prejudice[8](#_bookmark7). This causes jurors to be more careful in their deliberations, contemplating whether they feel a certain way based upon the facts or their own biases. While Judge Bennett does this regularly, other judges are beginning to warm to this idea. In the Western District of Washington, upon motion by Assistant Federal Defender Kyana Givens, a judge allowed the video to be shown and extensive questioning on the issue of race. There are likely many other instances happening throughout the country. Given what we know about implicit bias, a failure to request that the court address this issue is a missed opportunity.

7 Long version found at the following link: https:/[/www.youtube.com/watch?v=S0kV\_b3IK9M](http://www.youtube.com/watch?v=S0kV_b3IK9M)

8 A copy of the certification used in Judge Bennett’s courtroom is attached.

* 1. **Motion in Limine for Jury Instruction on Implicit Bias:** In conjunction with the aforementioned video and certification, Judge Bennett gives a jury instruction addressing implicit bias[9](#_bookmark8). Again, the instruction has the powerful effect of making the jury think long and hard before determining the accused’s fate.

#### Questions Submitted to Judge[10](#_bookmark9)

“In the midst of chaos, there is also opportunity.”

-Sun Tzu

Counsel fought for the questionnaire. They lost. Counsel fought some more for attorney conducted voir dire, and lost again. Counsel keeps fighting because it’s not over. If one is unable to convince the court that a questionnaire is appropriate and/or that voir dire is more beneficial when conducted by the attorney, it is critical that counsel submit questions for the judge to ask the venire. Like the questions submitted as part of the questionnaire, they should advance the theory of defense.

The difficulty in advancing the theory of defense through the judge is they view the objective of voir dire different. For them it’s simple—get a few folks in the box that don’t show any clear bias. Defense attorneys want to knock out anyone that won’t be receptive to their theory of defense and/or is clearly looking to screw the client for some not-so-obvious reason. These competing interests are difficult to resolve, but if counsel simply can’t get the judge to allow them to ask questions, this is the best alternative.

9 The instruction Judge Bennett uses is attached.

10 Sample questions on limited topics are attached.

Note that the court is not required to ask the questions because they were submitted. It is their discretion, so crafting good questions with an explanation of its importance is key. Counsel should be specific with the goal of their questions. Often times the court won’t ask the submitted question, but will attempt (good or bad) to get the information a different way. Decide early how the judge can best get the information counsel needs.

#### Conclusion

“Representative government and trial by jury are the heart and lungs of liberty.

Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.”

-John Adams, 1774

We must continue to fight for defendant’s rights in the process that is at the very core of our judicial system. There is no substitute for being able to stand in the well of the court and have a conversation with the people that may be called upon to determine the client’s fate[11](#_bookmark10). After all, “the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty,” which assessment cannot be matched through reliance upon a written record[12](#_bookmark11). This in-person voir dire process “affords the trial court a more intimate and immediate basis for assessing the venire member's fitness for jury service.[13](#_bookmark12)” But, for now we are stuck with the reality that many judges are not yet prepared to allow defense counsel to take control when it comes to voir dire. Well-

11 Recommended reading, Judge- Versus Attorney-Conducted Voir Dire, Susan Jones, Law and Human Behavior, Vol. 11, No. 2, 1987

12 Skilling, 130 S.Ct. at 2918.

13 Id.

crafted, methodical motions and questions from the defense will help counsel discover more about the venire until we reach a time where courts realize the benefit of allowing the parties to talk to the jury and relinquish control.

#### TEMPLATE: MOTION FOR SUPPLEMENTAL JURY QUESTIONNAIRE. IN THE EVENT THE PROSECUTOR AGREES THAT A QUESTIONNAIRE IS APPROPRIATE, FILE IT AS AN UNOPPOSED MOTION. THE INFORMATION IN THIS MOTION IS A CULMINATION OF INFORMATION GATHERED AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT THE YEARS.

**CAPTION**

**MOTION FOR SUPPLEMENTAL JURY QUESTIONNAIRE**

*"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."*



Thomas Jefferson

CLIENT NAME stands before this Court accused of CHARGE. The allegations include, ADD GENERAL SYNOPSIS OF FACT IN YOUR CASE THAT FRAME THE

ISSUE FROM THE DEFENSE PERSPECTIVE. On DATE, a jury make a determination regarding Mr./Ms. CLIENT LAST NAME’s innocence.

USE THIS PARAGRAPH TO EXPLAIN TO THE COURT WHY THE ALLEGATIONS AND YOUR THEORY OF THE CASE PRESENT UNIQUE AND/OR SENSITIVE ISSUES THAT WARRANT ADDITIONAL QUESTIONING.

In the interest of ensuring an efficient, but fair process, the proposed questionnaire will aid the parties and this Court in obtaining and receiving information that will be helpful for the exercise of early challenges for cause. AND/OR The questionnaire will allow the prospective jurors to maintain a measure of privacy on the sensitive issues that arise in this case (SEXUAL ABUSE, ALCOHOL ABUSE, OTHER ADDICTIONS, RACE, RELIGION, ETC.—THIS WILL DEPEND ON YOUR THEORY OF THE CASE, BUT BE SURE TO ARTICULATE THE PARTICULAR SENSITIVITY COUNSEL IS CONCERNED

ABOUT)[1](#_bookmark13). AND/OR Further, there are mundane issues that must be explored, and the proposed questionnaire will allow the parties and the court to filter through those critical issues while maintaining the voir dire time in court for more substantive issues.

Key to our country’s legal processes is the right to a fair and impartial jury chosen from the representative cross-section of the community, as it is guaranteed by the United States Constitution (AND THE STATE CONSTITUTION, IF APPLICABLE).

The Court and the parties are charged with ensuring that peremptory strikes are used in a manner that does not violate the Equal Protection Clause of the Fourteenth Amendment. This questionnaire will assist the court in addressing any challenges brought under Batson v. Kentucky , 476 U.S. 79 (1986), for the inappropriate use of preemptory challenges.

#### SIGNATURE

1 See ABA Principles for Juries and Trials, Principle 7(A)(5), 2005

#### TEMPLATE: MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE. THIS WILL ACCOMPANY A MOTION SIMPLY MAKING THE REQUEST. DEPENDING ON THE COURT, IT MAY BE WISE TO REQUEST A SPECIFIC TIME FRAME (YOU CAN START WITH 30 MINUTES PER SIDE). IF YOU ARE REQUESTING THAT THE ENTIRE PROCESS BE CONDUCTED BY COUNSEL, YOU WILL CERTAINLY WANT TO REQUEST MORE TIME. THIS MOTION IS A COMBINATION OF INFORMATION GATHERED BY MYSELF AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT MY CAREER. FILING THIS MOTION RESULTED IN THE ABILITY TO CONDUCT MY OWN VOIR DIRE, ALTHOUGH IN SOME CASES IT WAS LIMITED. MODIFY (READ UPDATE), STEAL, BORROW, DELETE AS YOU WISH.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL ATTORNEY CONDUCTED VOIR DIRE**

**INTRODUCTION**

One important mechanism for ensuring impartiality is voir dire, which enables the

*parties* to probe potential jurors for prejudice.

Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998)(emphasis added)

START WITH THE CLIENT, WHY IS HE/SHE HERE AND SOME BASIC FACTS.

To further the goals of justice, including the right of the accused to have his innocence or guilt determined by a body of his peers that is unbiased and impartial, CLIENT requests that the court permit each side in this case thirty minutes of attorney conducted voir dire as a complement, and in addition to the court's voir dire. Supplemental attorney conducted voir dire, while not statutorily or constitutionally mandated, will add an important dimension to the voir dire process and is in the interest of justice. It will most effectively advance the goal of obtaining an unbiased and impartial jury through the intelligent exercise of

peremptory challenges by counsel and full and informed consideration by the court of any challenges for cause which may be made.

**ARGUMENT**

One right the constitution confers on a defendant is the right to an impartial jury. Voir dire plays a critical function in protecting this constitutional right. *Rosales-Lopez*

*v. United States*, 451 U.S. 182, 188 (1981). Because of the crucial function of the peremptory challenge in acquiring an impartial jury, a "system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

Rule 24(a) of the Federal Rules of Criminal Procedure grants the court broad discretion in conducting the voir dire examination. Included within the broad discretion is the right to control who conducts the voir dire; the rule specifically provides that the court may either permit counsel to conduct the entire voir dire examination, permit counsel to conduct some voir dire examination to supplement initial voir dire examination by the court, or permit no voir dire examination by counsel and conduct the entire voir dire examination itself. *See* Fed. R. Crim. Pro. 24(a).

The court's discretion under Rule 24(a) is not without limit. It is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931). There are several reasons attorney conducted voir dire advances this goal.

#### ATTORNEY CONDUCTED VOIR DIRE WILL PERMIT THE MOST INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGES.

* 1. *The Importance of Voir Dire to Peremptory Challenges.*

The dual purpose of voir dire is to provide enough information to exercise challenges for cause and enough information to exercise peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). These challenges are intended to advance the goal of meeting the constitutional requirement of an impartial jury. Challenges for cause are narrow in scope; they "permit rejection of jurors on narrowly specified, provable and legally cognizable bas[e]s of partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Peremptory challenges, on the other hand, can be exercised "without a reason stated, without inquiry, and without being subject to the court's control." *Id.* at 220. *But see Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, discussed *infra* pp. 10-12. (NEED TO UPDATE)

Because of the narrow scope of challenges for cause, the peremptory challenge is often the most useful and important tool for a litigant in picking an impartial jury. As noted by the Supreme Court in *Swain*, "[t]he voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . 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." *Swain*, 380 U.S. at 218-219.

In order for a peremptory challenge to serve its purposes, it must be

intelligently exercised. This requires that the parties obtain sufficient information from the potential jurors upon which to base their challenges. *Art Press, Ltd. v.*

*Western Printing Machinery Co.*, 791 F.2d 616, 618 (7th Cir. 1986). As one court has noted, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir.), *cert. denied*, 434

U.S. 902 (1977). *See also United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980) ("[t]his court has previously stressed that voir dire examination not conducted by counsel has little meaning").

* 1. *The Contribution of The Attorneys' More In-Depth Knowledge of the Case.*

One reason why a short period of attorney conducted voir dire after the court's general voir dire will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case. Important follow-up questions are more likely to occur to an advocate than a judge for several reasons, including the fact that a judge "does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said" and the fact that "the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry." Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 549 (1975). The Fifth Circuit has recognized:

While Federal Rule of Criminal Procedure 24(a) gives wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The "federal" practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weaknesses of the case. . . Experience indicates that in the majority of situations questioning by counsel would be more likely to fulfill this need [for information upon which to base the intelligent exercise of peremptory challenges] than an exclusive examination in general terms by the trial court.

*United States v. Ible,* 630 F.2d 389, 395 (5th Cir. 1980). *Accord United States*

*v. Corey*, 625 F.2d at 707; *United States v. Ledee*, 549 F.2d at 993.

Voir dire conducted solely by the court interferes with the intelligent exercise of peremptory challenges because the court is usually less familiar with the facts and nuances of the case. Attorneys have been working for months on the case. They are most likely to know the areas of questioning that must be explored further in order to uncover the prejudices that are most pertinent to the evidence which will be presented at trial. They also act with an awareness that they will have to base peremptory challenges on the juror's answers.

* 1. *The Contribution of the Attorneys' Different Relationship to Potential Jurors.*

Another reason why attorney conducted voir dire—in addition to court voir dire—will elicit more complete information from potential jurors arises from the attorneys' relationship to the jurors. Psychological studies suggest at least two differences between attorney-juror relationships and judge-juror relationships that should enable attorneys to obtain more or different information from some

potential jurors. *See* Suggs and Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245, 253-58 (1981).

The first difference which may have an impact is the difference in status between judges and attorneys. Psychological studies suggest two things about the relationship between self-disclosure and the status of an interviewer: people (1) tend to disclose more to a person who is perceived to have higher status than they, but (2) tend to disclose less if the status differential is too great. Suggs and Sales, *supra* at 253. In other words, a person is likely to provide the most self- disclosure to a person who is perceived to have somewhat greater status but not such greater status that the juror finds it impossible to identify with the interviewer. *Id*. at 253-54.

This suggests that supplemental attorney conducted voir dire can add an important dimension to the voir dire process. Potential jurors come from widely varying social backgrounds, ranging from the unemployed, to employed blue collar workers who have only a high school education, to college students, to established and well-educated professionals. For some of these individuals, the relative "status" of judges and attorneys may be such as to make the judge most likely to obtain complete self-disclosure. But for others it may be the status differential with attorneys that will result in complete self-disclosure. By having both attorneys and the court conduct voir dire, self-disclosure is most likely to be maximized.

A second difference in the juror-attorney relationship and the juror-judge relationship is also significant. As one set of commentators has noted, "the judge has an extremely difficult role to fulfill, both intellectually and emotionally. He must be the arbiter of fine points of law, coordinate the activities of all parties to facilitate a just result and remain above interparty rivalries, all of which require that he remain aloof and emotionally detached." Suggs and Sales, *supra* p. 7, at

254. Attorneys are not so constrained. *See id*. This is reflected most superficially by the fact that it is the judge for whom jurors must stand upon his entry into the courtroom, not the attorneys.

This is important to the question of jurors' self-disclosure. Psychological studies show -- consistent with common sense -- that people tend to be less willing to talk andreveal themselves to those who must remain at least somewhat detached. Suggs and Sales, *supra* p. 7, at 254-55. Permitting the attorneys to conduct some follow-up voir dire in addition to the court's voir dire will counter this problem in the voir dire process.

Essentially, attorney conducted voir dire in addition to the court's voir dire takes advantage of both the attorneys' greater knowledge of the underlying facts of the case and the differences between the attorney-juror relationship and the

judge-juror relationship. Permitting attorney conducted voir dire in addition to court voir dire will bring the best of both worlds to the process and maximize the information obtained in voir dire.

*4. The Ability Of The Court To Control And Limit Voir Dire Abuse.*

There is a concern expressed by some commentators that attorneys may abuse the voir dire process, either by seeking to improperly ingratiate themselves with jurors or argue their theory of the case or by showing no concern for efficiency. *See* Suggs and Sales, *supra* p. 7, at 250-51. The great advantage of allowing attorney conducted voir dire as a supplement to court voir dire is that the court can fairly and reasonably control and limit such abuse.

If the court begins by conducting its own voir dire, it can reasonably limit the voir dire it allows the attorneys to conduct. If the court has already conducted its own voir dire, the court can legitimately expect the attorneys not to repeat the questions it has already asked and not to simply go on and on in an effort to establish rapport with the jurors. The court can rightfully demand that the attorneys limit themselves to new areas of examination or follow-up examination which has not already been covered and which is clearly relevant to the case at bar.

In addition, the court can legitimately place a specific time limit on attorney conducted voir dire when it begins with its own voir dire. The thirty-minute limit on voir dire, which is proposed in this motion is eminently justifiable when basic voir dire has already been conducted by the court. An attorney who is given only thirty minutes for additional voir dire examination is unlikely to waste his precious thirty minutes on mere prattling attempts at ingratiation which provide little, if any, actual information.

#### ATTORNEY CONDUCTED VOIR DIRE WILL AID THE PARTIES IN COMPLYING WITH THE REQUIREMENTS OF *BATSON V. KENTUCKY*.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause prohibits challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable to impartially to consider the State's case against a black defendant." *Id*. at 83; *See also United States v. Carter*, 111 F.3d 509, 512 (7th Cir. 1997). Thus, peremptory challenges must be made in a non-racially discriminatory manner in order to be constitutional. Discriminatory exercise of peremptory challenges on the basis of

gender is also barred. *See J.E.B. v. Alabama ex rel*. *T.B*., 511 U.S.

127 (1994); *United States v. Harris*, 197 F.3d 870, 873 (7th Cir. 1999).

*Batson* set up a system where a party may establish a prima facie case of discriminatory use of peremptory challenges.[1](#_bookmark14) First, a litigant must show that the opposing party has exercised peremptory challenges with intent to exclude members of a cognizable racial group or other protected class. *Id.* at 96. Second, a litigant may rely on the fact that the nature of peremptory strikes permits those who are inclined to discriminate to do so. *Id*. Finally, a litigant must show facts and other relevant circumstances that raise an inference that opposing counsel used peremptory strikes to exclude members of the group in question. *Id.* In deciding whether the litigant has made a prima facie showing, the trial court may

1 After *Batson*, a string of Supreme Court cases extended its reach to parties other than the government. Criminal defendants and civil litigants are thus also barred from discriminating in the exercise of peremptory challenges. See *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

consider all relevant circumstances, including the attorneys' questions and statements during the voir dire examination. Id. at 96-97.

Once a party makes a prima facie showing, the burden shifts to the opposing counsel to offer a neutral explanation for the challenge. *Id*. at 97. "[Counsel] must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id*. at 98 n.20 (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

Complete and effective voir dire is a basic premise which underlines the rationale of *Batson* and its progeny -- in two respects. First, a complete and effective voir dire eliminates any need to rely on generalizations and stereotypes about people. As the Supreme Court recognized in *J.E.B. v. Alabama ex rel.*

*T.B.*, 511 U.S. 127 (1994):

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. *Id.* at 1429. Simply put, there is no reason for counsel to rely on stereotypes and generalizations about people if he is permitted to ask specific questions about them. The second way in which a complete and effective voir dire is a necessary premise to the *Batson* decision is that "the voir dire process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges." *J.E.B.*, 511 U.S. 127, 143-44 n. 17.

Whether a litigant is trying to prove a prima facie case of discrimination or trying to rebut one, an in-depth and extensive voir dire is essential. An attorney who must defend his peremptories should have sufficient information to provide

a neutral explanation that will survive a *Batson* challenge. The court in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994) stated that "the stronger the objective evidence of discrimination, the more we will require by way of verifiable facts" to rebut the challenge. *Id.* at 1429-30. If an attorney is required to explain and point to "verifiable facts", he should be allowed to obtain those facts.

This suggests the need for, and inherent fairness of, allowing attorney conducted voir dire. If an attorney is going to be required to justify the inferences he draws and/or the impressions he gets from a juror's answers, he ought to be allowed to ask appropriate follow-up questions or ask questions in a way which will maximize the information he feels he needs to avoid relying on generalizations and stereotypes. An attorney conducting voir dire is able to do this more effectively than the court because the attorney knows what factors he is concerned about and knows the underlying circumstances of the case and what characteristics in jurors are relevant to those circumstances.

#### ATTORNEY CONDUCTED VOIR DIRE WILL HELP AVOID REVERSIBLE ERROR ON APPEAL.

The denial or impairment of the right to exercise peremptory challenges requires reversal of a conviction, without a showing of prejudice. *Lewis v. United States*, 146 U.S. 370, 376 (1892). A court which insists on conducting all voir dire itself may create grounds for reversal. The Ninth Circuit noted in *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979):

The trial judge [may] insist on conducting a voir dire examination, but if he does so, he must exercise a sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel. Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality.

*Id.* at 1297.

The court went on to reverse the defendant's conviction for failure of the trial court to conduct a voir dire that created "reasonable assurances that prejudice would be discovered if present." *Id.* at 1298.

Other convictions have been reversed for insufficient voir dire as well. *See, e.g., United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987) (failure to ask whether jurors would give greater credence to law enforcement officer testimony); *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (failure to ask whether jurors knew any of government's witnesses); *United States v. Ible*, 630 F.2d at 394-95 (failure to ask about jurors' moral or religious beliefs about alcohol); *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (failure to ask jurors in assault case whether they had ever been victim of crime involving knife or gun); *United States v. Allsup*, 566 F.2d 68, 70 (9th Cir. 1977) (failure to ask jurors about views on insanity defense); *United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976) (failure to ask jurors whether they had been employed by agency prosecuting case); *United States v. Dellinger*, 472 F.2d 340, 368-69 (7th Cir. 1972) (failure to ask jurors about attitudes toward Vietnam War, "youth culture", and relationship with law enforcement officers in case arising out of protest demonstration); *United States v. Poole*, 450 F.2d 1082, 1083-83 (3d Cir. 1971)

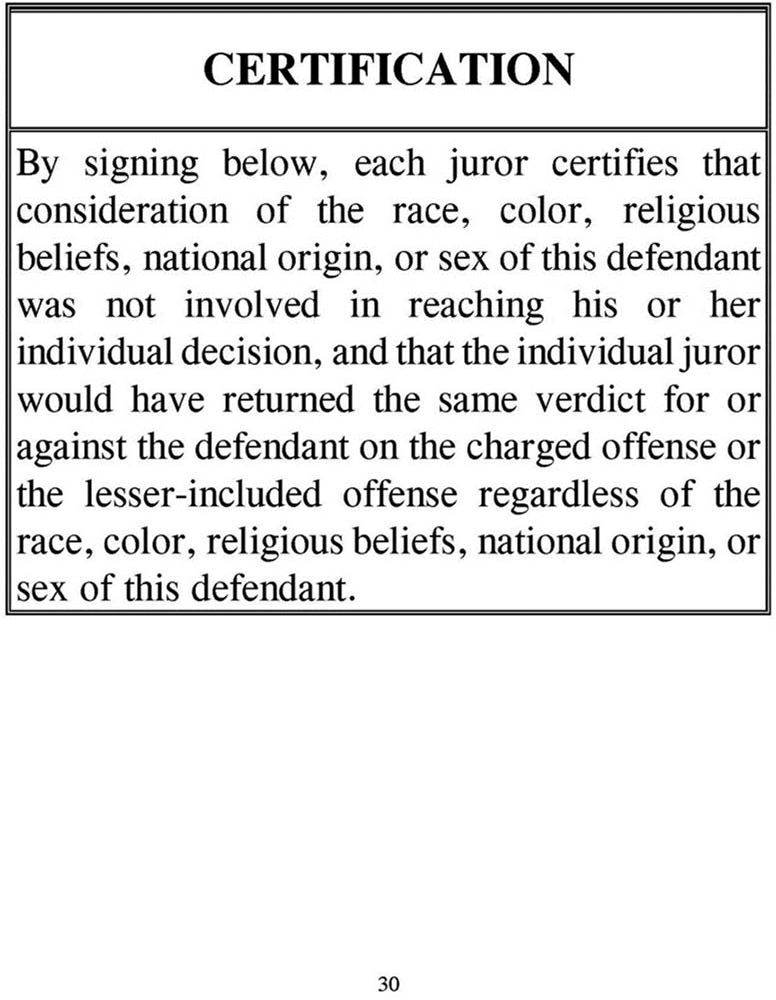
(failure to ask jurors in bank robbery case whether they or any family member had been victim of robbery or other crime).

There will be no possibility of such a reversal if the court permits counsel thirty minutes of voir dire each. A defendant would hardly be in the position to complain about a failure of the court to ask a particular voir dire question when he himself failed to ask the question. Granting counsel thirty minutes for voir dire transfers the burden of asking mandatory voir dire questions to counsel and removes that burden from the court. Any risk of reversal due to insufficient voir dire will thereby be eliminated. *See, e.g,, United States v. Rigsby*, 45 F.3d 120, 125 (6th Cir. 1995) (rejecting claim of error based on failure of court to ask particular voir dire question where defense attorneys were allowed to conduct additional voir dire after initial voir dire by court), *cert. denied*, 514 U.S. 1134 (1995).

**CONCLUSION**

Ensuring that Mr./Ms. CLIENT’S LAST NAME receives a fair trial is required under the Constitution. This court is uniquely positioned to help achieve that goal by allowing counsel to supplement this Court’s questioning of the jury pool.

#### SIGNATURE LINE



### PROPOSED JURY INSTRUCTION: IMPLICIT BIAS

You must decide during your deliberations whether or not the prosecution has proved the guilt of each defendant on each offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

**THIS IS A NON-EXHAUSTIVE LIST OF QUESTIONS I’VE GATHERED FROM VARIOUS SOURCES THAT I SIMPLY CAN’T RECALL AND BORROWED (READ STOLEN WITH PERMISSION) FROM COLLEAGUES THROUGHOUT THE YEARS. ALL QUESTIONS WON’T WORK FOR ALL CASES. IT IS IMPORTANT TO CHOOSE THE WRITTEN QUESTIONS SUBMITTED FOR A QUESTIONNAIRE OR TO THE JUDGE WISELY.**

**Sample Juror Questions**

Attitudes About Alcohol/Drunk Driving/Drug Use

Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they’re drunk.

Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic.

Do you, your relatives or close associates belong to any organizations which take an official position on the use of alcohol? (MADD, SADD, certain churches, etc.?)

Do you drink alcohol? How often?

What are your feelings about the use of alcohol?

Have you ever known anyone who was arrested for driving while intoxicated (DWI)? Explain.

Have you, your relatives, or close associates become familiar, through work, training, or study, with the effects of alcohol? If so, please explain:

Have you ever taken any courses which addressed the effects of alcohol? If so, please explain:

What is your knowledge, education or training about blood alcohol levels as shown by a blood test or breath test? Please explain:

Do you drive an automobile regularly? What kind of car(s) do you drive?

Have you ever been in an automobile accident? Was anyone injured or killed? Please explain:

How well do you feel the court system deals with alcohol related crimes? Do you know anyone that has had a drug problem? If yes, please explain: Attitudes About Domestic Violence

Have you or any member of your family been involved in a domestic dispute in which the police were called? Please explain. Was there any legal action? What was the final outcome of the situation?

How well do you feel the criminal justice system deals with domestic disputes? Please explain:

Attitudes About Guns/Violence

Do you or any of your relatives own or possess any type of weapon(s)? If yes, what type(s) and what was the reason for owning or possessing them?

Have you, any family members or friends ever had any type of bad experience involving a weapon? If yes, please explain:

Have you or any family member ever shot a gun? What is your experience with firearms?

Have you or any family member ever belonged to any kind of anti-gun or pro-gun club or organization (such as NRA)? If yes, what club or organization? If you/they are no longer a member, please explain why?

What are your feelings about gun control?

Have you or anyone you know ever been shot, accidentally or otherwise? If yes, please explain:

Have you or anyone you know ever been accused of committing an act of violence? If yes, please explain:

Attitudes About Immigration and the Border

How often do you cross the US-Mexico border?

Have you, or anyone in your family, ever done business with anyone located in Mexico? If yes, please explain:

Have you ever known anyone who was accused of smuggling drugs? If yes, please explain:

What are your feelings and opinions about people accused of smuggling drugs?

How strongly do you agree or disagree with this statement: “I know all the items that are in my car”?

How strongly do you agree or disagree with this statement: “most people get fearful and nervous around law enforcement”?

Attitudes About Race/Ethnicity

Do you believe it is ever appropriate to judge someone based on their skin color? Describe your most significant interaction(s) with a member of another race.

Describe a particularly impactful interaction that you or someone close to you had with a member of another race.

Describe the most serious incident you ever saw where someone was treated badly because of their race.

Describe the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

Describe the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

Have you ever been to the Reservation? If yes, please describe your experience.

What have you heard about the Reservation? Attitudes About Self Defense

Describe the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

Describe the most frightening experience you or someone close to you had when

they were threatened by another person.

What is the craziest thing you or someone close to you ever did out of fear? What is the bravest thing you ever saw someone do out of fear?

Describe the bravest thing you ever saw someone do to protect another person. A person must always retreat from provocation. Yes or No. Explain.

Attitudes About Lying

Describe the worst problem you ever had with someone who was a liar.

Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

Tell us about the most serious time that you or someone you know told a lie out of fear.

Tell us about the most serious time that you or someone you know told a lie to protect someone else.

Describe the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth

**GENERAL PRINCIPLES**

**PRINCIPLE 1– THE RIGHT TO JURY TRIAL SHALL BE PRESERVED**

1. Parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with law.
2. Parties, including the state, have the right to a fair, accurate and timely jury trial in criminal prosecutions in which confinement in jail or prison may be imposed.
3. In civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.
4. With respect to criminal prosecutions:
   1. A defendant’s waiver of the right to jury trial must be knowing and voluntary, joined in by the prosecutor and accepted by the court.
   2. The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing or in open court on the record.
   3. A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of trial.
   4. A defendant may withdraw a waiver of jury, and the prosecutor may withdraw its consent to a waiver, both as a matter of right, if there is a change of trial judge.
5. A quality and accessible jury system should be maintained with budget procedures that will ensure adequate, stable, long-term funding under all economic conditions.

#### PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

1. All persons should be eligible for jury service except those who:
   1. Are less than eighteen years of age; or
   2. Are not citizens of the United States; or
   3. Are not residents of the jurisdiction in which they have been summoned to serve; or
   4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or
   5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.
2. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.
3. The time required of persons called for jury service should be the shortest period consistent with the needs of justice.
   1. Courts should use a term of service of one day or the completion of one trial, whichever is longer.
   2. Where deviation from the term of service set forth in C.1. above is deemed necessary, the court should not require a person to remain available to be selected for jury service for longer than two weeks.
4. Courts should respect jurors’ time by calling in the minimum number deemed necessary and by minimizing their waiting time.
   1. Courts should coordinate jury management and calendar management to make effective use of jurors.
   2. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both

the number of persons summoned for jury duty and the number assigned to jury panels.

* 1. Courts should ensure that all jurors in the courthouse waiting to be assigned to panels for the first time are assigned before any juror is assigned a second time.

1. Courts should provide an adequate and suitable environment for jurors, including those who require reasonable accommodation due to disability.
2. Persons called for jury service should receive a reasonable fee.
   1. Persons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care. Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials.
   2. Employers should be prohibited from discharging, laying off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.
   3. Employers should be prohibited from requiring jurors to use leave or vacation time for the time spent on jury service or be required to make up the time they served.

#### PRINCIPLE 3 – JURIES SHOULD HAVE 12 MEMBERS

1. Juries in civil cases should be constituted of 12 members wherever feasible and under no circumstances fewer than six members.
2. Juries in criminal cases should consist of:
   1. Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction;
   2. At least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.
3. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of fewer jurors than required for a full jury, but in no case fewer than six jurors. In criminal cases the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, and the

consequences of waiver, personally waives the right to a full jury either in writing or in open court on the record.

#### PRINCIPLE 4 – JURY DECISIONS SHOULD BE UNANIMOUS

1. In civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted, except as provided in C. below.
2. A unanimous decision should be required in all criminal cases heard by a jury.
3. At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.

#### PRINCIPLE 5 – IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

1. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.
   1. All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state’s highest court or judicial council.
   2. A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.
   3. Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.
2. Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:
   1. The representativeness and inclusiveness of the jury source list;
   2. The effectiveness of qualification and summoning procedures;
   3. The responsiveness of individual citizens to jury duty summonses;
   4. The efficient use of jurors; and
   5. The reasonableness of accommodations being provided to jurors with disabilities.

#### PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

1. Courts should provide orientation and preliminary information to persons called for jury service:
   1. Upon initial contact prior to service;
   2. Upon first appearance at the courthouse; and
   3. Upon reporting to a courtroom for juror voir dire.
2. Orientation programs should be:
   1. Designed to increase jurors’ understanding of the judicial system and prepare them to serve competently as jurors;
   2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and
   3. Presented, at least in part, by a judge.
3. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.
   1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury’s role, the trial procedures including note-taking and questioning by jurors, the

nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

* 1. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room until the trial is over and the jury has reached a verdict. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F.
  2. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.
  3. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.

#### PRINCIPLE 7 – COURTS SHOULD PROTECT JUROR PRIVACY INSOFAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

1. Juror interest in privacy must be balanced against party and public interest in court proceedings.
   1. Juror voir dire should be open and accessible for public view except as provided herein. Closing voir dire proceedings should only occur after a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury.
   2. Requests to jurors for information should differentiate among information collected for the purpose of juror qualification, jury administration, and voir dire.
   3. Judges should ensure that jurors’ privacy is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.
   4. Courts should explain to jurors how the information they provide will be used, how long it will be retained, and who will have access to it.
   5. Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.
   6. Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and the parties.
   7. Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.
   8. Following jury selection and trial, the court should keep all jurors’ home and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure. Original records, documents and transcripts relating to juror summoning and jury selection may be destroyed when the time for appeal has passed, or the appeal is complete, whichever is longer, provided that, in criminal proceedings, the court maintains for use by the parties and the public exact replicas (using any reliable process that ensures their integrity and preservation) of those items and devices for viewing them.
2. Without express court permission, surveillance of jurors and prospective jurors outside the courtroom by or on behalf of a party should be prohibited.
3. If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.

#### PRINCIPLE 8 -- INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

**ASSEMBLING A JURY**

**PRINCIPLE 9 – COURTS SHOULD CONDUCT JURY TRIALS IN THE VENUE REQUIRED BY APPLICABLE LAW OR THE INTERESTS OF JUSTICE**

1. In civil cases where a jury demand has been made, a change of venue may be granted as required by applicable law or in the interest of justice.
2. In criminal cases, a change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.
3. Courts should consider the option of trying the case in the original venue but selecting the jury from a new venue**.** In addition to all other considerations relevant to the selection of the new venue, consideration should be given to whether the original venue would be a better location to conduct the trial due to facilities, security, and the convenience of the victims, court staff, and parties. This should be balanced against the possible inconvenience to the jurors.

#### PRINCIPLE 10 – COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS

1. Juror source pools should be assembled so as to assure representativeness and inclusiveness.
   1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.
   2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.
   3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.
   4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.
   5. Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.
2. Courts should use random selection procedures throughout the juror selection process.
   1. Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations.
   2. Courts should use random selection procedures in:
      1. Selecting persons to be summoned for jury service;
      2. Assigning jurors to panels;
      3. Calling jurors for voir dire; and
      4. Designating, at the outset of jury deliberations, those jurors who will serve as “regular” and as “alternate” jurors.
   3. Departures from the principle of random selection are appropriate:
      1. To exclude persons ineligible for service in accordance with basic eligibility requirements;
      2. To excuse or defer jurors in accordance with C. below;
      3. To remove jurors for cause or if challenged peremptorily in accordance with D. and E. below; or
      4. To provide jurors who have not been considered for selection with an opportunity to be considered before other jurors are considered for a second time, as provided for in Standard

2 D. 3.

1. Exemptions, excuses, and deferrals should be sparingly used.
   1. All automatic excuses or exemptions from jury service should be eliminated.
   2. Eligible persons who are summoned may be excused from jury service only if:
      1. Their ability to perceive and evaluate information is so impaired that even with reasonable accommodations having been provided, they are unable to perform their duties as jurors and they are excused for this reason by a judge; or
      2. Their service would be an undue hardship or they have served on a jury during the two years preceding their summons and they are excused by a judge or duly authorized court official.
   3. Deferrals of jury service to a date certain within six months should be permitted by a judge or duly authorized court official. Prospective jurors seeking to postpone their jury service to a specific date should be permitted to submit a request by telephone, mail, in person or electronically. Deferrals should be preferred to excusals whenever possible.
   4. Requests for excuses or deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.
2. Courts should use sensible and practical notification and summons procedures in assembling jurors.
   1. The notice summoning a person to jury service should be easy to understand and answer, should specify the steps required for answering and the consequences of failing to answer, should allow for speedy and accurate eligibility screening, and should request basic background information.
   2. Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.
3. Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should

maintain demographic information as to its source lists, summonses issued, and reporting jurors.

#### PRINCIPLE 11 – COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

1. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.
   1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.
   2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.
   3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.
2. The voir dire process should be held on the record and appropriate demographic data collected.
   1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors’ legal qualification to serve in the case.
   2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.
   3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.
   4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.
   5. It is the responsibility of the court to prevent abuse of the juror selection examination process.
3. Challenges for cause should be available at the request of a party or at the court’s own initiative.
   1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.
   2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.
   3. In ruling on a challenge for cause, the court should evaluate the juror’s demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.
4. Peremptory challenges should be available to each of the parties.
   1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.
   2. The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.
   3. The court should have the authority to allow additional peremptory challenges when justified.
   4. Following completion of the examination of jurors, the parties 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.
5. Fair procedures should be utilized in the exercise of challenges.
   1. All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.
   2. After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D.

4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.

* 1. The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.
  2. No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.

1. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.
   1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.
   2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that

the party challenged the juror because of the juror's membership in that group.

* 1. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.
  2. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.
  3. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.

1. The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court’s discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.
   1. Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.
   2. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.
   3. In civil cases where there are 12 or fewer jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.
2. Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when

there is a finding by the court that efforts are being made to intimidate or influence the jury's decision.

**CONDUCTING A JURY TRIAL**

**PRINCIPLE 12 – COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS INSOFAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED**

1. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.
2. Trial judges should use modern trial management techniques that eliminate unnecessary trial delay and disruption. Once begun, jury trial proceedings with jurors present should take precedence over all other court proceedings except those given priority by a specific law and those of an emergency nature.
3. Jurors should be informed of the trial schedule and of any necessary changes to the trial schedule at the earliest practicable time.

#### PRINCIPLE 13 – THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

1. Jurors should be allowed to take notes during the trial.
   1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed.
   2. Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.
   3. The court should ensure that jurors have implements for taking notes.
   4. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate.
   5. After the jurors have returned their verdict, all juror notes should be collected and destroyed.
2. Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court’s preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.
   1. At the time of distribution, the court should instruct the jurors concerning the purpose and use of their trial notebooks.
   2. During the trial, the court may permit the parties to supplement the materials contained in the notebooks with additional material that has been admitted in evidence.
   3. The trial notebooks should be available to jurors during deliberations as well as during the trial.
3. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.
   1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.
   2. Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.
   3. After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court

should modify the question to eliminate any objectionable material.

* 1. After the question is answered, the parties should be given an opportunity to ask follow-up questions.

1. The court should assist jurors where appropriate.
   1. The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court's rulings, conduct, or remarks during the trial.
   2. When necessary to the jurors’ proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.
   3. The court should exercise self-restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.
      1. Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes the questioning is necessary, the court should afford the parties an opportunity to develop the subject by further examination prior to its questioning of the witness.
      2. The court should instruct the jury that questions from the court, like questions from the parties, are not evidence; that only answers are evidence; that questions by the court should not be given special weight or emphasis; and the fact that the court asks a question does not reflect a view on the merits of the case or on the credibility of any witness.
2. The court should control communications with jurors during trial.
   1. The court should take appropriate steps ranging from admonishing the jurors to, in the rarest of circumstances, sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.
   2. At the outset of the case, the court should instruct the jury on the relationship between the court, the parties and the jury, ensuring that the jury understands that the parties are permitted to communicate with jurors only in open court with the opposing parties present.
   3. All communications between the judge and members of the jury panel from the time of reporting to the courtroom for juror selection examination until dismissal should be in writing or on the record in open court. Each party should be informed of such communications and given the opportunity to be heard.
3. Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.
4. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.
5. In civil cases the court should seek a single, unitary trial of all issues in dispute before the same jury, unless bifurcation or severance of issues or parties is required by law or is necessary to prevent unfairness or prejudice.
6. Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.
7. The court may empanel two or more juries for cases involving multiple parties, defendants, or claims arising out of the same transaction or cause of action, in order to reduce the number and complexity of issues that any one jury must decide. Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single trial.

**JURY DELIBERATIONS**

**PRINCIPLE 14 –THE COURT SHOULD INSTRUCT THE JURY IN PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS**

1. All instructions to the jury should be in plain and understandable language.
2. Jurors should be instructed with respect to the applicable law before or after the parties’ final argument. Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.
3. Instructions for reporting the results of deliberations should be given following final argument in all cases. At that time, the court should also provide the jury with appropriate suggestions regarding the process of selecting a presiding juror and the conduct of its deliberations.
4. The jurors alone should select the foreperson and determine how to conduct jury deliberations.

#### PRINCIPLE 15 – COURTS AND PARTIES HAVE A DUTY TO FACILITATE EFFECTIVE AND IMPARTIAL DELIBERATIONS

1. In civil cases of appropriate complexity, and after consultation with the parties, the court should consider the desirability of a special verdict form tailored to the issues in the case. If the parties cannot agree on a special verdict form, each party should be afforded the opportunity to propose a form and to comment upon any proposal submitted by another party or fashioned by the court. The court should consider furnishing each juror with a copy of the verdict form when the jury is instructed and explaining the form as necessary.
2. Exhibits admitted into evidence should ordinarily be provided to the jury for use during deliberations. Jurors should be provided an exhibit index to facilitate their review and consideration of documentary evidence.
3. Jury deliberations should take place under conditions and pursuant to procedures that are designed to ensure impartiality and to enhance rational decision-making.
   1. The court should instruct the jury on the appropriate method for asking questions during deliberations and reporting the results of its deliberations.
   2. A jury should not be required to deliberate after normal working hours unless the court after consultation with the parties and the jurors determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.
4. When jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.
5. A jury should be sequestered during deliberations only in the rarest of circumstances and only for the purposes of protecting the jury from threatened harm or insulating its members from improper information or influences.
6. When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court’s own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If the poll discloses that there is not that level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged.

#### PRINCIPLE 16 – DELIBERATING JURORS SHOULD BE OFFERED ASSISTANCE WHEN AN APPARENT IMPASSE IS REPORTED

1. If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.
2. If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
3. If there is no reasonable probability of agreement, the jury may be discharged.

**POST-VERDICT ACTIVITY**

**PRINCIPLE 17 – TRIAL AND APPELLATE COURTS SHOULD AFFORD JURY DECISIONS THE GREATEST DEFERENCE CONSISTENT WITH LAW**

Trial and appellate courts should afford jury decisions the greatest deference consistent with law.

#### PRINCIPLE 18 – COURTS SHOULD GIVE JURORS LEGALLY PERMISSIBLE POST-VERDICT ADVICE AND INFORMATION

1. After the conclusion of the trial and the completion of the jurors’ service, the court is encouraged to engage in discussions with the jurors. Such discussions should occur on the record and in open court with the parties having the opportunity to be present, unless all the parties agree to the court conducting these discussions differently. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.
2. Under no circumstances should the court praise or criticize the verdict or state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.
3. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.
4. Unless prohibited by law, the court should ordinarily permit the parties to contact jurors after their terms of jury service have expired, subject, in the court’s discretion, to reasonable restrictions.
5. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.

#### PRINCIPLE 19 – APPROPRIATE INQUIRIES INTO ALLEGATIONS OF JUROR MISCONDUCT SHOULD BE PROMPTLY UNDERTAKEN BY THE TRIAL COURT

1. Only under exceptional circumstances may a verdict be impeached upon information provided by jurors.
   1. Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
   2. The limitations in A.1 above should not bar evidence concerning whether the verdict was reached by lot or contains a clerical error, or was otherwise unlawfully decided.
   3. A juror’s testimony or affidavit may be received when it concerns:
      1. Whether matters not in evidence came to the attention of one or more jurors; or
      2. Any other misconduct for which the jurisdiction permits jurors to impeach their verdict.
2. The court should take prompt action in response to an allegation of juror misconduct.
   1. Upon receipt of an allegation of juror misconduct, the court should promptly inform the parties and afford them the opportunity to be heard as to whether the allegation warrants further enquiry or other judicial action.
   2. Parties should promptly refer an allegation of juror misconduct to the court and to all other parties in the proceeding.
   3. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with the parties concerning the nature and scope of the inquiry, including:
      1. Which jurors should be questioned;
      2. Whether the court or the parties should ask the questions; and
      3. The substance of the questions.
   4. If the court ascertains that juror misconduct has occurred, it should afford the parties the opportunity to be heard as to an appropriate remedy.
   5. If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that

the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.