A MANUAL ON
JURY TRIAL PROCEDURES

Prepared by
The Jury Committee of the Ninth Circuit

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FOREWORD

The original manual, written in 1990 by an earlier committee, represented an enormous undertaking. It has since been periodically revised. Those earlier versions are the foundation for this revision.

The committee has attempted to cite Supreme Court and Ninth Circuit case law, where available. The format has been altered so as to de-emphasize holdings and to emphasize principles or statements of law. Where appropriate, practical suggestions are included. This manual has attempted to integrate materials previously included under the complex litigation section of the original manual. It encompasses both criminal and civil litigation. A more detailed table of contents is included, with many new topics, and an index has been created. The appendices offer sample pretrial orders, sample trial checklists, and sample voir dire scripts.

The committee wishes to recognize the many contributions Judge James Ware made to this manual in his previous role as chair.

The committee also expresses appreciation to the Circuit Executive's Office for its tireless support of the committee and its decision to publish this edition of the manual.

NINTH CIRCUIT JURY COMMITTEE

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Description:

This section includes pretrial matters.

Topics:

1.1 Right to a Jury Trial

A. Civil Actions

Rule 38, Fed. R. Civ. P., acknowledges the Seventh Amendment and statutory right to a jury trial, where such a demand has been timely made. The failure to make the demand constitutes waiver to jury trial of a civil action. Rule 39(a)(1), Fed. R. Civ. P., provides for jury trial of all appropriate jury issues demanded unless the parties stipulate to trial by the court without a jury or the court finds that the right to jury trial does not exist on some or all of the issues demanded. Rule 39(c), Fed. R. Civ. P., authorizes the court "in most actions not triable of right by a jury" to try any issue with an advisory jury or a jury "whose verdict has the same effect as if trial by jury had been a matter of right."

In order to determine whether a civil action gives rise to a jury trial right, the court must examine the issues involved and the remedy sought. This determination requires the court (1) to compare the statutory action to the 18th century actions brought in the courts of England prior to the merger of law and equity courts, and (2) to examine the remedy sought and determine if it is legal or equitable in nature. This second inquiry is the more important one. *See Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1284-88 (1998); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996); *Wooddell v. Int'l Bhd. of Elec. Workers*, 502 U.S. 93 (1991).

The following topics are illustrative only.

1. *No Right to Jury Trial*

   a. ERISA. Because ERISA remedies are equitable in nature, plaintiff has no right to a jury trial. *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993).

   b. Title VII Injunctive Relief. There is no right to a jury trial as to the issuance of injunctive relief in a Title VII action. *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230

(7th Cir. 1994).

c. Civil Enforcement Action for Disgorgement of Profits. A civil enforcement action by a federal agency seeking disgorgement of illicit profits does not give rise to a jury trial right. Disgorgement of profits is equitable in nature even though it involves a claim for money. Because the court is not awarding damages to which the plaintiff is legally entitled, but is simply exercising discretion to prevent unjust enrichment, no jury trial right exists. *S.E.C. v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir.), *cert. denied*, 114 S. Ct. 439 (1993).

2. *Right to Jury Trial*

a. Generally. The Seventh Amendment of the United States Constitution entitles a plaintiff to a jury trial where money damages are sought. *Smith v. Barton*, 914 F.2d 1330 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2825 (1991).

b. Civil Action for Failure to Provide Tax Information. The Seventh Amendment guarantees a jury trial to determine defendant's liability where the government seeks civil penalties for defendant's willful failure to provide the government certain tax return information. *United States v. Nordbrock*, 941 F.2d 947, 948 (9th Cir. 1991).

c. *Bivens* Action. An Eighth Amendment claim brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), entitles either side to a jury trial. *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995).

d. Civil Rights Act of 1991. A party to an action under the Civil Rights Act of 1991 in which compensatory and punitive damages are sought is entitled to a jury trial. 42 U.S.C. § 1981(a)(c)(1).

e. 42 U.S.C. § 1983 Civil Rights Actions. A plaintiff

seeking damages in a civil rights action brought pursuant to 42 U.S.C. § 1983 has the right to a jury trial. *See*, *e.g.*, *Vera Cruz v. City of Escondido*, 126 F.3d 1214 (9th Cir. 1997).

f. Title VII. A plaintiff seeking compensatory damages in a Title VII action is entitled to a jury trial. 42 U.S.C. § 1981a(c)(1). *See, e.g.*, *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1482 (9th Cir. 1997).

g. Copyright Act. A party is entitled to a jury trial on statutory damages sought pursuant to the Copyright Act, 17 U.S.C. § 504(c). *Feltner v. Columbia Pictures Television*, 118 S. Ct. 1279, 1282 (1998).

B. Criminal Actions

1. *Criminal Actions*

a. Felony. Article III, Section 2, of the U.S. Constitution states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." This has been interpreted as meaning that a criminal "defendant is entitled to a jury trial unless the particular offense can be classified as 'petty.'" *Frank v. United States*, 395 U.S. 147, 148 (1969) (citations omitted).

b. Misdemeanor. Generally, a defendant is entitled to a jury trial if the misdemeanor is punishable by imprisonment for more than six months. *Frank*, 395 U.S. at 148.

c. Petty Offense. Petty criminal offenses may be tried without a jury. *District of Columbia v. Clawans*, 300 U.S. 617 (1937). A petty offense is "any misdemeanor, the penalty for which . . . does not exceed imprisonment for a period of six months." 18 U.S.C. § 1(3). "Where the maximum term of imprisonment is six months or less, there is a very strong presumption that the offense is petty and defendant is not entitled to a jury trial." *United States v.*

Ballek, 170 F.3d 871, 876 (9th Cir.), *cert. denied*, 120 S. Ct. 318 (1999). "Any offense punishable by a prison term of six months or less is presumed to be petty. This presumption may be overcome if there are objective indications that the legislature regards the offense as serious." *United States v. Clavette*, 135 F.3d 1308, 1309-10 (9th Cir. 1998) (crime of killing a grizzly bear in violation of the Endangered Species Act, punishable by imprisonment for six months and/or a $25,000 fine, held to be a petty offense). Where "a very large fine, or a very long period of probation, or the forfeiture of substantial property" is imposed, a petty offense may be converted into a more serious offense. *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir.) (restitution did not turn a petty offense into a serious offense), *cert. denied*, 120 S. Ct. 318 (1999).

C. Waiver of Jury Trial

1. *Criminal*

a. Waiver in general. Rule 23(a), Fed. R. Crim. P., states: "Cases to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

"The right to a jury trial may only be waived if the following four conditions are met: (1) the waiver is in writing; (2) the government consents; (3) the court accepts the waiver; and (4) the waiver is made voluntarily, knowingly, and intelligently." *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (citations omitted).

b. Waiver by Defendant. A defendant may waive the right to a jury trial. *Brown v. Burns*, 996 F.2d 219 (9th Cir. 1993) (extended colloquy regarding right to a jury trial and differences between bench and jury trials, and record of defendant's express waiver of his right to a jury trial, was sufficient to satisfy constitutional requirement of a knowing,

intelligent and voluntary waiver of the right to jury trial, notwithstanding failure to comply with Nevada law requiring defendant to execute signed written waiver of the right to jury trial); *United States v. Yee Soon Shin*, 953 F.2d 559, 561 (9th Cir. 1992) (knowledge of the right to participate in the selection of jurors is not constitutionally required for a knowing, voluntary and intelligent jury waiver).

c. Waiver by Government. There is no Sixth Amendment right to waiver of jury trial. Rule 23(a), Fed. R. Crim. P., provides for waiver with the consent of the government. The government is not required, however, to state reasons for refusing such consent. *United States v. Reyes*, 8 F.3d 1379 (9th Cir. 1993) (citing *Singer v. United States*, 380 U.S. 24, 37 (1965)) ("We need not determine in this case whether there might be circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.")

2. *Civil*

Once a timely demand for a jury has been made, all parties must agree to waiver of the right to a jury trial. Fed. R. Civ. P. 38(d). *But see* Fed. R. Civ. P. 39(b).

D. Stipulations re Elements (Criminal)

1. *Stipulations re elements*

A stipulation involving all of the elements of the offense requires a finding that the defendant voluntarily and intelligently chose to enter the stipulation. *Adams v. Peterson*, 968 F.2d 835 (9th Cir. 1992), *cert. denied*, 507 U.S. 1019 (1993).

"A stipulation is valid and binding if the defendant understands the contents of the stipulation, the nature of the

stipulated-facts trial, and the likelihood of a guilty finding." *Adams*, 968 F.2d at 844.

"[A] defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Old Chief v. United States*, 117 S. Ct. 644, 658 (1997) (acceptance of a stipulation regarding prior conviction may be appropriate even where government objects under Fed. R. Evid. 403).

2. *De facto guilty plea*

A stipulation of facts constituting a de facto guilty plea may trigger procedural protections guaranteed by *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (at change of plea proceeding defendant is entitled to be advised of constitutional rights being given up, including (1) "privilege against compulsory self-incrimination;" (2) "right to trial by jury;" and (3) "right to confront one's accusers"). *Adams*, 968 F.2d at 838.

1.2 I.R.S. Disclosure of Return Information Relating to Prospective Jurors in Certain Cases (Tax Litigation Only)

A. Generally–Judicial Proceedings Prior to August 5, 1997

Prior to August 5, 1997, in a judicial proceeding pertaining to tax administration, a party was entitled, upon request, to information regarding which prospective jurors had been audited. 26 U.S.C. § 6103(h)(5); *United States v. Sinigaglio*, 942 F.2d 581, 583 (9th Cir. 1991).

B. Generally–Judicial Proceedings on or After August 5, 1997

Effective August 5, 1997, 26 U.S.C. § 6103(h)(5) was repealed. The legislative history indicates that the disclosure requirements (1) slowed the litigation process; (2) provided "opportunity for harassment and intimidation of potential jurors in organized crime, drug, and some tax protester cases"; (3) expended judicial resources in interpreting disclosure requirements; and (4) caused confusion based on differing judicial interpretations of this section. 1997 U.S.C.C.A.N. (111 Stat. 899) 1129, 1513-14.

1.3 Jury Impanelment–Double Jeopardy (Criminal)

A. Jury Trial

Jeopardy attaches in a criminal jury trial when the jury is impaneled and sworn. *United States v. Trigg*, 988 F.2d 1008, 1010 (9th Cir. 1993); *Willhauck v. Flanagan*, 448 U.S. 1323 (1980). "Jeopardy terminates when the jury reaches a verdict, or when the trial judge enters a final judgment of acquittal." *United States v. Byrne*, 203 F.3d 671, 673 (9th Cir. 1999) (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

B. Court Trial

Jeopardy does not attach in a criminal trial to the court until the first witness has been sworn. *Willhauck v. Flanagan*, 448 U.S. 1323, 1325-26 (1980).

1.4 Speedy Trial Act Issues–18 U.S.C. § 3161, et seq. (Criminal)

A. Voir Dire–Tolling of Speedy Trial Act

The voir dire of the jury is the beginning of the trial and tolls the running of the Speedy Trial Act's time limits. *United States v. Nance*, 666 F.2d 353, 360 n.18 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982). *See also United States v. Manfredi*, 722 F.2d 519 (9th Cir. 1983). Regarding the Speedy Trial Act, see 18 U.S.C. §§ 3161 et seq.

B. Voir Dire Followed by Postponement of Trial

The Ninth Circuit has yet to decide whether and under what circumstances a court may begin voir dire in order to stay the Act's time limits. Some circuits have held that long delays between the jury selection and the swearing in can violate the Speedy Trial Act, even though the voir dire was begun within the time limits set by the act. *United States v. Crane*, 776 F.2d 600 (6th Cir. 1985); *United States v. Gonzalez*, 671 F.2d 441 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982).

While some short postponements have been tolerated, the following lengthier delays have been found to violate the Act: *United States v. Stayton*, 791 F.2d 17 (2d Cir. 1986) (23 months); *United States v. Andrews*, 790 F.2d 803 (10th Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987) (two and one-half months); *United States v. Fox*, 788 F.2d 905 (2d Cir. 1986) (five months). *Cf. United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (48-day delay between close of evidence and closing arguments held to have violated defendant’s due process rights).

1.5 Assessment of Jury Costs for Late Notification of Settlement

A. Civil

1. *Local Rules Authorization of Assessment*

Many district courts have local rules authorizing the imposition of jury costs upon litigants and/or their attorneys in civil cases for failure to provide the court with timely notice of settlement. *See, e.g.*, U.S. Dist. Ct. Rules N.D. Cal., Civil L.R. 40-1; U.S. Dist. Ct. Rules Ariz. 2.13(c).

The non-Ninth Circuit caselaw upholding local rules of this type has done so both on the basis of the district court's rule-making power, and also on the basis of the court's "inherent authority" to control and protect the administration of court proceedings. 28 U.S.C. § 2071; Fed. R. Civ. P. 83; *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992 (10th Cir. 1979); *White v. Raymark Indus.*, 783 F.2d 1175 (4th Cir. 1986).

2. *Assessment in Absence of Local Rule*

At least two other decisions from outside the Ninth Circuit have upheld the validity of an assessment against counsel even in the absence of a local rule. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985); *Nesco Design Group, Inc. v. Grace*, 577 F. Supp. 414 (W.D. Pa. 1983).

B. Criminal

Federal Rule of Criminal Procedure 57

The 1995 revision to Fed. R. Crim. P. 57(b) provides in part that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Accordingly, actual advance notice of the court’s

assessment of jury costs on parties failing to timely notify the court of settlement may be a predicate for imposition of costs.

1.6 Presence of Defendant (Criminal)

A. Defendant's Presence Generally

Rule 43(a), Fed. R. Crim. P., provides that a "defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

Rule 43(c)(3), Fed. R. Crim. P., states in part that a defendant need not be present "[a]t a conference or argument upon a question of law."

Case law does not offer precise answers as to all circumstances under which a defendant is entitled to be present.

In *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 107-08 (1934), the Supreme Court stated that a defendant has a constitutional right to be present at trial "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." In *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975), the Supreme Court stated that a defendant has the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."

The safer and better practice is to have the defendant present at all times unless the defendant waives the right to be present. *See, e.g., Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir. 1975), *cert. denied*, 423 U.S. 842 (1975) (under circumstances presented, any error resulting from defendant's absence at sidebar conferences was harmless); *Stein v. United States*, 313 F.2d 518, 522 (9th Cir. 1962), *cert. denied*, 373 U.S. 918 (1963) (defendant's absence from conference between court and counsel regarding admissibility of recordings not reversible error on facts presented).

B. Pretrial Conference

A defendant does not have the right to be present at a pretrial conference concerning legal issues. *United States v. Veatch*, 674

F.2d 1217, 1225-26 (9th Cir. 1981).

C. Voir Dire–Sidebar Conferences with Prospective Juror

At the outset of the voir dire process, the court may wish to notify prospective jurors that should a question of the court call for a response that might be a source of embarrassment, the prospective juror may approach the sidebar and answer the question. This procedure is especially helpful when questioning about arrests, convictions, involvement with drugs and/or other life experiences involving the jurors and/or their families.

The trial judge has several options available to guarantee that the defendant is appropriately apprised of any discussions with potential jurors which may occur outside the presence of the jury panel in open court.

1. *Sidebar Conferences During Voir Dire*

One option available to the trial judge is to speak with the prospective juror at a sidebar conference attended by respective counsel. Because of the close proximity of the defendant, this procedure has been upheld by other circuits. *See, e.g., United States v. Dioguardi*, 428 F.2d 1033 (2d Cir. 1970) (sidebar conference at which prospective juror was questioned and from which defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer with defendants). *Cf. United States v. Alessandrello*, 637 F.2d 131 (3d Cir. 1980) (questioning of prospective jurors concerning pretrial publicity in judge's anteroom from which defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer), *cert. denied*, 451 U.S. 949 (1981) .

Caveat: The practice of conducting individual voir dire outside the presence of the defendant, even to a very limited extent, has been criticized. *See, e.g., Alessandrello*, 637 F.2d at 147 (Higginbotham, J., dissenting). *See also United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983) (defendant has

right to be present during voir dire conducted at bench conferences if request made).

2. *Sidebar Conference with Interpreter Present*

In cases in which the defendant requires the services of an interpreter and headphones are being used for translation, the court may request that the certified court interpreter attend individual voir dire being conducted at a sidebar conference and transmit the conference to a defendant seated at counsel table.

3. *Sidebar Conference with Defendant*

Generally, it is not desirable to invite the defendant to personally attend bench conferences at which individual prospective jurors are questioned because: (1) prospective jurors may experience discomfort being in such close proximity to the defendant, and (2) when a defendant is in custody, security considerations may require that a guard accompany the defendant to the sidebar conference, which would alert the jury to the fact that the defendant is in custody.

4. *Other Options*

Problems associated with sidebar voir dire proceedings may be avoided if the court conducts examination in open court with panel excluded or obtains a waiver from the defendant of the right to be present at sidebar conferences.

D. Sidebar Conferences During Trial

Whether sidebar conferences will be allowed is within the sound discretion of the court.

A sidebar conference may also be used to resolve relatively short issues which should not be discussed in front of the jury. For more complex issues requiring lengthy discussion, the jury should be excused.

Practical Suggestion

Waiver of Defendant's Presence at Sidebar Conference

At the outset of trial, the trial judge should ask defense counsel if the defendant waives his or her right to be present at any sidebar conferences which may occur during trial.

E. *In Camera* Hearing with Juror

Although a district judge's *in camera* contact with a juror may constitute a "stage of the trial" for purposes of Fed. R. Crim. P. 43, a defendant may waive the right to be present. *United States v. Gagnon*, 470 U.S. 522 (1985) (waiver inferred from defendant's failure to request to be present at judge's *in camera* meeting with juror and defense attorney for defendant where juror expressed concern after defendant was observed sketching jurors).

F. Jury Instruction Conferences

The trial court may conduct the jury instruction conference in the defendant's absence. *United States v. Sherman*, 821 F.2d 1337 (9th Cir. 1987). *See also United States v. Rivera*, 22 F.3d 430, 438-39 (2d Cir. 1994) (defendant was not entitled to attend charging conference).

See generally Limitations on a Defendant's Right Under Rule 43 to be Present at Every Stage of Trial, BENCH COMMENT, (Fed. Jud. Center, Washington D.C.), May 30, 1986, at 1.

G. Read-backs During Deliberations

See § 5.1.F.

1.7 Delegation of District Court's Responsibilities to Magistrate Judge

A. Criminal Proceedings

The Ninth Circuit has stated that "it is clear that Congress intended to restrict magistrate judges to 'subsidiary matters' in felony cases." *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 82 (1994) (quoting *Gomez v. United States*, 490 U.S. 858, 872-73 (1989)).

Inherently judicial tasks must be performed by Article III judges. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). A defendant has a constitutional "right to have all stages of a criminal trial conducted by a person with jurisdiction to preside." *English v. United States*, 42 F.3d 473, 482 (9th Cir. 1994). Accordingly, the district court should use caution in delegating matters to a magistrate judge in criminal felony trials.

Because the Ninth Circuit has not addressed several of the matters below, case law from other circuits is cited.

1. *Changes of Plea*

The Ninth Circuit has yet to rule on whether a magistrate judge may accept a felony change of plea with the consent of the defendant. Other circuits have so held, however. *See United States v. Dees*, 125 F.3d 261 (5th Cir. 1997); *United States v. Williams*, 23 F.3d 629, 634 (2d Cir.) (magistrate judge may accept felony change of plea with the consent of the defendant), *cert. denied*, 115 S. Ct. 641 (1994). *See also* BENCH COMMENT, (Fed. Jud. Center, Washington D.C.), February 1998.

2. *Felony Jury Trials*

a. Voir dire. A magistrate judge may conduct voir dire in felony cases but only with the parties' consent. *Peretz v. United States*, 501 U.S. 923 (1991); *Gomez v. United States*, 490 U.S. 858 (1989).

b. Presiding over closing argument. A magistrate judge may not preside over closing arguments in a felony criminal trial. *United States v. Boswell*, 565 F.2d 1338, 1341 (5th Cir.) (harmless error on facts presented where trial judge was ill; court did not decide whether personal, intelligent waiver was required; Rule 25(a), Federal Rules of Criminal Procedure, which states that when a trial judge is unable to proceed with trial, "any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial," does not authorize magistrate judges to preside over closing arguments), *cert. denied*, 439 U.S. 819 (1978).

c. Instructing jury on law. Absent consent, a magistrate judge may not rule upon objections to and requests for instructions. *United States v. De La Torre*, 605 F.2d 154 (5th Cir. 1979) (absent waiver by counsel, defendant entitled to have Article III judge rule on counsel's objections and requests for instructions to the jury). The Sixth Circuit has stated that a magistrate judge's mere reading of instructions to the jury is permissible. *Allen v. United States*, 921 F.2d 78 (6th Cir. 1990) (reading instructions to jury is a mere ministerial function), *cert. denied*, 501 U.S. 1253 (1991).

d. Presiding over jury deliberations.

(1) Read-backs. Once a district judge has determined that there should be a read-back and the scope of the read-back, a magistrate judge may preside over the read-back of trial testimony because a read-back is a subsidiary matter. *United States v. Carr*, 18 F.3d 738, 740 (9th Cir.), *cert. denied*, 115 S. Ct. 82 (1994). *See also United States v. Demarrias*, 876 F.2d 674 (8th Cir. 1989).

(2) Directive to continue deliberations. Under the supervision of a trial judge, a magistrate judge's directive

to a jury to continue deliberations has been held to be permissible. *United States v. Saunders*, 641 F.2d 659, 662-64 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981).

(3) Reading *Allen* charge. A magistrate judge may be delegated the duty of reading a standard *Allen* charge to the jury. *United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991).

(4) Answering jury's question. The Ninth Circuit has not ruled upon whether a magistrate judge may answer a jury's question. *United States v. Foster*, 57 F.3d 727, 732 (9th Cir. 1995). However, the Ninth Circuit has cited with approval an Eighth Circuit holding that a magistrate judge "may accept the jury's questions, communicate them to the absent district judge, and communicate the district judge's responses to the jury." *Carr*, 18 F.3d at 740 (citing *Demarrias*, 876 F.2d at 677).

e. Accepting jury's verdict. A magistrate judge may accept a verdict when the trial judge is unavailable, *United States v. Johnson*, 962 F.2d 1308 (8th Cir. 1992) (accepting jury's verdict was a ministerial task), *cert. denied sub nom.*, 506 U.S. 928 (1992), or occupied with other court business. *United States v. Day*, 789 F.2d 1217 (6th Cir. 1986). However, a magistrate judge has no authority to accept a verdict, without the consent of the parties, where additional action is required. *United States v. Gomez-Lepe*, 207 F.3d 623, 631 (9th Cir. 2000).

Practical Suggestion

Caution regarding Utilization of Magistrate Judge

The committee recommends that any delegation to a magistrate judge of trial-related tasks in a criminal felony trial should be made only in those cases where there is clear authority to do so.

3. *Misdemeanor Trials*

A magistrate judge may preside over a federal misdemeanor trial only upon a defendant's express written consent. 18 U.S.C. § 3401(b); *Peretz v. United States*, 501 U.S. 923 (1991) (consent required); *N.L.R.B. v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994).

4. *Evidentiary Hearing in Revocation of Probation Proceedings*

A magistrate judge may conduct revocation of probation proceedings (and submit recommendations to the district judge) only if the following three conditions are met: "(1) defendant's probation was imposed for a misdemeanor; (2) the defendant consented to trial, judgment, and sentencing by a magistrate judge; and (3) the defendant initially was sentenced by a magistrate judge." *United States v. Colacurcio*, 84 F.3d 326, 329 (9th Cir. 1996).

5. *Evidentiary Hearing in Revocation of Supervised Release Proceedings*

A magistrate judge may only conduct revocation of supervised release proceedings by report and recommendation to the district judge. 18 U.S.C. § 3401(i); *United States v. Colacurcio*, 84 F.3d 326, 330 (9th Cir. 1996).

B. Civil Proceedings

1. *Voir Dire*

A magistrate judge may preside over voir dire in a civil case only with the consent of the parties. *Stockler v. Garratt*, 974 F.2d 730 (6th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990).

2. *Trial*

A magistrate judge may conduct a civil trial only with the consent of the parties. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984).

See Inventory of United States Magistrate Judge Duties, Administrative Office of the United States Courts, February 1995, ¶ 96-103.

1.8 Pretrial Order Governing Procedure at Trial (Criminal)

The use of a comprehensive order governing the proceedings at trial issued well in advance may be of great assistance in expediting the trial and alerting counsel as to deadlines for submission of jury instructions and witness and exhibit lists, as well as other expectations of the court. An example of such an order is contained in Appendix 1 at page 147.

1.9 Pretrial Order Governing Procedure at Trial (Civil)

The use of a comprehensive order governing the proceedings at trial issued well in advance may be of great assistance in expediting the trial and alerting counsel as to deadlines for submission of jury instructions and witness and exhibit lists, as well as other expectations of the court. An example of such an order is contained in Appendix 2 at page 152.

1.10 Pre-Voir Dire Jury Panel Questionnaires

A. Prescreening Questionnaires Prior to Reporting for Jury Duty

"The district judge has discretion in conducting voir dire . . . ." *United States v. Boise*, 916 F.2d 497, 504 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991). The use of a prescreening questionnaire may be considered where a lengthy trial is anticipated and/or there has been a great deal of pretrial publicity. The questionnaire allows each prospective juror to state in writing, and under oath, any reason why his or her service as a juror in a lengthy trial would cause undue hardship. Some questionnaires simply screen for prospective jurors who can be available for the anticipated length of the trial, others screen for the type of case, e.g., drugs, and others screen for a particular case. After a review of responses to the questionnaire, the court will excuse those prospective jurors whose responses are sufficient to show hardship or prejudice.

1. *Avoids Necessity of Appearance*

Prescreening does not exclude a discernible class of prospective jurors. The only difference between the use of a prescreening device and excusal based on in-court voir dire is that the prospective juror is spared the inconvenience of coming to court. Prejudice to defendant may be avoided through counsel's ability to object to the excusal of any particular juror whose showing of hardship is thought to be insufficient. *United States v. Layton*, 632 F. Supp. 176 (N.D. Cal. 1986).

2. *Length of Trial*

Notifying prospective jurors of the projected length of the trial and advising each juror to submit a written request for excusal if service would be a hardship does not permit jurors to decide for themselves before trial whether or not to serve, thereby leaving a jury that was not randomly drawn. Absent proof that the jury is other than a random cross section of the community, the district

court's discretion in jury selection is broad enough to encompass consideration of hardship excusal requests. *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986) (prescreening questionnaire permissible where each request for a hardship excusal was personally considered by the district court and ruled upon based on its individual merits), *cert. denied*, 480 U.S. 935 (1987).

B. Questionnaires Immediately Prior to Voir Dire

Immediately prior to voir dire potential jurors may be required to complete a questionnaire containing the usual inquiries bearing upon a juror's potential bias generally and specifically to describe their knowledge of the case and the source of that knowledge. *United States v. Ebens*, 800 F.2d 1422, 1426 (6th Cir. 1986). *See also United States v. Dischner*, 974 F.2d 1502, 1522 (9th Cir. 1992) (thorough voir dire resulted from comprehensive questionnaires regarding familiarity with parties and individualized voir dire), *cert. denied*, 507 U.S. 923 (1993); *United States v. Blanton*, 719 F.2d 815, 824 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984).

C. Confidentiality of Questionnaires

Confidentiality of the answers to questionnaires may not be guaranteed. *See, e.g., Copley Press, Inc. v. San Diego County Superior Court*, 223 Cal. App. 3d 994, 273 Cal. Rptr. 22 (1990), *vacated*, 276 Cal. Rptr. 289, 801 P.2d 1040, *on remand*, 228 Cal. App. 3d 77, 278 Cal. Rptr. 443 (1991) (the press is constitutionally entitled to have access to at least some of the information contained in such questionnaires, although access is not absolute), *cert. denied*, 112 S. Ct. 304 (1991). *See also United States v. King*, 140 F. 3d 76, 81 (2d Cir. 1998).

Practical Suggestions

Use of Questionnaires

The committee makes three recommendations in this regard.

- The court may use a neutral time-screening questionnaire, issued by the clerk's office, in any case expected to exceed two weeks in trial. Various districts have such a procedure already in place.

- A longer questionnaire which provides more background information about the venire panel can be devised by counsel for the parties, and, if approved by the court, mailed to jurors in advance. Such a special questionnaire should be drawn with great care and scrutinized closely by the trial judge. There are, understandably, privacy concerns of the prospective jurors. An instruction sheet must also be devised to govern the prospective jurors conduct in completing the questionnaire, alerting the prospective juror to, among other features, the fact that the responses are made under penalty of perjury. The trial judge may reasonably expect that the parties seeking use of such a customized questionnaire will raise the subject with the court early on in pretrial proceedings.

- The court should be sensitive to the risk that some individuals may inappropriately seek to avoid jury duty.

The use of pre-voir dire questionnaires by the Northern District of California is described in *A More Efficient Method of Jury Selection for Lengthy Trials*, 73 JUDICATURE 43 (1989).

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Chapter Two: Voir Dire

Description:

The materials in this section relate to events that occur from the calling of the case in the courtroom through the swearing in of the jury.

Topics:

2.1 Trial Checklist (Criminal)

See Appendix 3, at page 159, for a sample checklist. The checklist addresses items the court may wish to discuss with counsel prior to the panel being brought to the courtroom, including witness and exhibit lists, length of trial, unresolved motions *in limine*, number of alternates and raising of *Batson* challenges.

2.2 Trial Checklist (Civil)

See Appendix 4, at page 160, for a sample checklist. The checklist addresses items the court may wish to discuss with counsel prior to the panel being brought to the courtroom, including witness and exhibit lists, length of trial, and unresolved motions *in limine*.

2.3 Jury Selection–Sample Voir Dire Script (Criminal)

See Appendix 5, at page 162, for a sample script. The script includes explanations regarding the voir dire process and sample questions concerning the offense(s) being tried, publicity, witnesses, bias relating to law enforcement, employment in law enforcement, presumption of innocence and burden of proof, and other inquiries.

2.4 Jury Selection-Sample Voir Dire Script (Civil)

See Appendix 6, at page 174, for a sample script. The script includes explanations regarding the voir dire process and sample questions concerning the case being tried, familiarity with the parties and potential witnesses, willingness to follow the law and other inquiries.

2.5 Qualifications of Federal Jurors

A. Qualifications

28 U.S.C. § 1865(b) states that a person is qualified to serve as a juror if he or she (1) is a citizen of the United States; (2) is at least 18 years of age; (3) is able "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form"; (4) is able to speak the English language; (5) is mentally and physically capable of rendering satisfactory jury service; and (6) does not have "a charge pending against him for the commission of, or has [not] been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year" or "his civil rights have . . . been restored."

B. Erroneous Inclusion of Disqualified Juror

"We agree with [*United States v.*] *Boney I*, [977 F.2d 624 (D.C. Cir. 1992)] and [*United States v.*] *Humphreys*, [982 F.2d 254 (8th Cir. 1992)] that the participation of a felon-juror is not an automatic basis for a new trial. We also agree with *Boney I* and *Humphreys* that the participation of a felon-juror can be the basis for a new trial if the juror's participation in the case results in 'actual bias' to one or more of the parties." *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1059 (9th Cir. 1997).

2.6 Voir Dire Regarding Pretrial Publicity

A suggested procedure for conducting examination of prospective jurors regarding pretrial publicity is as follows:

1. Inquire of the entire panel if any venireperson has heard anything about the case. Indicate that the venirepersons are to respond only by stating "yes" or raising their hands so the response can be recorded. After the response is recorded, ask the venirepersons if any of them have heard anything about the case through a medium other than radio, television, or newspapers. After that response is recorded, ask those who responded affirmatively if they have already formed an opinion about the case. If they respond in the affirmative, ask them if they feel they can set that opinion aside and judge the case solely on the basis of the evidence presented during the trial. At that point, the judge will have narrowed the issues to be discussed with the respective jurors during individual voir dire.

2. The court should caution prospective jurors not to disclose the substance of any pretrial publicity to which they have been exposed. If only one or two prospective jurors answer affirmatively to the questions about publicity, then consider questioning those individuals at sidebar. If a substantial number of prospective jurors answered the questions affirmatively or indicated familiarity with the case, then the judge may wish to consider bringing each of the prospective jurors into the courtroom outside the presence of the rest of the panel or into a separate room designated for that purpose, such as the jury room, at which time the prospective jurors can be examined individually.

3. At the time the judge examines each venireperson individually, caution that juror not to discuss the questions or responses given to the questions with any of the other prospective jurors.

4. Voir dire must not merely rely on the prospective juror's own assessment of impartiality without inquiry. *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979); *Silverthorne v. United*

States, 400 F.2d 627 (9th Cir. 1968).

5. If the judge then decides to excuse the prospective juror, another juror must be drawn to replace that venire person before examination of the next prospective juror.

2.7 Closed Voir Dire

Generally, a court may not close criminal voir dire to the public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). Courts may consider the right of the defendant to a fair trial and the right to privacy of prospective jurors in determining whether or not to close voir dire proceedings. In order to close the proceedings, a court must make findings that an open proceeding would threaten those interests and less restrictive alternatives to closure are inadequate. *Id.* at 510-11 (stating that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). Judges should generally inform the potential jurors of the array of questions and allow individual jurors to make affirmative requests to proceed *in camera*. *Id.* at 512. In addition, members of the press and the public deserve notice and an opportunity to object to the closure. *In re South Carolina Press Ass'n*, 946 F.2d 1037, 1039-40 (4th Cir. 1991).

2.8 Closed Proceedings Generally.

"Though criminal trials are presumptively open to the public, *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982), a court may order closure of a criminal proceeding if those excluded are afforded a reasonable opportunity to state their objections and the court articulates specific factual findings supporting closure. Such findings must establish the following: '(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.' *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990)." *Unabom Trial Media Coalition v. United States Dist. Court*, 183 F.3d 949, 951 (9th Cir. 1999) (citations omitted).

2.9 Anonymous Juries

The decision to use an anonymous jury is committed to the sound discretion of the judge. *United States v. Thai*, 29 F.3d 789, 800 (2d. Cir. 1994). Although the judge must find that there is a strong reason to believe that the jury needs protection, *United States v. Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996), the judge need not conduct an evidentiary hearing on the subject. *United States v. Edmond*, 52 F.3d 1080, 1091 (D.C. Cir. 1994).

There is a five-factor test to be employed to determine if the jury needs protection: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to public intimidation or harassment. *Edmond*, 52 F.3d at 1091. *See also United States v. Salvatore*, 110 F.3d 1131, 1143 (5th Cir. 1997); *United States v. Saya*, 980 F. Supp. 1152, 1154 (D. Haw. 1997).

The court *must* take reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected. To minimize prejudicial effects, the court should provide the jurors with an innocuous explanation for the use of the anonymous jury. *See*, *e.g*, *Edmond*, 52 F.2d at 1093 (approving instruction that use of an anonymous jury was "routine").

To ensure that the defendant's fundamental rights are protected, the court should provide defendant with adequate voir dire, sufficient to fully ascertain any possible bias without requesting information that would identify the jurors. *See*, *e.g*., *United States v. Childress*, 58 F.3d 693, 704 (D.C. Cir. 1995) (upholding anonymous jury where "court conducted a searching voir dire and gave jurors an extensive questionnaire").

2.10 Attorney Participation in Voir Dire

Under both the criminal and civil rules (Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a)), direct attorney participation in the voir dire examination is discretionary with the court. Most courts require that the parties submit written proposed voir dire questions prior to trial.

2.11 Recurring Voir Dire Problems

A. Civil Voir Dire

1. *Juror Veracity*

A new civil trial is justified where a party demonstrates that (1) a juror failed to answer honestly a material question on voir dire, and (2) a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (in a product liability trial, a juror's failure to reveal that his son had been injured when a truck tire exploded did not justify a new trial).

A juror's lack of candor regarding non-material, collateral matters resulting in no bias or prejudice to the complaining party does not require the granting of a new trial. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1058 (9th Cir. 1997). *See also Pope v. Man-Data, Inc.*, 209 F.3d 1161 (9th Cir. 2000) (error for district court to grant new trial where neither dishonesty nor bias of juror was demonstrated, notwithstanding juror's failure to disclose requested information regarding litigation and collection action history).

2. *Prospective Juror's Employment*

When a prospective juror is an employee of a party, the district court should examine the juror closely in order to determine whether any bias exists. *Nathan v. Boeing Co.*, 116 F.3d 422, 425 (9th Cir. 1997).

3. *Law Governing Challenges for Cause*

Federal law governs challenges for cause. Even in diversity cases, federal law and not state law applies to challenges for cause. *Nathan*, 116 F.3d at 424.

4. *Court's Failure to Ask Questions*

By inquiring about prejudices or biases concerning relevant

areas, the district court need not explore general attitudes on these topics. *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1507-08 (9th Cir. 1992) (court's overview of case concerning alleged police use of excessive force in attempting to subdue armed person overdosing on drugs and inquiry concerning any prejudices or biases of prospective jurors eliminated necessity of asking voir dire questions concerning attitudes about suicide, drug use, and firearms), *cert. denied*, 113 S. Ct. 2415 (1993).

B. Criminal Voir Dire

1. *Juror Veracity*

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 1033 (1998). A juror's lying during voir dire may warrant an inference of implied bias. *Dyer*, 151 F.3d at 979.

2. *Areas to be Covered*

"[A] defendant is entitled to a voir dire that fairly and adequately probes a juror's qualifications." *United States v. Toomey*, 764 F.2d 678, 683 (9th Cir. 1985). *But see United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991) (in a child molestation prosecution, the court's questioning as to whether there was anything about the nature of the charges that would prevent a juror from being fair and impartial may be sufficient voir dire without exploring whether prospective jurors had been victims of child sexual abuse, accused of child molestation, or were associated with groups supporting child sex abuse victims), *cert. denied*, 112 S. Ct. 1598 (1992).

a. Law enforcement officers. The court should inquire whether any prospective jurors would be inclined to "give greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position . . . ." *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979). *See also United States v. Contreras-*

Castro, 825 F.2d 185, 187 (9th Cir. 1987). "[W]hether a question need be asked about police credibility depends on various case-specific circumstances . . . ." *Paine v. City of Lompoc*, 160 F.3d 562, 565 (9th Cir. 1998) (no error on facts presented).

b. Government witnesses. The court should inquire as to "whether jurors [know] any of the government's witnesses." *United States v. Washington*, 819 F.2d 221, 223 (9th Cir. 1987). *See also United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993) ("a trial court abuses its discretion in failing to ask prospective jurors any questions concerning acquaintance with any government witnesses" (citations omitted)).

c. Witnesses in general. It is appropriate for the court to inquire as to whether any prospective juror "is acquainted with or related to any witness." *Baldwin*, 607 F.2d at 1297.

d. Bias or prejudice against defendant based upon crime charged. A prospective juror's bias concerning a crime is not grounds for that individual to be excused, so long as the bias is such that "those feelings do not lead to a predisposition toward the prosecution." *Lincoln v. Sunn*, 807 F.2d 805, 815 (9th Cir. 1987) (quoting *United States v. Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983)).

e. Bias or prejudice based upon race. "[A]bsent some indication prejudice is likely to arise or that the trial will have racial overtones," the district court is not required to inquire about racial prejudice. *United States v. Rosales*, 617 F.2d 1349, 1354 (1980), *aff'd*, 451 U.S. 182 (1981). *See also United States v. Sarkisian*, 197 F.3d 966, 979 (9th Cir. 1999) (even assuming "a reasonable possibility that racial or ethnic prejudice might have influenced the jury, the district court's questions regarding the defendants' ethnicity, the use of interpreters, and the jurors' abilities to serve impartially [] were all reasonably sufficient to test the jury for bias and partiality" (citation omitted)), *cert. denied*, 120

S. Ct. 2230 (2000).

f. Willingness to follow law. Where it appears that a prospective juror disagrees with the applicable law, the court should inquire as to whether the juror is nevertheless willing to follow the law. *See United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1084 (1999).

g. Supplemental questions. "It is wholly within the judge's discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality." *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir. 1998) (quoting *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir. 1991)).

3. *Statements by Prospective Jurors–Risk of Infection of Panel*

A jury panel's exposure to inflammatory statements made by a prospective juror requires, at a minimum, that the trial judge voir dire the entire panel "to determine whether the panel ha[s] in fact been infected." *Mach v. Stewart*, 129 F.3d 495, 498 (9th Cir. 1997).

Practical Suggestion

General Inquiry

Where appropriate, the court should inquire as to whether anything has occurred in the presence of the jury which would prevent them from being fair and impartial.

C. Recurring Problems Regarding Shackled or Handcuffed Defendant

1. *Shackling*

"Because visible shackling during trial is so likely to cause a defendant prejudice, it is permitted only when justified by an essential state interest specific to each trial." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (citing *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

2. *View of Defendant in Restraints*

"A jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom," absent actual prejudice, does not warrant relief. *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (citations omitted).

3. *Restraints Generally*

"[S]hackling, like prison clothes, is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. Therefore, '[i]n the presence of the jury, [the defendant] is ordinarily entitled to be relieved of handcuffs, or other unusual restraints, so as not to mark him as an obviously bad man or to suggest that the fact of his guilt is a foregone conclusion.'" *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (alteration in original) (quoting *Stewart v. Corbin*, 850 F.2d 492, 497 (9th Cir. 1988)).

2.12 Challenges for Cause

A. In General

The number of prospective jurors who may be challenged for cause is unlimited. 28 U.S.C. § 1870. However, situations in which a challenge for cause can be used are "narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror." *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981).

B. Erroneous Overruling of Challenge for Cause

If a defendant, by exercising a peremptory challenge, cures the erroneous denial of a challenge for cause, the defendant has been deprived of no rule-based or constitutional right. *See United States v. Martinez-Salazar*, 120 S. Ct. 774, 777 (2000).

2.13 Peremptory Challenges

A. Civil

Rule 47(b), Fed. R. Civ. P., refers to 28 U.S.C. § 1870 as establishing the number of civil peremptory challenges. Section 1870 specifies that each party is entitled to three peremptory challenges; where there are several defendants or plaintiffs in a case, for purposes of determining each side's peremptory challenges, the court may allow additional peremptory challenges to each side and permit the challenges to be exercised separately or jointly.

Because there are no alternate jurors in civil cases, there is no provision for additional peremptory strikes based upon alternates being impaneled.

B. Criminal

1. *Number of Peremptory Challenges*

Rule 24(b), Fed. R. Crim. P., provides the following peremptory challenges:

Peremptory Challenges	Type of Criminal Case
20	Any offense punishable by death
government 6; defendant(s) 10	Any offense punishable by imprisonment for more than one year
3 per side	Any offense punishable by imprisonment for not more than one year or by a fine, or both

The joinder of two or more misdemeanor charges for trial does not entitle a defendant to ten peremptory challenges. *See United States v. Machado*, 195 F.3d 454, 457 (9th Cir. 1999).

2. *Additional Peremptory Challenges–Where Alternates to Be Impaneled*

Rule 24(c), Fed. R. Crim. P., also specifies the number of peremptory challenges to prospective alternate jurors:

No. of Alternates To Be Impaneled	Number of Peremptory Challenges
1 or 2	1 peremptory challenge in addition to those otherwise allowed
3 or 4	2 peremptory challenges to each side, in addition to those otherwise allowed
5 or 6	3 peremptory challenges to each side, in addition to those otherwise allowed

The additional peremptory challenges may be used against an alternate juror only. Fed. R. Crim. P. 24(b).

3. *Additional Peremptory Challenges–Multiple Defendants*

There is no right to additional peremptory challenges in multiple defendant cases. Rule 24(b), Fed. R. Crim. P., makes award of additional challenges permissive. Nor does disagreement between codefendants on the exercise of joint peremptory challenges mandate a grant of additional challenges, unless the defendants demonstrate the jury ultimately selected is not impartial or representative of the community. *United States v. McClendon*, 782 F.2d 785, 787-88 (9th Cir. 1986).

C. Rulings on Peremptory Challenges (Criminal)

1. *Peremptory Challenges–Erroneous Denial of Defense Peremptory Challenge*

An erroneous denial of a defense peremptory challenge requires reversal of the conviction. *United States v. Annigoni*, 96 F.3d 1132, 1147 (9th Cir. 1996) (en banc).

2. *Peremptory Challenges–Erroneous Allowance of Government Peremptory Challenge*

"Clearly, the proper remedy for the improper use of a peremptory challenge is automatic reversal." *See, e.g., United States v. Annigoni*, 96 F.3d 1132, 1147 (9th Cir. 1996) (en banc).

2.14 *Batson* Challenges

A. In General

1. *Prosecution Peremptory Strikes*

In *Batson v. Kentucky*, 476 U.S. 79, 87-96 (1986), the Supreme Court held that the racially discriminatory exercise of peremptory challenges by a prosecutor violated the equal protection rights of both the criminal defendant and the challenged juror. The *Batson* court found that a defendant could demonstrate an equal protection violation based on the prosecutor's discriminatory exercise of peremptory challenges in that defendant's case alone; the court found that there was no need for a defendant to prove that the prosecutor had a pattern or practice in all of his/her cases of using peremptory challenges in a discriminatory manner. *Batson*, 476 U.S. at 95.

2. *Criminal Defense Strikes*

The exercise of peremptories by criminal defendants is also subject to a *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *United States v. DeGross*, 960 F.2d 1433, 1442 (9th Cir. 1992) (en banc).

3. *Civil Litigation*

The Supreme Court extended *Batson*'s prohibition against the racially discriminatory use of peremptories to civil actions in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-31 (1991).

4. *Standing*

Criminal defendants have standing to assert the equal protection rights of challenged jurors and, therefore, non-minority defendants can challenge the exercise of peremptories against prospective jurors in protected racial groups. *Powers v. Ohio*, 499 U.S. 400, 410-16 (1991).

5. *Gender*

The exercise of peremptory challenges based on gender violates the Equal Protection Clause. *J.E.B. v. Alabama,* 511 U.S. 127, 130-31 (1994); *United States v. DeGross*, 960 F.2d at 1437-43 (9th Cir. 1992) (en banc).

6. *Erroneous Rulings on Batson Challenges*

a. Denial of peremptory challenge. An erroneous denial of a defense peremptory challenge requires reversal of the conviction. *United States v. Annigoni*, 96 F.3d 1132, 1147 (9th Cir. 1996) (en banc).

b. Allowance of peremptory challenge. "Clearly, the proper remedy for the improper use of a peremptory challenge is automatic reversal." *See, e.g., United States v. Annigoni,* 96 F.3d 1132, 1147 (9th Cir. 1996) (en banc).

B. *Batson* Procedure

1. *Three-Step Process*

A *Batson* challenge is a three-step process:

(a) the party bringing the challenge must establish a prima facie case of impermissible discrimination;

(b) once the moving party establishes a prima facie case, the opposing party bears the burden of producing a neutral, non-discriminatory reason for the peremptory; and

(c) the moving party must demonstrate that the challenged party's reasons are pretextual–the ultimate burden of proving purposeful discrimination always remains with the moving party.

See Hernandez v. New York, 500 U.S. 352, 358-59 (1991). *See also Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995); *Stubbs v. Gomez*, 189 F. 3d 1099, 1104 (9th Cir. 1999), *petition for cert.*

filed, U.S. Apr. 18, 2000 (No. 99-9429).

2. *Prima Facie Case*

To establish a prima facie case of discrimination, the moving party must demonstrate:

(a) that the challenged juror is a member of a protected group and
(b) that the facts and circumstances surrounding the exercise of the peremptory challenge raise an inference of discrimination.

Johnson v. Campbell, 92 F.3d 951, 953-54 (9th Cir. 1996).

3. *Opposing Party's Burden*

Once a prima facie case is established, the challenged party need only offer facially non-discriminatory reasons; the reasons need not be "persuasive or even plausible." The persuasiveness of the challenged party's reasons is not relevant until the third part of the inquiry when the trial court determines whether the moving party has carried its burden of proving purposeful discrimination. *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995); *United States v. Bauer*, 84 F.3d 1549, 1554 (9th Cir. 1996).

4. *Timeliness of Batson Challenges*

"The case law is clear that a *Batson* objection must be made as soon as possible . . . ." *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir. 1996).

5. *No Specific Findings Required*

"Neither *Batson* nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir.) (citation omitted), *cert. denied*, 120 S. Ct. 235 (1999).

2.15 Number of Jurors and Alternate Jurors

A. Civil Trials

1. *Number of Jurors*

A court may not seat a jury of fewer than six nor more than twelve. *See* Fed. R. Civ. P. 48.

2. *Alternates*

The selection of alternate jurors in civil trials was discontinued because of the burden placed on alternates who were required to listen to the evidence "but denied the satisfaction of participating in its evaluation." Advisory Committee Note, Fed. R. Civ. P. 47(b) (1991). The possibility of mistrial was mitigated by Rule 48 providing for a minimum jury size of six for rendering a verdict. Obviously, the judge should increase the jury to more than six so that as jury depletion occurs, at least six jurors remain to render a verdict.

3. *Unanimous Verdict*

Unless otherwise stipulated by the parties, a jury's verdict must be unanimous. Fed. R. Civ. P. 48.

B. Criminal Trials

1. *Number of Jurors*

Fed. R. Crim. P. 23(b) specifies that juries in criminal trials shall consist of twelve members. The rule also governs stipulations by the parties to a jury of less than twelve and/or the rendering of a verdict by less than twelve jurors.

2. *Alternates*

In criminal actions, the court may direct that no more than six (6) jurors, in addition to the regular jurors, be called and impaneled

to sit as alternate jurors. Fed. R. Crim. P. 24(c).

2.16 Dual Juries

The Ninth Circuit has held that the use of dual juries does not violate due process. *See Lambright v. Stewart*, 191 F.3d 1181, 1186 (9th Cir. 1999) (en banc) (federal habeas proceeding).

NOTES

Chapter Three: The Trial Phase

Description:

This section contains materials dealing with the trial from the swearing of the jury through closing argument.

Topics:

3.1 Setting the Trial Schedule–Options

In extended trials, the court may wish to consider a flexible trial day schedule in terms of beginning and ending times for the convenience of the court, attorneys, witnesses, and jurors.

A trial day which begins at 8:00 to 8:30 a.m. and continues through lunch until 1:30 to 2:00 p.m. with regular recesses works quite well. Such a schedule provides the court with approximately five and one-half to six hours court time each trial day, while still affording the court, attorneys, witnesses, and jurors time to attend to other professional and personal matters during business hours.

3.2 Jury Admonitions

When the jury is first impaneled and sworn, it is recommended that the court instruct the jury concerning their conduct during trial. *See* 9TH CIR. CRIM. JURY INSTR. 1.8 (1997); 9TH CIR. CIV. JURY INSTR. 1.8 (1997).

At appropriate times during the trial the court should remind the jurors not to talk to one another, to others, or allow others to talk to them or read or listen to any media reports of the trial. In addition, they should be advised not to conduct their own investigation or visit the scene of events involved or undertake any research, such as use of the Internet. *See* 9TH CIR. CRIM. JURY INSTR. 2.1 (1997); 9TH CIR. CIV. JURY INSTR. 2.1 (1997).

3.3 Preliminary Instructions and Orientation of the Jury

After the jury has been sworn and before presentation of opening statements, it is helpful for the court to present the jury with preliminary instructions concerning its duties and the role that the court, the attorneys, and each member of the court's staff will take during the trial. Some courts preinstruct the jury regarding the burden of proof, the fact that comments of the court and counsel are not evidence, etc. This occasion can also be used to provide helpful information to the jurors concerning their service and how to communicate with the court if necessary.

Preliminary instructions and orientation is an effective way for the court to answer many common juror questions and to make their service a more effective and positive experience.

See 9TH CIR. CRIM. JURY INSTR. Preliminary Instructions 1.1-1.13 (1997); 9TH CIR. CIV. JURY INSTR. Preliminary Instructions 1.1-1.14 (1997).

Erroneous pretrial jury instructions can be a basis for appeal. *United States v. Hegwood*, 977 F.2d 492 (9th Cir. 1992), *cert. denied sub nom.*, 508 U.S. 913 (1993); *Guam v. Ignacio*, 852 F.2d 459, 461 (9th Cir. 1988).

3.4 Notetaking by Jurors

The decision of whether to allow jurors to take notes is in the discretion of the trial judge. *United States v. Vaccaro*, 816 F.2d 443, 451 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987), and 484 U.S. 928 (1987), *abrogated on other grounds, Huddleston v. United States*, 485 U.S. 681 (1988). In lengthy or complex cases, jurors should normally be allowed to take notes. *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994). If notetaking is permitted, the jurors should be given the preliminary instruction on taking notes. 9TH CIR. CRIM. JURY INSTR. 1.10 (1997); 9TH CIR. CIV. JURY ISTR. 1.10 (1997).

If notetaking is permitted, the court should instruct the jurors to leave the notes in the jury room when the court is not in session. The jurors should also be told that the notes will be destroyed at the conclusion of the trial by the clerk.

3.5 Juror Questions During Trial

There may be occasions where a juror desires to ask a question of a witness. The court has discretion in permitting or refusing to permit jurors to ask questions. *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994), *cert. denied*, 516 U.S. 816; *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970) (no error by trial judge in allowing juror to submit question to court).

Questions by jurors during trial should not be encouraged or solicited. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985) ("[J]uror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable.") The court in *DeBenedetto* explained the hazards of jury questioning and the reasons such questioning may not only be improper but also prejudicial to the point of necessitating a mistrial or reversal on appeal. *See also United States v. Ajmal*, 67 F.3d 12, 14 (2d Cir. 1995) ("[a]lthough we affirm our earlier holding . . . that juror questioning of witnesses lies within the trial judge's discretion, we strongly discourage its use") (citations omitted); *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) ("In most cases, the game will not be worth the candle" and "juror participation should be the long-odds exception, not the rule"); *United States v. Nivica*, 887 F.2d 1110, 1123 (1st Cir. 1989) (the risks associated with juror questioning of witnesses is compounded in criminal cases), *cert. denied sub nom.*, 494 U.S. 1005 (1990).

Practical Suggestions

Juror Questions

In the event a juror does ask a question, either during testimony or in writing during recess, the following is the recommended procedure:

1. Refuse to take the question during testimony, but require that the question be set forth in writing at the next recess with the explanation that proper sequence of questioning as well as the rules of evidence require that the court determine if the question is proper. This procedure will allow the judge to examine the question and discuss it with counsel.

2. If the question is improper, the jury can be told that the rules of evidence do not allow the question.

3. If the question is proper, counsel for the parties may wish to ask the question. If the parties do not wish to ask the question, but do not have a legitimate objection to the question, the judge may ask the question. In either case, the jury can be advised that the question will be asked or will not be asked.

4. It is recommended that whenever a juror's question is to be asked, inquiry should be made by counsel or the judge, not the juror.

5. Extreme caution should be exercised in permitting questions from the jury in criminal cases. If questions are to be permitted, the court should advise the jurors of the procedures to be followed prior to any witnesses being called.

3.6 Judges Examining Witnesses

A. Civil Jury Cases

A trial judge has the right to examine witnesses and call the jury's attention to important evidence. *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 531 (9th Cir. 1986). Questions by the judge which aid in clarifying the testimony of witnesses, expedite the examination of witnesses, or confine the testimony to relevant matters in order to arrive at the ultimate truth are proper so long as conducted in a non-prejudicial manner. *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir. 1984). Questions by a court indicating skepticism are proper when the witnesses are permitted to respond to the district court's expressed concerns to the best of their ability. *Id.* A judge must be careful, however, not to project to the jury an appearance of advocacy or partiality.

B. Criminal Jury Cases

The trial judge should exercise great caution in examining witnesses during a criminal trial. The court may participate in the examination of witnesses for the purpose of clarifying the evidence, controlling the orderly presentation of evidence, confining counsel to evidentiary rulings, and preventing undue repetition of testimony. *United States v. Allsup*, 566 F.2d 68, 72 (9th Cir. 1977). However, "the court must . . . be mindful that in the eyes of a jury, the court occupies a position of 'preeminence and special persuasiveness,'" and thus must avoid the appearance of giving aid to one side or the other. *Id*. (quoting *United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975)). *See also United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994).

In several cases, prejudicial judicial questioning has resulted in the reversal of convictions. *See, e.g., Allsup*, 566 F.2d at 72-73 (the court's rehabilitation of a prosecution witness whose credibility had been seriously undermined by the defense constituted error which, when considered together with other errors, required a new trial); *United States v. Pena-Garcia*, 505 F.2d 964 (9th Cir. 1974) (judge threatened and intimidated witnesses and gave jury the

impression he thought defense witness was lying under oath); *United States v. Stephens*, 486 F.2d 915 (9th Cir. 1973) (judge implied to jury that he thought defendant was guilty). *See also United States v. Saenz*, 134 F.3d 697 (5th Cir. 1998) (judge's questioning of witnesses required reversal); *United States v. Tilghman*, 134 F.3d 414 (D.C. Cir. 1998) (judge's questioning of defendant required reversal).

C. Non-Jury Cases

Great latitude is permitted in examining witnesses during a civil trial. The judge should be careful, however, to avoid the appearance of advocacy or partiality.

Practical Suggestion

Judge's Examination of Witnesses

The judge should exercise restraint in examining witnesses in jury trials, and be careful to avoid even the appearance of advocacy or partiality. When appropriate, the judge should consider giving a cautionary instruction to the jury that the jury is not to give any greater weight to the judge's questions than to questions by ——— others.

3.7 Interpreters

A. Use and Competency

1. *Appointment of Interpreter*

Rule 43(f), Fed. R. Civ. P., provides for the appointment of a court interpreter, with the determination of interpreter's fees and assessment of fees as costs in a civil action.

It is suggested that when an interpreter is presented by a party to a civil case, the court determine if the interpreter is qualified, and, if so, appoint that person as the court's interpreter in order to control fees and assess costs if appropriate under Rule 43(f). If the suggested interpreter is not acceptable, the court should appoint one of its own choosing pursuant to Rule 43(f).

2. *Right of a Criminal Defendant to an Interpreter*

A defendant in a criminal case has a statutory right to a court-appointed interpreter when his or her comprehension of the proceedings or ability to communicate with counsel is impaired. 28 U.S.C. § 1827(d)(1).

3. *Competence of Interpreter*

The initial determination as to the competence of an interpreter rests with the trial judge. In making that determination, the court may wish to consider whether the interpreter is federally certified by the Administrative Office of the U.S. Courts. During trial, counsel and the court should be informed of any difficulty with interpreters. The judge must then decide whether to retain or replace the interpreter. *See United States v. Anguloa*, 598 F.2d 1182 (9th Cir. 1979).

Complaints directed toward an interpreter by a party may require that the trial court conduct an evidentiary hearing. *Chacon v. Wood*, 36 F.3d 1459, 1465 (9th Cir. 1994).

B. Translations: Disputed Documents

Where the translation of a document is disputed, qualified translators may give their respective translations, and explain their opinions about what the words mean, and the jury will decide which translation is appropriate.

C. Interpreter for Jurors

In the case of a deaf juror, it may be appropriate to permit use of an interpreter. In *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987), the Tenth Circuit ruled that a juror's deafness did not disqualify the juror from service, nor did the interpreter's presence during jury deliberations deprive defendant of a fair and impartial trial.

D. Necessity of Oath

It is necessary for the district court to have an oath or affirmation administered to an interpreter who will be translating the testimony of a witness. Fed. R. Evid. 604; *United States v. Armijo*, 5 F.3d 1229, 1235 (9th Cir. 1993); *United States v. Taren-Palma*, 997 F.2d 525, 532 (9th Cir. 1993), *cert. denied*, 511 U.S. 1071 (1994).

Some districts fulfill this obligation by having all interpreters, at the outset of their service as a federally certified court interpreter, sign a written affidavit swearing or affirming to translate all proceedings truthfully and accurately.

E. Cautionary Instruction to Bilingual Jurors

Instruction 1.14 of the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL (1997) is a model instruction regarding the obligation of bilingual jurors to accept the translation given by the federally certified court interpreter. *See also* 9TH CIR. CRIM. JURY INSTR. 1.12 (1997).

Practical Suggestions

Interpreters at Trial

1. Permit counsel to confer with defendant with assistance of interpreter. *United States v. Lim*, 794 F.2d 469, 471 (9th Cir.), *cert. denied sub nom.,* 479 U.S. 937 (1986).

2. Introduce interpreter(s) to the jury, explaining the function performed and the high proficiency required of federal court interpreter, and explore with the venire panel whether any are biased against the defendant because of the defendant's need for an interpreter.

3. In multi-defendant criminal cases, a single interpreter using electronic equipment with additional headsets may be consid ered.

3.8 Successive Cross-Examination

A. In General

Limits can be placed on repetitive cross-examination in multi-defendant trials. The court should caution counsel at the onset that although there may be some repetition, exhaustion of subject matter by each counsel will not be permitted. The court may require defense counsel to designate lead counsel for a particular witness. *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997), (where defense counsel was allowed to cross-examine as to issues particular to their clients, court did not err in asking counsel to designate one attorney to conduct "main" cross-examination into basic issues), *cert. denied sub nom.*, ___ U.S. ___, 118 S. Ct. 896 (1998). In the absence of agreement, the court may designate the appropriate order. As a rule, repetitive cross-examination on the same subject matter should not be allowed.

The court has discretion to limit cross-examination in order to preclude repetitive questioning where it determines that a particular subject has been exhausted. "District Court has considerable discretion in restricting cross-examination." *United States v. Marbella*, 73 F.3d 1508, 1513 (9th Cir. 1995), *cert. denied sub nom.*, 518 U.S. 1020 (1996). *Accord United States v. Dudden*, 65 F.3d 1461, 1469 (9th Cir. 1995). Cross-examination may also be limited to avoid extensive and time-wasting exploration of collateral matters. The trial court has the duty to control cross-examination to prevent an undue burdening of the record with cumulative or irrelevant matters. This general duty includes a specific duty to prevent counsel from confusing the jury with a proliferation of details on collateral matters. *United States v. Weiner*, 578 F.2d 757, 766 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

B. Scope of Re-Direct and Re-Cross Examination (Criminal)

Allowing re-cross (or re re-cross) is within the sound discretion of the trial court except where new matters are elicited on redirect, in which case denial of re-cross violates the confrontation clause. *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993), *cert.*

denied, 513 U.S. 934 (1994). What constitutes new matters should be liberally construed in criminal cases. It is reversible error to impose a blanket ban on re-cross examination when new and damaging testimony has been presented on re-direct examination. *United States v. Jones*, 982 F.2d 380 (9th Cir. 1992).

C. Defendant's Refusal to Answer Questions on Cross-Examination (Criminal)

"When a defendant refuses to answer questions on cross-examination, the district court may impose one or more of the following sanctions: (1) permit the prosecution to comment on the defendant's unprivileged refusal to answer; (2) permit the prosecution to impeach the defendant's direct testimony by continuing to elicit his unprivileged refusal to answer; (3) instruct the jury that it may take the defendant's refusal to answer various questions into account when reaching a verdict; and/or (4) strike the defendant's testimony." *United States v. King*, 200 F.3d 1207, 1217 (9th Cir. 1999) (citation omitted).

"The Constitution does not give a defendant the right to testify without subjecting himself to cross-examination which might tend to incriminate himself." *Williams v. Borg*, 139 F.3d 737, 740 (9th Cir.) (striking of state defendant's testimony following his refusal to answer questions regarding prior convictions was neither arbitrary nor disproportionate on facts presented), *cert. denied*, 525 U.S. 937 (1998).

The court should exercise extreme caution in limiting cross-examination in criminal cases.

3.9 Managing Exhibits

Sections 22.13 and 22.3 of the MANUAL FOR COMPLEX LITIGATION (3rd ed. 1995) contain an excellent discussion of the techniques that may be used in the orderly and illuminating presentation of exhibits to the court and jury.

Some exhibits, of course, cannot be delivered to the jury room because of their size. Arrangements should be made so that such exhibits are stored in a place convenient to the courtroom so they can be studied by the jury in private.

The court should normally not send certain admitted exhibits into the jury deliberations room, such as toxic substances and chemicals, contraband drugs, firearms and currency. These exhibits can be viewed in the courtroom prior to or during deliberations or in the jury room under court supervision.

Firearms, ammunition clips or cylinders should be rendered safe or inoperable for trial.

If toxic exhibits must be handled by the jury, surgical-type throw-away plastic gloves can be provided, or the containers sealed.

3.10 Summaries

A. Summary Exhibits and Charts

When considering the admissibility of "summary of evidence" exhibits, it is important to distinguish between charts or summaries *as evidence* and charts or summaries as illustrative or "*pedagogical devices*." *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991).

1. *Charts and Summaries as Evidence*

Charts and summaries as evidence are governed by Fed. R. Evid. 1006, which allows the introduction of charts, summaries, or calculations "of voluminous writings, recordings, or photographs which cannot conveniently be examined in court." The party seeking to admit a summary as evidence under Fed. R. Evid. 1006 must establish a foundation that (1) the underlying materials upon which the summary is based are admissible in evidence, and (2) the underlying documents were made available to the opposing party for inspection. *United States v. Johnson*, 594 F.2d 1253, 1254-57 (9th Cir.), *cert. denied sub nom.*, 444 U.S. 964 (1979). *See also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). Rule 1006 does not encompass summaries of previously admitted oral testimony. *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993).

2. *Charts and Summaries as Illustrative or "Pedagogical Devices"*

Charts or summaries of testimony or documents already admitted into evidence merely help illustrate, and are not evidence themselves. Illustrative evidence should be used only as a testimonial aid, and should not be admitted into evidence or otherwise used by the jury during deliberations. *Wood*, 943 F.2d at 1053-54 (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984)); *United States v. Abbas*, 504 F.2d 123, 125 (9th Cir. 1974), *cert. denied*, 421 U.S. 988 (1975)). In addition, cautionary instructions should be given to the jury when summary charts are

used for pedagogical purposes. *Soulard*, 730 F.2d at 1300.

The court may wish to include in the pretrial order a requirement that summary charts be produced in advance of trial. The court may also give a cautionary instruction both at the time the evidence is introduced and again during final instructions. *See* 9TH CIR. CIV. JURY INSTR. 3.10 & 3.11 (1997); 9TH CIR. CRIM. JURY INSTR. 4.17 & 4.18 (1997).

B. Summary Testimony

Summary testimony, whether expert or nonexpert, is disfavored, but may be admissible in exceptional cases pursuant to Fed. R. Evid. 611(a). The court should "exercise reasonable control over the mode . . . of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time." *Baker*, 10 F.3d at 1412 (nonexpert summary testimony); *United States v. Olano*, 62 F.3d 1180, 1204 (9th Cir. 1995) (nonexpert summary testimony), *cert. denied*, 519 U.S. 931 (1996). For cases involving expert summary testimony, see *United States v. Marchini*, 797 F.2d 759, 765-66 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) and *United States v. Cuevas*, 847 F.2d 1417, 1428 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). In both cases the admission of expert summary testimony was upheld because it was based upon the evidence adduced at trial and the witness was subjected to thorough cross-examination about his or her testimony after it was admitted.

In *Baker*, the Ninth Circuit criticized the admission of testimony, noting that "[p]ermitting an 'expert' witness to summarize testimonial evidence lends the witness' credibility to that evidence and may obscure the jury's original evaluation of the original witnesses' reliability." *Baker*, 10 F.3d at 1412. The court found no undue prejudice, however, because of the precautions taken by the district court. The court had required the government to lay a foundation for the summary evidence outside the presence of the jury, continued the trial for over one week to give the defense time to examine the materials, gave limiting instructions

three times during the agent's testimony, and invited defense counsel to present its own summary witnesses. In addition, the defense thoroughly cross-examined the witness about her methods of preparing the summaries, and her alleged selectivity and partiality. *Id.* *See also Olano*, 62 F.3d at 1204 (district court did not abuse its discretion in permitting a certified public accountant who was the case agent for the bank fraud investigation to give summary testimony of evidence presented by the government's preceding witnesses).

C. Summary Witnesses Using Charts and Exhibits

Summary witnesses may use charts and summary exhibits for illustrative and demonstrative purposes, provided the offering party lays a foundation, the opposing party has had an opportunity to review the charts and summaries, and the court gives appropriate limiting instructions. *Olano*, 62 F.3d at 1204; *Baker*, 10 F.3d at 1412. The Ninth Circuit has cautioned, however, that where the summary witness is summarizing previous oral testimony, the charts and summary exhibits are more appropriately presented by counsel during closing argument. *Baker*, 10 F.3d at 1412.

Summary charts and exhibits used by summary witnesses should be admitted under Rule 611(a) only in exceptional circumstances. *Olano*, 62 F.3d at 1204. In *Olano*, the admission of summary charts was upheld under Rule 611(a) because the defendants had an opportunity to review the charts, the defense had an opportunity to cross-examine the summary witness, and the court gave a limiting instruction informing the jury that the charts were not being admitted as substantive evidence. *Id*.

D. Summaries of Evidence by Counsel

"[A] summary of oral testimony is generally the purpose and province of closing argument." *Baker*, 10 F.3d at 1412. Thus, counsel may orally summarize and argue the evidence, and use charts and summaries as a visual aid. *Abbas*, 504 F.2d at 125. The court may also allow counsel to present mini arguments during the trial. *See* § 3.16.

E. Judicial Summaries of Evidence

While the court may comment upon the evidence, caution should be exercised in doing so. *Quercia v. United States*, 289 U.S. 466, 469 (1933). *See also Rodriguez v. Marshall*, 125 F.3d 739, 749 (9th Cir. 1997), *cert. denied*, 524 U.S. 919 (1998).

When commenting on the evidence, judges must avoid the appearance of advocacy or partiality. *United States v. Sanchez-Lopez*, 879 F.2d 541, 552 (9th Cir. 1989) (defamation case). Nor may a judge comment on a witness's credibility if such credibility is a crucial factor in the case. *Id*. Reversal is also required if a judge expresses his opinion on an ultimate issue of fact in front of the jury or argues for one of the parties. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991). Judges should avoid making prejudicial remarks, especially in criminal cases. For instance, a judge may not comment on a criminal defendant's guilt. *United States v. Wills*, 88 F.3d 704, 718 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 499 (1996). In sum, "[j]udicial comments must be aimed at aiding the jury's fact finding duties, rather than usurping them." *United States v. Stephens*, 486 F.2d 915, 917 (9th Cir. 1973).

3.11 Tape-Recordings–Admissibility of Tape Excerpts and/or Translated Transcript

A. Generally

"A recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy." *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.) (citations omitted), *cert. denied*, 120 S. Ct. 261 (1999).

B. Preferred Procedure Regarding Accuracy of Transcripts

"Generally, the Court reviews the following steps taken to ensure the accuracy of the transcripts: (1) whether the court reviewed the transcripts for accuracy, (2) whether defense counsel was allowed to highlight alleged inaccuracies and to introduce alternative versions, (3) whether the jury was instructed that the tape, rather than the transcript, was evidence, and (4) whether the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations. " *Rrapi*, 175 F.3d at 746 (citation omitted).

C. Foreign Language Tapes

Where a foreign language tape has been translated, the general requirement that the jury be told that the tape and not the transcript are the evidence no longer applied." *Rrapi*, 175 F.3d at 746.

D. Video-Taped Depositions - Immigration Case

8 U.S.C. § 1324(d) states: "Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence."

This section "simply allows the introduction of video-taped testimony 'notwithstanding any provision of the Federal Rules of Evidence.'" *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998) (by failing to object to the release of witnesses, defendant waived any objection regarding the government causing witness to be unavailable, as required for use of video-taped deposition).

3.12 Jury Examination of Demonstrative Evidence

A. Jury View of the Scene

There is no specific federal rule permitting the jury to make an inspection of the premises or place involved in the action or the scene of the crime. The Ninth Circuit has not directly addressed this issue. The federal courts do recognize the inherent power of the trial court to permit a view or inspection. *Gunther v. E.I. Du Pont De Nemours & Co.*, 255 F.2d 710, 716 (4th Cir. 1958); *Fitzpatrick v. Sooner Oil Co.*, 212 F.2d 548, 551 (10th Cir. 1954).

The courts are divided over whether the view of the premises is evidence in the case. Some courts adhere to the traditional rule that a view is not to be considered as evidence. *Park-In Theaters, Inc. v. Ochs*, 75 F. Supp. 506, 512 (S.D. Ohio 1948). Other courts hold that a view of the premises is evidence and that a motion for a view should be granted during the trial and not deferred until the conclusion of the trial. *United States v. Harris*, 141 F. Supp. 418, 419-20 (S.D. Cal. 1955).

The district court has wide discretion in granting a request for a view. *Skyway Aviation Corp. v. Minneapolis, N. & S. Ry. Co.*, 326 F.2d 701, 708 (8th Cir. 1964).

It is improper for the parties to request a view in front of the jury. *Fitzpatrick v. Sooner Oil Co.*, 212 F.2d 548, 551 (10th Cir. 1954). In a criminal case, the defendant should be present at a view, but the absence of a defendant may not violate the defendant's constitutional rights. *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934).

The trial judge should be present during the view. The court reporter should also be present. *State v. Garden*, 267 Minn. 97, 111, 125 N.W.2d 591, 600 (Minn. 1963). The court should secure one or more jury officers to accompany the jury to ensure compliance with the court's order.

The jury should be admonished to refrain from any discussion

prior to, during and after the view unless allowed by the court. The trial judge should ensure that jurors do not receive unsworn testimony or communications during the view. The trial judge should formally instruct the jury on the procedure to be followed during the view.

B. Jury Examination of Other Demonstrative Evidence

The court has wide discretion to allow the jury to review demonstrative evidence. However, the court should not permit the use of new evidence, by way of a demonstration, after the jury begins deliberations. *United States v. Rincon*, 28 F.3d 921, 926-27 (9th Cir.) (court properly denies request to view defendant with sunglasses during deliberations), *cert. denied*, 513 U.S. 1029 (1994).

3.13 Incompetent Jurors, Late or Missing Jurors

In a criminal case, the trial judge makes the determination whether to substitute an alternate for a sitting juror who has "become or [is] found to be unable or disqualified to perform [his or her] duties." Fed. R. Crim. P. 24(c).

A. Civil

The court has discretion to excuse jurors for cause during the trial. *United States v. Gay*, 967 F.2d 322, 324 (9th Cir.), *cert. denied*, 506 U.S. 929 (1992). A trial court's "need to manage juries, witnesses, parties, and attorneys, and to set schedules" are factors that can outweigh a party's right to a particular jury. *Id.* (citing *United States v. Jorn*, 400 U.S. 470, 479-80 (1971)). The removal of a juror meets the "good cause" standard. Although "[s]ickness, family emergency or juror misconduct that might occasion a mistrial are examples of 'appropriate grounds' for excusing a juror" (Fed. R. Civ. P. 47(c) Advisory Committee Note 1991 Amendment), the judge's discretion is not limited to those scenarios. "'[J]ust cause' . . . embraces all kinds of problems–temporary as well as those of long duration–that may befall a juror during jury deliberations." *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092 (1995). Before doing so, the court should determine the basis for the actions and discuss the matter with the lawyers on the record.

B. Criminal

The trial court may remove a juror and replace the juror with an alternate whenever facts convince the judge that the juror's ability to perform his or her duties as a juror has been impaired. A juror's drunkenness is good cause for substitution with an alternate. *United States v. Jones*, 534 F.2d 1344, 1346 (9th Cir. 1976), *cert. denied*, 429 U.S. 840 (1976).

In criminal cases, the court has discretion to excuse a juror for cause. Although no finding is required if a juror becomes manifestly unable to perform his or her duties, it is better to make

an adequate record. *United States v. Lustig*, 555 F.2d 737, 745 (9th Cir. 1977), *cert. denied sub nom.*, 434 U.S. 926 (1977), and *cert. denied*, 434 U.S. 1045 (1978).

The missing or late juror who is absent from court for a period sufficiently long to interfere with the reasonable dispatch of business may be the subject of dismissal. *See United States v. Gay*, 967 F.2d 322 (9th Cir.), *cert. denied*, 506 U.S. 929 (1992) (three-hour delay may be enough in certain circumstances). *But see United States v. Tabacca*, 924 F.2d 906, 913-15 (9th Cir. 1991) (A one-day absence after deliberations had begun on a two- and-one-half-day trial does not constitute "just cause" under Fed. R. Crim. P. 23(b) for excusing the juror and allowing the remaining 11 to deliberate and return a verdict. Because the trial was not complex, a delay of only one day would be unlikely to induce dulled memories on the part of the jurors. Excusing the juror was held to be reversible error.)

3.14 Juror Exposure to Extrinsic Influences

A. In General

When the trial court becomes aware that someone has made some kind of improper contact with a juror, the court should determine the circumstances, the impact upon the juror, and whether the contact was prejudicial, in a hearing in which all interested parties are permitted to participate. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied sub nom.*, 457 U.S. 1136 (1982) and 459 U.S. 906 (1982), *superceded by rule as stated in United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992); *United States v. Myers*, 626 F.2d 365 (4th Cir. 1980).

B. Evidentiary Hearing

Upon a motion for mistrial or new trial based on the jury's consideration of extrinsic evidence, "[a]n evidentiary hearing must be granted unless the alleged misconduct could not have affected the verdict or the district court can determine from the record before it that the allegations are without credibility." *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). *See also United States v. Wilson*, 7 F.3d 828 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994). In addition, the court "must" hold a fair evidentiary hearing when a reasonable possibility of prejudice to the jury's verdict arises from ex parte contacts with a juror. A "reasonable possibility" of prejudice does not arise when a court or its staff shows a "courtesy" to a juror by providing juror a ride to bus stop and such service was offered by the judge in open court and a party failed to object to this service. *United States v. Velasquez-Carbona*, 991 F.2d 574, 576 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2982 (1993). "[N]ot every incident of a juror's ex parte contact . . . constitute[s] actual prejudice . . . ." *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991). Rather, a new trial is warranted only "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998) (quoting from *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979)).

C. Types of Extraneous Influences

There are two different standards for judging extraneous influences on jurors. If the juror has been exposed to extraneous material, then the trial court should grant a new trial if there is a reasonable possibility that the material could have affected the verdict. *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998); *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). However, if the juror has been exposed to improper ex parte contact, the trial court should grant a new trial only if the court finds actual prejudice to the defendant. *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir.), *cert. denied*, 488 U.S. 912 (1988). *See also United States v. Harber*, 53 F.3d 236, 242 (9th Cir. 1995) (Where the intrusion into the jury's deliberations is by a law enforcement officer who was a prosecution witness or who made comments regarding the defendant's guilt, prejudice to the defendant's right to due process is inherent or presumptive.).

See supra §§ 5.2.C and 6.3.

3.15 Removal of Counts or Defendants (Criminal)

Although Fed. R. Crim. P. 29 motions regarding dismissal of defendants and/or counts should be granted when appropriate, the granting of such motions may impact the trial as to the remaining defendants and/or counts. Defendants or counts that have been discharged may have occasioned evidence to be introduced in the joint trial of the remaining defendants that would not otherwise have been presented. Motions for mistrial may then be made on the ground that the removed defendant or count should never have been before this trier of fact and that a fair trial cannot be had under those circumstances. *United States v. DeRosa*, 670 F.2d 889 (9th Cir. 1982), *cert. denied sub nom.*, 459 U.S. 993 (1982) and 459 U.S. 1014 (1982).

Many times codefendants in a joint trial either enter a plea or are severed or dismissed. It is recommended that Instruction 2.13 from the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL (1997) dealing with the problem of the severed or dismissed defendant (or one of similar import) be utilized. This is a neutral, short explanation which, in effect, instructs the jury that the matter is no longer before them and should not be considered by them in any way in reaching the result as to the remaining defendants whose cases remain before them for resolution.

These same considerations apply to the severance of counts and/or defendants during trial.

The court should attempt to obtain the agreement of counsel concerning the giving of and form of any curative instruction.

3.16 Cautionary and Curative Instructions

A. In General

An admonition is of particular importance when a serious matter has occurred in the jurors' presence and an admonition to disregard is needed by the court. Many times, a very strict and emphatic admonition may save a case that in other circumstances would have to be retried.

In addition to a cautionary admonition during trial, the court should use a jury instruction at the end of the case on "What is Not Evidence." *See* 9TH CIR. CRIM. JURY INSTR. 3.5 (1997); 9TH CIR. CIV. JURY INSTR. 3.5 (1997).

In appropriate situations, the court should consider giving curative instructions to eliminate possible prejudice. Juries are presumed to follow curative instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). However, "[t]here are some extreme situations in which curative instructions will not neutralize the prejudice when evidence is improperly admitted." *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997) (citations omitted.)

See also supra 3.17.D.

B. Severance During Trial and Need for Cautionary Instructions (Criminal)

1. *Decision to Sever*

The issue of severance arises both prior to and during trial. The party seeking a severance has a "heavy burden" to justify severance. The court should grant a severance only when there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Rule 8(b), Fed. R. Crim. P., allows for the joinder of two or

more defenses or defendants in the same indictment or information. Rule 14, in turn, permits a court to grant a severance if "it appears that a defendant or the government is prejudiced by a joinder."

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro,* 506 U.S. at 537. As a result, as a general rule, defendants who are charged together will be tried together. *United States v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986).

2. *Cautionary Instructions as Alternative*

In the event severance of a court or defendant is necessary after trial commences, the jury should be given a short neutral statement that the matter(s) are no longer before them and that they should not speculate as to why a count or defendant is no longer in the case.

Double jeopardy does not attach if the court grants a defendant's motion for severance during trial. *Jeffers v. United States*, 432 U.S. 137 (1977); *Guam v. Gill*, 59 F.3d 1010 (9th Cir. 1995).

3.17 Mini-Arguments During Trial

The trial judge may consider allowing counsel to make mini-arguments during trial. The court has discretion to allow short arguments to the jury or judge to explain an important issue or summarize the testimony of one or more witnesses. This can be used effectively in complex or lengthy jury and non-jury cases. Arguments may be limited to five minutes or less and can be allowed only at the court's discretion. For example, in cases involving lengthy testimony by experts in a complex patent case, the court may wish to consider asking each lawyer to summarize the testimony that will or has been presented so that the trier of fact may better understand the issues presented. This procedure might also be considered in trials where the court has limited the time each side will have to present their case. The lawyers might be allowed to use a portion of their allotted time for mini- arguments during the trial.

The trial court should use extreme caution in allowing mini-arguments in criminal cases. If mini-arguments are allowed, the court should caution the jury that they should keep an open mind until they have heard all the evidence, heard the court's instructions and heard final argument of the parties at the conclusion of the trial.

3.18 Defendant's Right to Testify

Although a defendant's right to testify is well established, *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), a defendant must assert the right to testify before the jury has reached a verdict. *See United States v. Pino-Noriega*, 189 F.3d 1089, 1095-96 (9th Cir.), *cert. denied*, 120 S. Ct. 453 (1999).

3.19 Closing Argument

A. In General

Lawyers are entitled to argue reasonable inferences from the evidence. *United States v. Young*, 470 U.S. 1, 9 n.7 (1985).

B. Response to Objectionable Closing Argument

The district court has a duty to dispel prejudice from the government's argument. *See United States v. Rodrigues*, 159 F.3d 439, 450-51, *amended by* 170 F.3d 881 (9th Cir. 1999) (where district court did not "rebuke" government's counsel for "gratuitous attack on the veracity of defense counsel," district court took inadequate steps to dispel prejudice).

Curative instructions and admonishment of counsel from trial courts play a crucial role in correcting objectionable closing arguments. "When prosecutorial conduct is called in question, the issue is whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (citing *United States v. Young*, 470 U.S. 1, 11 (1985)). Examples of improper argument include vouching for witnesses, commenting on a criminal defendant's failure to testify and misstating the evidence. "A trial judge should be alert to deviations from proper argument and take prompt corrective actions as appropriate." *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992) (citation omitted). Such action "may neutralize the damage by admonition to counsel or by appropriate curative instructions to the jury." *Simtob*, 901 F.2d at 806.

C. Admonishment of Counsel

Where counsel makes an improper argument, the court should admonish counsel and/or give the jury an appropriate curative instruction. *United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997) (prosecutor's unimpeded improper vouching for witness during questioning and summation required reversal). The

admonishment may be done in the presence of the jury. *See Guar. Servs Corp. v. American Employers' Ins. Co.*, 893 F.2d 725, 729 (5th Cir.1990); *United States v. Hoskins*, 446 F.2d 564, 565 (9th Cir. 1971).

D. Curative Jury Instructions

When a court gives a curative instruction to the jury, the instruction should specifically address the improper argument, rather than state a boilerplate rule regarding evaluation of evidence. *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990). For example, a belated instruction that the jurors "are the sole judges of the credibility of the witnesses" was insufficient to neutralize the harm caused when the prosecutor vouched for government witnesses. *Kerr*, 981 F.2d at 1053.

3.20 Judgment of Acquittal - Jeopardy

The trial court's oral granting of a motion for judgment of acquittal, without an entry of judgment, and subsequent vacating of the acquittal, does not violate double jeopardy prohibitions. *See United States v. Byrne*, 203 F.3d 671, 674-75 (9th Cir. 2000).

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Chapter Four: Jury Instructions

Description:

This section contains materials dealing with instructing the jury.

Topics:

4.1 Submission of Instructions

Rules Governing Jury Instructions

Rule 30, Fed. R. Crim. P., and Rule 51, Fed. R. Civ. P., govern instructions to a jury in a criminal and civil case, respectively.

Both rules provide that "at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests." Both rules also provide that the "court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury." The court should be careful to consider instructions submitted at any time during trial. *See* Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

Rule 30, Fed. R. Crim. P., provides that copies of the requests shall be furnished to all parties.

Practical Suggestions

Manner of Submission of Instructions

1. The trial court should request counsel to submit proposed instructions prior to the commencement of the trial. Notwithstanding any deadline set by the court, the court is obligated under Fed. R. Crim. P. 30 to consider any instructions submitted by counsel during the trial. Ultimately, the court is responsible for properly instructing the jury on the applicable law.

2. The trial court may wish to direct counsel for each party to meet prior to trial and develop a joint set of agreed upon instructions. To the extent that counsel are unable to agree on a complete set of instructions, the court may still require the parties to submit one set of instructions. Each party can thereafter separately submit a set of supplemental proposed

instructions.

3. The trial court should direct counsel to request pattern instructions by simply submitting a list of the identifying numbers from the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL (1997) the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL (1997), FEDERAL JURY PRACTICE AND INSTRUCTIONS (4th ed. 1992), or a similar source of pattern instructions.

4. The court may find it helpful to request that counsel submit proposed nonpattern instructions in computer format, such as on a disk in WordPerfect format or any other word processing format that may be convenient.

See Appendices 1 and 2 for examples of pretrial orders addressing these issues.

4.2 Record on Instructions

A. Criminal Cases

Rule 30, Fed. R. Crim. P., requires that a defendant object to instructions with adequate specificity; an objection must distinctly state the matter to which the party objects, as well as "the grounds of the objection." Fed. R. Crim. P. 30. *See also United States v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989) (Rule 30 requires that a party make a "formal, timely and distinctly stated objection"). Offering an alternative instruction alone is not enough to satisfy the specificity objection. *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Williams*, 990 F.2d 507, 511 (9th Cir. 1993). The district court must be made fully aware of the objecting party's position. *See United States v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989).

B. Civil Cases

Rule 51, Fed. R. Civ. P., allows a party to file a written request that the court instruct the jury on the law as set forth in the requests. The court must inform counsel of its proposed action on the requests before arguments are made to the jury. A party must object to the instructions before the jury retires to consider its verdict, "stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. As with Rule 30, Fed. R. Crim. P., the court must give the parties an opportunity to make the objections out of the hearing of the jury.

The parties should make all objections on the record.

C. Timing

The court should always rule on objections on the record prior to instructing the jury so that any objections can be considered and instructions can be revised if necessary. "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury." Fed. R. Crim. P. 30.

4.3 Preliminary Charge and Final Instructions

A. Preliminary Charge to Jurors

In addition to the preliminary instructions, some judges give a preliminary charge to the jury regarding the elements of the offense and related principles. If the judge gives the jury a preliminary charge on the elements of the offense, the jury should be cautioned that the formal charge to the jury will come at the end of the trial and will be binding on the jury.

See also § 3.2.

B. Formal Charge at End of Trial

Many courts are now instructing at the close of the evidence and before argument. The Federal Rules were specifically amended in 1987 to permit this practice. *See* Fed. R. Crim. P. 30; Fed. R. Civ. P. 51. Accordingly, a judge has discretion to give the bulk of the instructions (including a description of the elements of the claims or offenses) before argument. The judge may then instruct on the rules governing deliberations after counsel have concluded their arguments.

The court reporter should record the jury instructions as they are being read by the judge. Under 28 U.S.C. § 753(b), court reporters are required to record verbatim "all proceedings in criminal cases had in open court." However, if the reporter fails to record the instructions, the case will not result in a reversal unless the defendant can demonstrate prejudice. *See United States v. Antoine*, 906 F.2d 1379, 1381 (9th Cir.), *cert. denied*, 498 U.S. 963 (1990); *United States v. Carrillo*, 902 F.2d 1405, 1409-10 (9th Cir. 1990).

Failure of the trial court to instruct the jury orally on each of the elements of the crime charged, even though the court sent a set of written instructions into the jury room, entitles the defendant to a new trial. *See People of the Territory of Guam v. Marquez*, 963 F.2d 1311, 1314-15 (9th Cir. 1992). *See also Harmon v. Marshall*,

69 F.3d 963, 964 (9th Cir. 1995) (holding that omitting or otherwise failing to submit to the jury one element of an offense is reversible error per se).

C. Providing Copies of Instructions to Jury

The trial court should furnish the jury with a copy of the written jury instructions to assist them during deliberations. *See United States v. Tagalicud*, 84 F.3d 1180, 1184 (9th Cir. 1996) (criticizing the trial court for giving instructions once, orally, and for not sending the jury instructions into the jury room). The trial court may consider providing a copy of the jury instructions to each juror during the reading of the instructions and for use during deliberations.

Moreover, providing a correct copy of the instructions may assist in nullifying a judge's misstatement of the law made during the reading of the jury instructions. *See United States v. Ancheta*, 38 F.3d 1114, 1116-17 (9th Cir. 1994).

D. Final Instructions–Script

See Appendix 7, at page 176, for a sample script of final instructions.

E. Supplemental Instructions During Deliberations

See § 5.1(E).

4.4 Jury's Use of Indictment (Criminal)

A. Availability of Indictment to Jury During Trial and Deliberations

The trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment for use during jury deliberations. *See United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). *See also United States v. Petersen*, 548 F.2d 279, 280 (9th Cir. 1977) (holding that a trial judge also has the discretion to refuse a defendant's request that a copy of the indictment be furnished to the jury.)

A copy of the indictment may be furnished to the jury during deliberations. *See Haupt v. United States*, 330 U.S. 631, 643 (1947). When the trial judge allows the jury to use the indictment during deliberations, the trial judge should instruct the jury that it is not evidence of guilt and should not be treated as such. However, limiting instructions are not essential in every instance. *See United States v. Utz*, 886 F.2d 1148, 1151-52 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *United States v. Steed*, 465 F.2d 1310, 1316 (9th Cir. 1972), *cert. denied*, 409 U.S. 1078 (1972).

The court should exercise caution in providing the indictment to the jury.

B. Tailoring the Indictment

So long as the court does not add anything or broaden the scope of the indictment, it may withdraw from the jury's consideration surplusage in the indictment. *See Ford v. United States*, 273 U.S. 593, 602 (1927) (holding that the striking of surplusage is not an unconstitutional amendment of an indictment); *United States v. Wells*, 127 F.3d 739, 743 (9th Cir. 1997); Fed. R. Crim. P. 7(d) (stating that a court may strike surplusage on the defendant's motion).

Surplusage includes aliases not relevant to identify the defendant. *See United States v. Reynolds*, 710 F.2d 535, 545 (9th

Cir. 1983).

If the court decides to send the indictment to the jury, the court may wish to delete from the jury's copy of the indictment references to various counts and defendants not before the jury. *United States v. Utz*, 886 F.2d 1148, 1149 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *United States v. Wellington*, 754 F.2d 1457, 1461-63 (9th Cir.) (use of retyped indictment upheld), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Cirami*, 510 F.2d 69, 74 (2d Cir.) (retyped "clean" copy of indictment is preferable), *cert. denied*, 421 U.S. 964 (1975).

Practical Suggestion

Redacting Indictment for Jury's Use

The counts pertaining to the accused on trial could be renumbered in order to have sequential counts and verdicts. Note however, that coordinating the verdicts to the counts of the original indictment could prove complicated if several redacted indictments are created for multiple trials.

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Chapter Five: Jury Deliberations

Description:

This section contains materials dealing with jury deliberations.

Topics:

5.1 Jury Questions During Deliberation

A. General Procedure for Considering Jury Questions

The instructions to the jury should require that any questions they have be submitted to the court in writing. *See* 9TH CIR. CRIM. JURY INSTR. 7.5 (1997). When a question is received, it should be numbered, noted with the time, and filed or marked as a court's exhibit. It should then be delivered promptly to the trial judge who should assemble the attorneys for the respective parties, either in person or by telephone. A defendant has a Sixth Amendment right to be represented by an attorney at a conference with the judge concerning a jury's question. *United States v. Barragan-Devis,* 133 F.3d 1287 (9th Cir. 1998). The question should be read on the record if appropriate and comments elicited from the attorneys regarding an appropriate response. The court should instruct the jury to continue its deliberations after sending a question to the court because it may take a period of time for the court to respond to the question. *See* 9TH CIR. CRIM. JURY INSTR. 7.5 (1997).

A request for a dictionary or a treatise on the issue before the jury should be refused.

B. Criminal Jury Trials

In resolving issues that arise during deliberations in a criminal case, the defendant has the right to be present unless the subject matter concerns solely matters of law. *See also* § 1.6, *infra*.

Should the jury question the court regarding the consequences of a guilty verdict, it is suggested that the court give 9TH CIR. CRIM. JURY INSTR. 7.3 (Jury Consideration of Punishment).

C. Civil Jury Trials

In resolving issues that may arise in a civil case, the trial court should discuss any jury questions with counsel on the record.

D. Responses to Questions from the Jury about Jury Instructions

The court may instruct the jury to reread the instruction in question. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 446 U.S. 923 (1980).

The court need only repeat the instruction that the jury is confused about and may reject a party's request to repeat other instructions in conjunction with the jury's request. *United States v. Bay*, 820 F.2d 1511, 1514-15 (9th Cir. 1987).

When considering an additional instruction, the court should be cautious to ensure that any additional instruction is not coercive or prejudicial to either party. *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir. 1988); *United States v. Tham*, 665 F.2d 855, 858 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982); *United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976).

If the question from the jury violates the court's instructions to the jury, such as one which advises the court how the jury stands on a given issue, either numerically or otherwise, then the judge should refuse the question and send it back with the reassertion of the relevant instruction. Counsel should normally be advised of the reason for refusing the note.

E. Supplemental Jury Instructions

When a jury's question indicates confusion about the original jury instructions, it may be necessary to supplement the original instructions with additional instructions that will help clarify the apparent confusion in the mind of the jury. It may be error to merely refer the jury to the original instructions.

"[I]f a supplemental jury instruction given in response to a jury's question introduces a new theory to the case, the parties should be given an opportunity to argue the new theory . . . to prevent unfair prejudice." *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir.), *cert. denied*, 115 S. Ct. 431 (1994). *See also United States*

v. Hannah, 97 F.3d 1267 (9th Cir. 1996) (no prejudice shown from giving of supplemental instructions where court afforded counsel additional closing argument), *cert. denied*, 117 S. Ct. 1007 (1997); *United States v. Warren*, 984 F.2d 325, 329-30 (9th Cir. 1993); *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir. 1988) (where the court gives supplemental instructions but allows no additional time for argument to address the theory, unfair prejudice may result).

F. Requests for Readbacks of Testimony

1. *In General*

Whether or not to have portions of testimony read to a jury is within the discretion of the court. *United States v. Binder*, 769 F.2d 595, 600 (9th Cir. 1985). *See also Jury Requests to Have Transcripts of Testimony Read Back or Furnished*, BENCH COMMENT, (Fed. Jud. Center, Washington D.C.), August 1991.

Although the court has broad discretion to grant or deny a jury's request for a readback, "a jury request for a readback should balance the jury's need to review the evidence before reaching their verdict against the difficulty involved in locating the testimony to be read back, the possibility of undue emphasis on a particular portion of testimony read out of context, and the possibility of undue delay in the trial." *United States v. Criollo*, 962 F.2d 241, 243 (2d Cir. 1992).

The defendant has the right to be present during the replaying or reading back of testimony. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (harmless error on facts presented), *cert. denied*, 118 S. Ct. 1178 (1998). *See also La Crosse v. Kernan*, 211 F.3d 468, 474 (9th Cir. 2000) (“A criminal defendant has a constitutional right to be present during the readback of testimony to a jury” and “must personally waive his right to be present at the readback.” (citations omitted)).

2. *Blanket Refusal to Provide Readback Disapproved*

"[T]he district court erred in announcing before jury deliberations began a prohibition against readbacks of testimony." *Criollo*, 962 F.2d at 244. *See also United States v. Damsky*, 740 F.2d 134, 138 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984) (trial court's urging jury to "exhaust [their] collective memories" before requesting a readback, in order to discourage readbacks, "does not seem to be a particularly wise policy").

"It is error . . . for the court to deny the jury's request [for a readback] without consulting counsel for their views before exercising such discretion." However, absent a showing of prejudice, the error is harmless. *United States v. Birges*, 723 F.2d 666, 671 (9th Cir.), *cert. denied*, 469 U.S. 863 (1984).

The Ninth Circuit has found no error, absent a showing of prejudice, in the trial judge's cautioning the jury not to abuse the readback privilege. *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995) ("[T]he trial judge's statement, 'I want you to use [the readback privilege] if you need it but please don't utilize the reporter frivolously,' did not violate Turner's constitutional rights.").

3. *Cautionary Instruction Regarding Readbacks*

Furnishing prior testimony may place undue emphasis on that testimony. This is particularly true when the testimony repeated to the jury directly contradicts the defendant's testimony or that of other defense witnesses. *United States v. Sacco*, 869 F.2d 499, 501-02 (9th Cir. 1989). *See also United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989) (no error in having testimony read back where "trial court cautioned the jury about the danger of concentrating on the testimony of only one witness and instructed the jurors to reach their decision on the basis of all of the evidence."), *cert. denied sub nom.*, 498 U.S. 845 (1990).

Jurors should be told to give full consideration to the entirety of the testimony when a specific witness' testimony is read back in part or in full. *United States v. Sandoval*, 990 F.2d 481, 486 (9th Cir.), *cert. denied*, 510 U.S. 878 (1993).

Practical Suggestion

Evaluating Requests for Readbacks

Readback requests should be considered individually, in light of concerns for undue emphasis as well as for the delay and difficulty involved in conducting the readback. Although the court has broad discretion responding to a readback request, the court should first consult with counsel, and then place the reasons for such grant or denial on the record. The court should also be careful not to intimidate or chill the jury in its making of readback requests.

4. *Transcript of Testimony Furnished to Jury*

The trial court should probably never send a transcript of testimony into the jury room. If it decides to do so, great caution should be exercised. "To avoid the possibility of this undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the Court, with the defendant and attorneys present." *United States v. Hernandez*, 27 F.3d 1403, 1408 (9th Cir. 1994) (reversible error to send transcript of witness to jury), *cert. denied*, 513 U.S. 1171 (1995).

G. Transcript Constituting Exhibit at Trial

It is "not a preferred procedure to send translated transcripts in to the jury room when they have not been read to or by the jury in open court." *United States v. Franco*, 136 F.3d 622 (9th Cir. 1998) (not reversible error, however, where defendants stipulated to authenticity and did not object to transcripts being sent to jury). *But see United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996).

5.2 Communications with a Deliberating Jury

A. In General

The interchange between judge and jury should be surrounded by formalities so that the defendant has adequate opportunity to evaluate the propriety of a proposed response or instruction and to form objections or suggest a different response. *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979).

B. Ex Parte Communications

The court should refrain from ever having ex parte communication with any member of the jury outside the presence of counsel. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (ex parte communication between the trial judge and the presiding juror held improper).

See § 5.1.

C. Investigation of Alleged Jury Misconduct

The trial judge may examine each juror concerning the circumstances of alleged misconduct. This should be done on the record and in the presence of counsel and the defendant. Counsel should be permitted to ask questions, albeit through the court, and given an opportunity to be heard (outside of the juror's presence).

In examining the jurors individually, the trial judge should bear in mind that repeated questioning could itself be prejudicial in causing jurors to become curious about the subject matter of the inquiry.

Jurors should be admonished not to discuss the content of the inquiry with the other jurors.

Silverthorne v. United States, 400 F.2d 627, 640-41 (9th Cir. 1968). *See also Smith v. Phillips*, 455 U.S. 209, 216-17 (1982).

D. Extrinsic Evidence During Deliberations

In analyzing the jury's exposure to evidence not presented in open court, "a new trial is warranted only 'if there existed a reasonable possibility that the extrinsic material could have affected the verdict.'" *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998) (quoting *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987)). In considering juror misconduct during deliberations, appellate courts look to "five separate factors to determine the probability of prejudice: '(1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.'" *Plunk*, 153 F.3d at 1024-25.

See §§ 3.13.C and 6.3.

E. Ex Parte Contacts

Ninth Circuit precedents "distinguish between introduction of 'extraneous evidence' to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case." *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir.), *petition for cert. filed*, U.S. July 14, 2000 (No. 00-90). "'Where ex parte contacts are involved, the defendant will receive a new trial only if the court finds 'actual prejudice to the defendant.'" *Id*. at 906 (quoting *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991)).

F. Jury Tampering

"In a criminal case, any . . . tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . ."

Remmer v. United States, 347 U.S. 227, 229 (1954). *See also United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999) (co-defendant's tampering with jury required reversal of defendant's convictions unless government could show there was no reasonable possibility that tampering affected jury's decision as to defendant).

5.3 Using Less than Twelve Jurors and Seating Alternate Jurors (Criminal)

A. Jury of Less than Twelve

The parties may stipulate in writing, subject to the court's approval, that the jury may consist of any number less than twelve should the court find it necessary to excuse one or more jurors for just cause after trial commences and also during deliberations. Fed. R. Crim. P. 23(b).

See § 3.12 regarding excusing jurors prior to deliberation.

B. Jury of More than Twelve Prohibited

Even with the parties' consent, a court may not create a jury of more than twelve. Fed. R. Crim. P. 23(b) states that juries "shall be of 12" persons, and permits waivers of this requirement only for juries of less than twelve. *United States v. Ullah*, 976 F.2d 509, 512 (9th Cir. 1992).

C. Just Cause to Excuse Juror–Rule 23(b)

Rule 23(b) of the Federal Rules of Criminal Procedure provides that the parties may stipulate to the case being tried to a jury of less than twelve and, even absent stipulation, the court may excuse a juror for "just cause" if the court concludes that a valid verdict may be returned by the remaining eleven jurors.

The court must have an adequate basis for its finding of just cause to excuse a juror. Just cause may be found when the length of a juror's absence is not known (such as with an illness), or when the trial is lengthy and complex and the time the juror would be out would be so long that the members of the jury would suffer dulled memories as a result of the delay. *See United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991) (in a trial that lasted only two and one half days, the trial court's decision to excuse a juror who could not attend one day for lack of transportation was reversible error). *See also United States v. Stratton*, 779 F.2d 820, 834 (2d Cir. 1985)

(no abuse of discretion where court excused juror who had previously notified the court of upcoming religious holiday, and jury would have been forced to wait four and one half days for her to return), *cert. denied*, 476 U.S. 1162 (1986).

See also What Constitutes "Just Cause" to Dismiss a Juror in a Criminal Trial After Deliberations Have Begun, BENCH COMMENT (Fed. Jud. Center, Washington D.C.), October 1991.

1. *Excusing Deliberating Juror Where Reason is Based on Juror's View of Case*

"[I]f the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (emphasis in original). *See also United States v. Beard*, 161 F.3d 1190 (9th Cir. 1998).

2. *Necessity for Evidentiary Hearing*

"An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993). *See also United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir.1999) (on facts presented, district court did not err in refusing to conduct evidentiary hearing regarding whether a juror should have been excused).

D. Grounds for Excusing a Deliberating Juror

Appellate courts have upheld the dismissal and replacement of jurors whose physical or mental condition prevented them from effectively participating in deliberations. *Perez v. Marshall*, 946 F. Supp. 1521 (S.D. Cal. 1996), *denial of habeas corpus aff'd.*, 121

F.3d 716 (9th Cir. 1997) (on facts presented, not error for state trial judge to dismiss juror based on juror's emotional incapacity to deliberate where alternate recalled to join jury).

E. Substituting Alternate Jurors During Deliberations

The court has discretion to excuse a juror for cause during deliberations pursuant to Rule 23(b). *United States v. Egbuniwe*, 969 F.2d 757, 760 (9th Cir. 1992). However, once the jury begins deliberations, the court should not substitute an alternate for a regular member who has been discharged without an express waiver of Rule 24(c) by the defendant. *See Beard v. United States*, Nos. 97-10353, 97-10410, 1998 WL 806435 (9th Cir. Nov. 23, 1998).

The substitution of a juror during deliberations implicates two rules: Rule 23(b), which allows a court, in its discretion, to proceed with eleven jurors after excusing one for just cause; and Rule 24(c), which requires the trial court to discharge all alternates who have not been selected as jurors by the time deliberation begins. *United States v. McFarland*, 34 F.3d 1508 (9th Cir. 1994), *cert. denied*, 515 U.S. 1107 (1995). Despite the mandatory language of existing Rule 24(c), the court may substitute an alternate juror after deliberations have begun with the express consent of the defendant. *United States v. Foster*, 711 F.2d 871 (9th Cir.) (written stipulation approved), *cert. denied*, 465 U.S. 1103 (1983). Where the propriety of substituting an alternate is not raised in the trial court, the substitution will be reviewed for plain error. *United States v. Olano*, 507 U.S. 725 (1993). The defendant will bear the burden to show that the error was prejudicial, i.e., that it affected the outcome of the proceedings. *See United States v. McFarland*, 34 F.3d 1508, 1514 (9th Cir. 1994).

Note: A proposed amendment to Fed. R. Crim. P. 24(c), which would eliminate the mandatory requirement that alternates be discharged and would expressly allow alternates to be retained, was approved by the Judicial Conference Standing Committee on Rules of Practice and Procedure in June 1998 and was approved by the Judicial Conference of the United States in September 1998. The

amendment has been transmitted to the United States Supreme Court for approval and if approved will become effective December 1, 1999.

F. Presence of Alternates During Deliberations Prohibited

The court should not permit alternates to be present in the jury room during deliberations. *United States v. Olano*, 507 U.S. 725, 736 (1993).

G. Preserving Availability of Alternate Jurors

In the event the court decides to retain the alternate jurors, the court should not discharge the alternates, but should instruct the alternates not to discuss the case with any other person unless and until recalled to replace a regular juror during deliberations. If an alternate juror is substituted with the consent of the parties, the jury must be instructed to begin the deliberations anew so that the alternate will have the benefit of the entire deliberations process. *United States v. McFarland*, 34 F.3d 1508, 1514 (9th Cir. 1994).

5.4 "*Allen*" Charge

A. In General

"An *Allen* charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty." *Rodriguez v. Marshall*, 34 F.3d 739, 750 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2304 (1998).

In *Allen v. United States*, 164 U.S. 492, 502 (1896), the United States Supreme Court upheld a supplemental instruction given to a deadlocked jury that urged jurors to reconsider their opinions and try again to reach a verdict. All circuit courts of appeal have since upheld some form of supplemental jury charge. *Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1 (1988). The circuits differ, however, in their approval of the form and timing of supplemental instructions. *United States v. Wills*, 88 F.3d 704, 716 n.6 (9th Cir.) (reviewing circuit case law on *Allen* instruction), *cert. denied*, 117 S. Ct. 499 (1996).

In the Ninth Circuit, the *Allen* charge is upheld unless it is clear from the record that the charge had an impermissible coercive effect on the jury. *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992). *See also United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997). The charge "will be upheld only if in a form not more coercive than that approved in *Allen*." *United States v. Mason*, 658 F.2d 1263, 1266 (9th Cir. 1981). The same instruction is recommended in both civil and criminal trials. *See* NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS– CRIMINAL INSTR. 7.6 Deadlocked Jury (1997); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL INSTR. 4.7 Deadlocked Jury (1997).

The *Allen* instruction is usually given after the jury announces it is deadlocked. It may be given as part of an original charge, however. *Wills*, 88 F.3d at 716. It is not considered as coercive if given as a part of the initial instructions to the jury rather than after the jury reaches impasse. *United States v. Armstrong*, 654 F.2d 1328, 1334 (1981), *cert. denied*, 454 U.S. 1157 (1982). If it is given as a part of the original charge and the jury declares itself deadlocked, the court may remind the jury of the charge without

committing error. *Id.* This is because there is only one impasse to which the charge is directed. *United States v. Nickell*, 883 F.2d 824, 829 (9th Cir. 1989). However, only in the unusual situation is it permissible to give the jury a second *Allen* charge after a second jury deadlock. *Id.*

B. Content of *Allen* Charge

See NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL § 7.6 Deadlocked Jury (1997); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL § 4.7 Deadlocked Jury (1997).

It is important that any instruction caution the jurors not to abandon their conscientiously held views. *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995). While it is helpful to incorporate an instruction on the burden of proof, its absence does not necessarily require reversal. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1350 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 135 (1996); *United States v. Cuozzo*, 962 F.2d 945, 952 (9th Cir.), *cert. denied*, 506 U.S. 978 (1992).

Any *Allen* charge given should not refer to the possibility of a retrial. *United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir.) ("The district court should not have mentioned the possibility of retrial."), *cert. denied*, 118 S. Ct. 227 (1997).

In addition to the Ninth Circuit model instructions, the Ninth Circuit has approved the § 18.14 instruction for criminal trials from 1 DEVITT & BLACKMAR, FEDERAL PRACTICE AND INSTRUCTIONS, (3rd ed. 1977). *United States v. Armstrong*, 654 F.2d 1328, 1334 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). That section received minor editing changes and appears as § 20.08 in 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (4th ed. 1992).

C. Coercive Factors

Four factors are examined in determining the coerciveness of an

Allen instruction: "(1) The form of the instruction; (2) the period of deliberation following the *Allen* charge; (3) the total time of jury deliberation; and (4) the indicia of coerciveness or pressure upon the jury." *United States v. Wills*, 88 F.3d at 717, *quoting United States v. Foster*, 711 F.2d 871, 874 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

D. Period of Deliberation Following the *Allen* Charge

"A jury verdict reached immediately after an *Allen* charge can be an indication of coercion." *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985). Relatively short periods of deliberation after an *Allen* charge do not raise suspicions of coercion if the jury is deciding simple issues. *United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir.) (40 minutes of additional deliberations), *cert. denied*, 118 S. Ct. 227 (1997); *United States v. Bonam*, 772 F.2d at 1451 (one and one half hours additional deliberations). Neither do longer periods of deliberation after the supplemental instruction necessarily raise suspicions of coercion. *United States v. Wills*, 88 F.3d at 718 (four days of additional deliberations); *United States v. Easter*, 66 F.3d 1018, 1023 (9th Cir. 1995) (two and one half hours additional deliberation), *cert. denied*, 516 U.S. 1150 (1996); *United States v. Lorenzo*, 43 F.3d at 1307 n.3 (five and one half hours additional deliberations).

E. Total Time of Jury Deliberations

One factor which will be considered by an appellate court reviewing the giving of an *Allen* charge is the total amount of time the jury deliberated, including deliberation time after being given the charge. *United States v. Cuozzo*, 962 F.2d 945 (9th Cir. 1992) (the total hours of deliberation were not disproportionate in view of the fact that the trial had lasted eleven days, that the jury had deliberated two days before giving the *Allen* charge and then deliberated another six hours, all of which indicated the jury was working carefully without the appearance of coercion), *cert. denied*, 506 U.S. 978 (1992).

F. Indicia of Coercion

1. *Expense of Trial/Retrial Required*

Reference to the cost of the trial or that the case may need to be retried has no place before the jury. *United States v. Hernandez*, 105 F.3d 1330 (9th Cir.), *cert. denied*, 118 S. Ct. 227 (1997); *United States v. Bonam* 772 F.2d 1449, 1450 (9th Cir. 1985).

2. *Division of Jurors*

There is no indication of coercion surrounding an *Allen* instruction when a judge does not know the numerical division of the jury, which way the jury is leaning, or which way any particular juror is inclined to vote. *United States v. Easter*, 66 F.3d at 1023. The judge should avoid learning the split or the identity of the holdout jurors. *Ajiboye*, 961 F.2d at 894.

The court should be aware that if it learns of the numerical split of the jury, even inadvertently, extreme caution should be exercised before giving an *Allen* instruction. *Ajiboye*, 961 F. 2d at 893-94. If the court learns of the identity of the hold out jurors, an *Allen* charge should not be given. *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

3. *Repeating Allen Instruction*

A court should use extreme caution in repeating an *Allen* instruction as it may be considered coercive. *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977). It is only in an unusual situation when the second reading of an *Allen* instruction may be considered not overly coercive. *United States v. Nickell*, 883 F.2d 824, 828-29 (9th Cir. 1989).

G. De Facto *Allen* Charge

Communications with a deliberating juror by court staff may constitute a de facto *Allen* charge. *See Weaver v. Thompson*, 197

F.3d 359, 366-67 (9th Cir. 1999) (bailiff's communication to deliberating jury that jury had to reach a verdict on all counts constituted an impermissible de facto *Allen* charge).

5.5 Procedures Before Declaring the Jury Deadlocked

A. In General

In either a civil or criminal trial, if the jury is unable to agree upon a verdict, the court may either discharge the jury or return the jury to the jury room for further deliberations. Prior to discharging the jury, the trial judge must determine whether there is a probability that a jury can reach the verdict within a reasonable time. Upon receiving a communication from the jury stating that it cannot agree, the trial court is required to question the jury to determine independently whether further deliberations might overcome the deadlock. *United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). Questioning the foreman individually and the jury either individually or as a group is satisfactory. *See id*. Merely questioning the jury foreman may not be sufficient. *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978).

The courts have considered a number of factors in determining whether there has been an abuse of discretion in declaring a deadlocked jury. These include: "(1) the timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which a judge has had with the jury, and (7) the effect of possible exhaustion in the impact which coercion of further deliberations might have on the verdict." *Arnold*, 566 F.2d at 1387. Of these factors, the most critical factor is the jury's own statement that it was unable to reach a verdict. *Id.*

After receiving the responses and considering the foregoing factors, if it appears the jury is hopelessly deadlocked, and the jury should therefore be discharged, the court should provide an opportunity for the parties to comment on the propriety of an order of mistrial, including whether each party consents or objects or is able to suggest alternatives. This should occur before the jury is discharged. This is required in a criminal trial by Fed. R. Crim. P. 26.3 (West, 1997). If a criminal defendant's counsel will not move

for a mistrial, the court must make findings indicating the manifest necessity for discharging the jury, to forestall double jeopardy claims. *United States v. Sammaripa*, 55 F.3d 433, 434 (9th Cir. 1995).

Practical Suggestion

Procedure for Determining if Jury is Deadlocked

You may ask the foreperson of the jury the following:

"In your opinion, is the jury hopelessly dead-locked?" If the foreperson's response is, "Yes," then ask the foreperson, "Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?" If the foreperson's response is, "No," then ask the following question of the entire panel, "Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?" You may wish to poll the jury and record their answers which shall be yes or no. *United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974) ("The 'crucial factor' . . . is a statement from the jury that it is 'hopelessly deadlock ed'."), *cert. denied*, 420 U.S. 992 (1975).

B. Numerical Division Inquiry

The court should not inquire as to the numerical division as this constitutes reversible error. *Brasfield v. United States*, 272 U.S. 448, 449 (1926); *Jimenez v. Myers*, 40 F.3d 976, 980 n.3 (9th Cir. 1993), *cert. denied*, 516 U.S. 813 (1995).

C. Disclosure of Numerical Split by Jury

The mere fact that jurors volunteer the numerical division of the jury does not compel mistrial or reversal. *United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992). When the trial court is inadvertently notified by the jury of the numerical split, the trial court may inform the jury: (1) Not to disclose the numerical vote again; (2) to continue deliberations; and, (3) that no juror is to surrender conscientiously held beliefs. *United States v. Changco*, 1 F.3d 837, 842 (9th Cir.), *cert. denied*, 510 U.S. 1019 (1993).

5.6 Verdicts

A. Coerced Verdict

Coerced verdicts require a new trial. *Rinehart v. Wedge*, 943 F.2d 1158, 1160 (9th Cir. 1991) (Where jury returned a general verdict inconsistent with its factual findings and the district court recalculated the general verdict and polled the jury to ratify the recalculated verdict, the district court had intruded on the jury's deliberative process and had coerced the verdict.).

B. Written Verdict Controls

When a written verdict and the court's oral reading of that verdict contradict each other, the written verdict controls. This is true even if the jurors failed to correct the trial court's misreading of the verdict. It would be unreasonable to expect the jurors to correct the judge, and it would be unreasonable to conclude by their failure to do so that they have assented to the misread verdict. *United States v. Boone*, 951 F.2d 1526, 1532-33 (9th Cir. 1991).

C. Partial Verdicts

In a case involving multiple defendants and/or multiple counts, a jury may return verdicts on one or more counts and deadlock on others. *See* Fed. R. Crim. P. 31(b); Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 513 (2d ed. 1987). It is within the trial court's sound discretion to question a potentially deadlocked jury as to whether it can reach a partial verdict. *United States v. Armstrong*, 654 F.2d 1328, 1333 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); *United States v. Kanahele*, 951 F. Supp. 945, 947 (D. Haw. 1997). "[J]uries should neither be encouraged nor discouraged to return a partial verdict but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or defendants." *United States v. DiLapi*, 651 F.2d 140, 147 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

An agreement among jurors becomes a final verdict only after it has been returned in open court and recorded. *Kanahele*, 951 F. Supp. at 946 (citing *Rice v. Wood*, 44 F.3d 1396, 1402 (9th Cir. 1995). "The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one." *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) (citing *United States v. Nelson*, 692 F.2d 83, 85 (9th Cir. 1982) (continued deliberations can change jurors' views on previously considered counts)).

D. Special Verdicts

1. *In General*

Special verdicts are frequently useful in complex jury trials. This procedure may help assure that the jury focuses on the proper issues, reduce the length and complexity of instruction, and minimize the need for, or scope of retrial in the event an error is committed.

2. *Civil*

Rule 49(a), Fed. R. Civ. P., provides the court with authority to request a special verdict. On its face, Rule 49(a) grants wide discretion on the use of special verdicts to the trial courts. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1374 (9th Cir. 1987). The cases, however, give little guidance as to how the court should exercise its discretion in using or not using Rule 49. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2505 (2d ed. 1994).

The form of the verdict should be decided before closing argument so that counsel may structure their arguments and the court its instructions accordingly. *Landes*, 833 F.2d at 1365. Special verdicts should be drafted in a way that aids the jury in understanding and deciding the issues and minimizes the risk of inconsistent findings. The issues should be arranged and presented on the form in a logical and understandable manner. For example,

questions common to several causes of action or defenses should be asked only once, and related questions should be grouped together. MANUAL FOR COMPLEX LITIGATION § 21.633 (Fed. Jud. Center, 3rd ed. 1995). *See also* Fed. Rules Dig. 3rd ed. at 574-602.

3. *Criminal*

"Although there is no per se prohibition '[a]s a rule, special verdicts in criminal trials are not favored.'" *United States v. Reed*, 147 F.3d 1178 (9th Cir. 1998) (quoting *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976)). "Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances." *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) (citing numerous cases in which special verdicts have been upheld).

NOTES

NOTES

Chapter Six: Post-Verdict Considerations

Description:

This section contains material dealing with post-trial matters.

Topics:

6.1 Post-Verdict Interview of Jurors

A. Court Interviews

Many judges conduct post-trial interviews of jurors in both civil and criminal cases.

Depending on the circumstances of the case and/or the personal preference of the judge, conferences between the court and the jurors can be a valuable resource both in expanding the judiciary's understanding of juror attitudes and needs and in addressing juror concerns. While entirely permissible, and often-times productive, these conferences must be governed by certain cautionary guidelines.

Communications between the court and jurors must await the rendering of a verdict and/or dismissal of the jury panel for that particular case. While judges may, and should, express appreciation to the jurors for their services, no expression of approval or disapproval concerning the verdict is appropriate. While generic discussions of jury duty are both allowable and encouraged, there can be no discussion regarding the merits of the case, facts, or evidence on which the jury deliberated. Conferences should, in general, be viewed by the court as an opportunity for jurors to express their concerns and offer their suggestions in the area of jury care and comfort.

B. Attorney Interviews

Attorneys frequently request post-trial interviews to learn how the jurors reacted to their presentation during trial and to explore whether the verdict is vulnerable to legal challenge. Interviews of jurors by the attorneys, or their clients or agents, are discouraged in the Ninth Circuit. *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980); *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972). Such interviews have only limited value to the attorneys because a verdict may not be impeached on the basis of the jury's deliberations or the manner in which it arrived at its verdict. Federal Rule of Evidence 606(b) prohibits a juror's subsequent testimony as to matters

occurring during deliberations except that
a juror may testify as to extraneous prejudicial information or outside influence improperly brought to bear upon any juror. The Ninth Circuit has held that it is improper and unethical to interview jurors to discover what was the course of deliberations. *Northern Pac. Ry. v. Mely,* 219 F.2d 199, 202 (9th Cir. 1954).

C. Interviews by the Media

The court should avoid direct restraints on the media. *See* Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" issue, approved September 25, 1980; 87 F.R.D. 519. News gathering is an activity protected by the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665 (1972). There is a heavy presumption against the constitutional validity of any restraint on the media. *United States v. Sherman,* 581 F.2d 1358 (9th Cir. 1978).

Practical Suggestion

Discharge of Jury

It has been helpful to inform the jury on their discharge as follows:

Ladies and gentlemen:

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Many times jurors ask if they are now at liberty to discuss the case with anyone. Now that the case is over, you are of course free to discuss it with any person you choose. By the same token, however, I would advise you that you are under *no obligation whatsoever* to discuss this case with any person. If you *do* decide to discuss the case

with anyone, I would suggest you treat it with a degree of solemnity in that whatever you do decide to say, you would be willing to say in the presence of the other jurors or under oath here in open court in the presence of all the parties. Also, always bear in mind if you do decide to discuss this case, that the other jurors fully and freely stated their opinions with the understanding they were being expressed in confi dence. Pleas e respect the privacy of the views of the other jurors.

6.2 Use of Juror Exit Questionnaire

Many courts have used exit questionnaires which are completed at the end of a person's term of jury service. Depending on the use of the results, some are completed only by sworn jurors, and others by all persons reporting, whether or not selected. One type determines basic juror attitudes and juror use information, such as loss of income and use of the person's time. This questionnaire has no open-ended questions making analysis very rapid.

A second variety of questionnaire is comprised almost totally of open-ended questions which gives jurors more latitude to describe their personal views regarding their jury duty experience.

A third type of questionnaire rates the judge, court staff, and the attorney's conduct during the trial. This has been an invaluable educational device for some judges, not only as to their own performance, but that of their staff. It also is helpful to attorneys. When used, the best result can be obtained if the attorneys are told of its proposed use prior to the trial, or at least during the course of it, and that the replies will be shown only to that attorney relative to his own performance. Again, caution should be used to ensure that this practice does not lead to a proliferation of post-trial motions.

6.3 Post-Verdict Evidentiary Hearing Regarding Extrinsic Evidence

When extrinsic evidence is presented to a jury, the defendant is entitled to a new trial if there is a reasonable possibility that the extrinsic material could have affected the verdict. An evidentiary hearing is necessary to determine what effect the extrinsic evidence had on the jurors. *United States v. Navarro-Garcia*, 926 F.2d 818, 821-23 (9th Cir. 1991).

Fed. R. Evid. 606(b) governs the scope of a juror's testimony upon an inquiry into the validity of a verdict or indictment. "Rule 606(b) of the Federal Rules of Evidence prohibits a juror from testifying about the jury deliberations or how the jurors reached their conclusions unless 'extraneous prejudicial information was improperly brought to the jury's attention.'" *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir.) (error for district court to grant new trial based on juror's statements to the press regarding impact of evidence), *cert. denied*, 120 S. Ct. 582 (1999).

A juror may testify on any mental bias in matters unrelated to specific issues that the juror was called on to decide and whether extraneous prejudicial information was improperly brought to the juror's attention. *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983).

Substance abuse does not constitute improper outside influence about which jurors may testify under Fed. R. Evid. 606(b) (precluding juror testimony to impeach a verdict except on the question of whether extraneous prejudicial information was improperly brought to the attention of the jury). *Tanner v. United States*, 483 U.S. 107, 122 (1987).

See also §§ 3.13.C and 5.2.C.

NOTES

NOTES

APPENDICES

The appendix materials are referenced in the text of this manual as shown below.

APPENDIX 1. PRETRIAL ORDER GOVERNING PROCEEDINGS AT TRIAL (CRIMINAL), Section 1.8

APPENDIX 2. PRETRIAL ORDER GOVERNING PROCEEDINGS AT TRIAL (CIVIL), Section 1.9

APPENDIX 3. TRIAL CHECKLIST (CRIMINAL), Section 2.1

APPENDIX 4. TRIAL CHECKLIST (CIVIL), Section 2.2

APPENDIX 5. JURY SELECTION–SAMPLE VOIR DIRE SCRIPT–(CRIMINAL), Section 2.3

APPENDIX 6. JURY SELECTION SAMPLE VOIR DIRE SCRIPT–(CIVIL), Section 2.4

APPENDIX 7. FINAL INSTRUCTIONS BEFORE JURY DELIBERATIONS–SAMPLE SCRIPT (CRIMINAL), Section 4.3

APPENDIX 1: PRETRIAL ORDER GOVERNING PROCEEDINGS AT TRIAL (CRIMINAL)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

	)	
	)	
Plaintiff(s)	)	
	)	CASE NO. CR
vs.	)	ORDER RE:
	)	CRIMINAL TRIAL
	)	PREPARATION
Defendant(s)	)	
_____	)	

The above mentioned cause of action is set for trial before the Honorable Stephen V. Wilson.

1. Arrive at the Courtroom not later than 8:45 a.m. on the first day of trial.

2. Counsel for the Government shall present my Courtroom Deputy Clerk with the following documents:

a) **THREE copies** of the Government's witness list.

b) **THREE copies** of the Government's exhibit list in the form specified in Local Rule 9.9 (Civil).

c) **ALL** of the Government's exhibits, with official exhibit tags attached, bearing the same number shown on the exhibit list, must be delivered to the Clerk not later than 8:45 a.m. on the first day of trial. (Defendant's counsel do not have to deliver their exhibits to the Clerk on the first day of trial; however, Defendant's counsel is responsible for affixing exhibit tags to their exhibits which they intend to use in the Defendant's case.) Exhibits shall be numbered 1, 2, 3, 4, etc., **NOT 1.1,** 1.50, etc. If a blow up is an enlargement of an existing exhibit, it shall be designated with the number of the original exhibit followed by an "A" design. Counsel for the Government should be aware that the Court will order that exhibits such as firearms, narcotics, etc., remain in the custody of the agents during the pendency of the trial. It shall be

the responsibility of the agents to produce said items for court, secure them at night and guard them at all times while in the courtroom. Exhibit tags can be obtained from the receptionist in the main clerk's office, Room G-8.

d) If counsel need additional equipment, such as a shadow box, overhead projector, etc., call my Courtroom Clerk no later than 4:30 p.m. two days BEFORE trial, so that the necessary arrangements may be made.

3. The Court finds it helpful to follow the testimony closely and, thus, counsel **must** have the following available:

a) A bench book containing a copy of all exhibits that can, as a practical matter be reproduced. Each exhibit shall be tabbed with the exhibit number for easy referral. (Defendant's counsel shall provide, as practical, the Court with a copy of their exhibits as introduced.)

4. Usual "trial days" are Tuesdays through Fridays, 9:00 a.m. to 5:00 p.m. Lunch recess is normally 12:00 noon to 1:30 p.m.

5. Before trial commences, the Court will give counsel an opportunity to discuss, in advance, housekeeping matters and anticipated problems of procedure or law. During the trial, if there are any housekeeping matters you wish to discuss, please **inform my Courtroom Clerk of the types of matters for discussion.**

6. **TRANSCRIPTS:** Counsel for the government shall obtain authorization from their agencies. A copy of said authorization shall be given to the court reporter when requesting transcripts.

7. **JURY INSTRUCTIONS**

Jury instructions are to be **submitted not later than the Wednesday of the week prior to trial.** Counsel need submit only proposed substantive jury instructions; the Court propounds its own **general instructions** and essentially follows the Ninth Circuit Model Jury Instructions (West 1997). In those cases where a special verdict is desired, counsel shall submit a proposed verdict form with the jury instructions.

a) **Form of Jury Instructions**

The parties must submit joint jury instructions and a joint proposed verdict form (if a special verdict). In order to produce these joint instructions, the parties shall meet and confer

sufficiently in advance of the required submission date. The instructions should be submitted in the order in which the parties wish to have the instructions read. This order should reflect a single organized sequence agreed to by all of the parties.

The joint jury instructions shall be submitted in three sets as follows: 1) those instructions which are agreed to by all parties; 2) those instructions which are propounded by the Government to which the defendant(s) object; and 3) those instructions which are propounded by the Defendant(s) to which the Government objects.

Instructions upon which agreement cannot be reached should reflect the basic disagreements among the parties as to the law.

Attribution and case citation for each instruction should be placed on pages following a proposed instruction. For disputed instructions, a party should note its objections to a proposed instructions and its reasons for putting forth its alternative of pages placed after **its own** alternative instruction.

INSTRUCTIONS SHALL BE BRIEF, CLEAR, CONCISE, WRITTEN IN PLAIN ENGLISH, FREE OF ARGUMENT, AND SHALL BE ORGANIZED IN LOGICAL FASHION AS TO AID JURY COMPREHENSION. Standard or form instructions, if used, must be revised to address the particular facts and issues of this case.

The following list contains some suggested sources for jury instructions:

1) **Ninth Circuit Model Jury Instructions** (West 1997)
2) **Federal Jury Practice and Instructions** (Devitt and Blackmar (4th ed. 1992))
3) **Modern Federal Jury Instructions** (Matthew Bender 1984)
4) **California Forms of Jury Instructions** (Matthew Bender 1985)

8. **INSTRUCTIONS TO COUNSEL GOVERNING TRIALS IN THIS COURT**

a) During trial counsel **shall not** refer to their clients by their first names.

b) Opening statements, examinations of witnesses, and

closing arguments should be made from the lectern only.

c) The Court views opening statements in a jury case as one of the most important parts of the case. Avoid discussing the law or arguing the case in opening statements.

d) Do not use objections for the purpose of making a speech, recapitulating testimony, or attempting to guide the witness. When objecting, state only that you are objecting the legal ground of the objection, e.g., hearsay, irrelevant, etc. If you wish to argue an objection further, ask for permission to do so.

e) **Speak up** when making an objection. The acoustics in most courtrooms make it difficult for all to hear an objection when it is being made. Counsel must speak audibly and clearly when questioning witnesses or arguing to the court or jury. Counsel should instruct their witnesses to speak audibly and clearly.

f) Do not approach the clerk or the witness box without specific permission. Please go back to the lectern when the purpose of the approach is finished.

g) Please rise when addressing the Court. In jury cases, please rise when the jury enters or leaves the Courtroom.

h) Address all remarks to the Court. Do not address the clerk, the reporter, or opposing counsel. If you want to say something to opposing counsel, ask permission to talk to him or her off the record. All requests for the re-reading of questions or answers, or to have an exhibit placed in front of the witness, shall be addressed to the Court.

i) The Court shall be addressed as "Your Honor" at all times, not "Judge" as in state court practice.

j) Do not make an offer of stipulation unless you have conferred with opposing counsel and have reason to believe the stipulation will be accepted. Any stipulation of fact will require the defendant's personal concurrence. A proposed stipulation should be explained to him or her in advance.

k) While Court is in session, do not leave the counsel table to confer with investigators, secretaries, or witnesses in the back of the Courtroom unless permission is granted in advance.

l) Counsel should not by facial expression, nodding, or other conduct exhibit any opinions, adverse or favorable, concerning any testimony which is being given by a witness. Counsel should admonish their own client and witnesses similarly to

avoid such conduct.

m) When a party has more than one lawyer, only one may conduct the direct or cross-examination of a given witness.

n) If a witness was on the stand at a recess or adjournment, have the witness back on the stand, ready to proceed when the Court resumes.

o) Do not run out of witnesses. If you are out of witnesses and there is more than a brief delay, the Court may deem that you have rested.

p) The Court attempts to cooperate with doctors and other professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be put on out of sequence. Anticipate any such possibility and discuss it with opposing counsel. If there is objection, confer with the Court in advance.

q) Counsel are advised to be on time as the Court starts promptly. Morning and afternoon breaks are approximately 10 minutes in length.

DATED:

_____

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX 2: PRETRIAL ORDER GOVERNING PROCEEDINGS AT TRIAL (CIVIL)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

	)	
	)	
Plaintiff(s)	)	
	)	
vs.	)	
	)	CASE NO. CV
	)	
	)	ORDER RE:
	)	CIVIL TRIAL PREPARATION
Defendant(s)	)	
	)	Pretrial Conference_____
_____	)	Court/Jury Trial_____

The above mentioned cause of action is set for trial before the Honorable Stephen V. Wilson. Counsel preparing for trial before this Court **shall** comply with this Order. Non-compliance will be subject to sanctions.

A. JURY CASES

1. JURY INSTRUCTIONS

In a jury trial, jury instructions and a verdict form are to be **submitted not later than two court days prior to the pretrial conference or one week prior to trial if pretrial conference is waived.** Counsel need submit only proposed substantive jury instructions; the Court propounds its own **general instructions** and essentially follows the Ninth Circuit Model Jury Instructions (West 1997).

a) **Form of Jury Instructions and Verdict Forms:**

The parties must submit joint jury instructions and a joint proposed verdict form. In order to produce these joint instructions, the parties shall meet and confer sufficiently in advance

of the required submission date. The instructions should be submitted in the order in which the parties wish to have the instructions read. This order should reflect a single organized sequence agreed to by all of the parties. **The Court insists upon receiving lucid and accurate instructions setting forth the elements of each party's claims and defenses.** The instructions should be tailored to the facts of each case.

b) **Procedure for Instructions Upon Which Agreement Cannot Be Reached:** Instructions shall be submitted in 3 sets with conformed courtesy copies of each set delivered to chambers.

1. The agreed upon instructions.
2. Those instructions propounded by Plaintiff, opposed by Defendant.
3. Those instructions propounded by Defendant, opposed by Plaintiff.

Instructions upon which agreement cannot be reached should reflect the basic disagreements among the parties as to the law. While the Court recognizes that such disagreements arise in almost every case, the Court also recognizes that parties ultimately disagree over only a limited number of issues. The disputed instructions should be equally so limited.

The disputed instructions should be presented to the Court within the framework of the overall set for instructions. The parties should put forth differing versions of disputed instructions, and the Court will select one version (as outlined in 1(b) above).

The instructions and verdict form submitted to the Court must be numbered, and the parties must also **submit a numbered index.** Attribution and case citation for each instruction should be placed on pages following a proposed instruction. For disputed instructions, a party should note its objections to a proposed instruction and its reasons for putting forth its alternative on pages placed after **its own** alternative instruction.

INSTRUCTIONS SHALL BE BRIEF, CLEAR, CONCISE, WRITTEN IN PLAIN ENGLISH, FREE OF ARGUMENT, AND SHALL BE ORGANIZED IN LOGICAL FASHION SO AS TO AID JURY COMPREHENSION. Standard or form instructions, if used, must be revised to address the particular facts and issues of this case.

The following list contains some suggested sources for jury instructions:

1) **Ninth Circuit Model Jury Instructions** (West 1997)
2) **Federal Jury Practice and Instructions** (Devitt and Blackmar (4th ed. 1992))
3) **Modern Federal Jury Instructions** (Matthew Bender 1984)
4) **California Forms of Jury Instructions** (Matthew Bender 1985)

B. COURT TRIALS

Counsel for plaintiff(s) and defendant(s) in non-jury trials shall submit the direct testimony of its witnesses in writing in the format of a declaration subject to the penalties of perjury. Paragraphs in each declaration shall be numbered consecutively so as to facilitate the identification of paragraphs for evidentiary objections.

Counsel are to exchange and file these declarations with the Court at least eight calendar days before trial, unless otherwise ordered by this Court. Four calendar days before trial, counsel may file a separate document stating any evidentiary objections he or she may have with each declaration.

At trial the Court will rule on the evidentiary objections, and, depending upon the rulings, the declarations will be received in evidence either in whole or in part or rejected. Counsel will then conduct the cross-examination and re-direct examination at trial. This Order does not apply to rebuttal witnesses.

Failure to comply with the literal terms of this Order will result in sanctions or the refusal of the Court to allow the testimony of that witness.

C. WAIVER OF PRETRIAL CONFERENCE

In those cases where the Court waives a pretrial conference, counsel shall submit memos of contentions of fact and conclusions of law, trial briefs, exhibit lists, witness lists etc., as required by Local Rule 9, at least one week prior to trial.

D. PROCEDURE PRIOR TO TRIAL

1. If you are intending to use any depositions for

impeachment or any purpose, arrange to have them lodged on the first day of trial if they are in your control, or request opposing counsel to do the same for depositions in his or her control. Otherwise, be prepared to lodge a copy in lieu of the original with a stipulation that the copy may be used as if it were the original.

2. Come to the Courtroom not later than 8:30 a.m. on the first day of trial and present my Courtroom Deputy Clerk with the following documents:

a) **THREE COPIES** of your previously filed **exhibit list** in the form specified in Local Rule 9.9. Then the if exhibit is objected to, add after the description of each exhibit the words "OBJECTED TO." (Photographs, charts, etc. and each document shall be listed on the exhibit list.) Blow-ups of previously marked exhibits shall receive an "A" designation following the exhibit number.

b) **THREE COPIES** of your previously filed **witness list.** It will be assumed that each listed witness will testify live unless following his or her name you state "by deposition." (See marking of deposition, item #6.)

c) In court trials, **ONE** copy of each witness' declaration.

d) **ALL** of your exhibits, with **official** exhibit tags attached, bearing the same number shown on our exhibit list, must be delivered to the Clerk not later than 8:30 a.m. on the first day of trial. Official exhibit tags are available from the receptionist in the main clerk's office, Room G-8. Exhibits shall be marked in accord of Local Rule 8.5 and 9.7. A separate number is **NOT** given to each page of a single document.

e) In civil cases, equipment such as a video tape player, tape recorder, projector, shadow box, etc., are no longer provided by the Court. You must arrange to bring your own equipment. You may bring the equipment into the courthouse, but courthouse regulations require a property pass to remove the equipment from the building. A property pass may be obtained by notifying the clerk's office at 894-3656.

3. The Court finds it helpful to follow testimony closely and thus, **counsel MUST** have the following available:

a) A bench book containing a copy of **all** exhibits that can, as a practical matter be reproduced. Each exhibit shall be

marked with a tab identifying the exhibit's number for easy reference.

b) An extra copy of each deposition that will be used in lieu of live testimony or for impeachment.

4. Counsel are advised to be on time as the Court starts promptly. Usual "trial days" are Tuesdays through Fridays, 9:00 a.m. to 5:00 p.m. Lunch recess is normally 12:00 noon to 1:30 p.m. Morning and afternoon breaks are 5 to 10 minutes in length.

5. Before trial commences, the Court will give counsel an opportunity to discuss, in advance, housekeeping matters and anticipated problems of procedure or law. During the trial, if there are any housekeeping matters you wish to discuss, please **inform my Courtroom Clerk of the types of matters for discussion.**

6. Where witnesses testify by deposition, please do the following:

a) Mark with colored pen or pencil in the original of the deposition the parts you will be offering. Plaintiff will use **blue** and Defendant will use **red.**

b) In a jury case, the marked portions of the depositions may be read to the jury. You can arrange with opposing counsel or co-counsel to have someone in the witness chair read the witness' answers. The questions will be read by yourself where you were the questioner and by the opposing counsel when he or she was the questioner.

E. INSTRUCTIONS TO COUNSEL GOVERNING TRIAL IN THIS COURT

a) During trial counsel **shall not** refer to their clients by their first names.

b) Opening statements, examination of witnesses, and closing arguments should be made from the lectern only.

c) The Court views opening statements in a jury case as one of the most important parts of the case, and counsel will be afforded ample time to make them. These statements should be well organized. Avoid discussing the law or arguing the case in opening statements.

d) Do not use objections for the purpose of making a speech, recapitulating testimony, or attempting to guide the

witness. When objecting, state only that you are objecting and the legal ground of the objection, e.g., hearsay, irrelevant, etc. If you wish to argue an objection further, ask for permission to do so.

e) **Speak up** when making an objection; the acoustics in most courtrooms make it difficult for all to hear an objection when it is being made.

f) Do not approach the clerk or the witness box without specific permission. Please go back to the lectern when the purpose of the approach is finished.

g) Please rise when addressing the Court. In a jury case, please rise when the jury enters or leaves the Courtroom.

h) Address all remarks to the Court. Do not address the clerk, the reporter, or opposing counsel. If you want to say something to opposing counsel, ask permission to talk to him or her off the record. All requests for the re-reading of questions or answers, or to have an exhibit placed in front of a witness, shall be addressed to the Court.

i) Court shall be addressed as "Your Honor" at all times, not "Judge" as in state court practice.

j) In a jury case, do not make an offer of stipulation unless you have conferred with opposing counsel and have reason to believe the stipulation will be accepted. In criminal cases, any stipulation of fact will require the defendant's personal concurrence. A proposed stipulation should be explained to him or her in advance.

k) While Court is in session, do not leave the counsel table to confer with investigators, secretaries, or witnesses in the back of the Courtroom unless permission is granted in advance.

l) Counsel should not by facial expression, nodding, or other conduct exhibit any opinions, adverse or favorable, concerning any testimony which is being given by a witness. Counsel should admonish their own clients and witnesses similarly to avoid such conduct.

m) When a party has more than one lawyer, only one may conduct the direct or cross-examination of a given witness.

n) If a witness was on the stand at a recess or adjournment, have the witness back on the stand, ready to proceed when Court resumes.

o) Do not run out of witnesses. If you are out of witnesses

and there is more than a brief delay, the Court may deem that you have rested.

p) The Court attempts to cooperate with doctors and other professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be put on out of sequence. Anticipate any such possibility and discuss it with opposing counsel. If there is objection, confer with the Court in advance.

DATED:

_____

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX 3: TRIAL CHECKLIST (CRIMINAL)

1. Review **indictment/charges**

2. Ascertain whether
   a. **witness lists**, and
   b. **exhibit lists** have been filed.

3. Confirm anticipated **length of trial** and discuss **daily schedule** during trial.

4. Discuss **procedure regarding jury selection**:
   a. Procedure for selecting jury and number of prospective jurors to be seated
   b. Strike method to be used regarding peremptory challenges (*e.g.* simultaneous strikes)
   c. Number of peremptory challenges per side
   d. Designation of alternate(s)
   e. Notice of procedure for raising *Batson* challenges.

5. **Waiver of presence** of defendant at **sidebar conferences**.

6. **Motions *in limine***

7. **Pretrial publicity** (if applicable)

8. **Questionnaire** (If a questionnaire has been submitted to the jury panel, the court should discuss responses with counsel before calling the jury panel into the courtroom.)

APPENDIX 4: TRIAL CHECKLIST (CIVIL)

1. Review **complaint** and **counterclaims**.

2. **Preliminary instructions** regarding claim(s) and defense(s). Discuss the content of any preliminary instructions concerning claim(s) and defense(s) which the court believes useful to the jury.

3. Ascertain whether
   a. **witness lists**, and
   b. **exhibit lists** have been filed

4. Discuss **thumbnail description** of **claim(s**) and **counterclaim(s)** and **defense(s)** to be provided to jury during voir dire.

5. Confirm anticipated **length of trial** and discuss **daily schedule** during trial.

6. Discuss **procedure regarding jury selection**:
   a. Procedure for selecting jury and number of prospective jurors to be seated
   b. Strike method to be used regarding peremptory challenges (*e.g.* simultaneous strikes)
   c. Number of peremptory challenges per side
   d. Notification of the Clerk if either side has any *Batson* challenges. *Batson* challenges must be raised by counsel immediately after strikes are exercised and before the jury is called into the jury box.

7. Ascertain who will be **seated at counsel table**.

8. **Motions *in limine***.

9. **Pretrial publicity** (if applicable).

10. **Questionnaire** (If a questionnaire has been submitted to the jury panel, the court should discuss responses with counsel before calling the jury panel into the courtroom.)

APPENDIX 5: JURY SELECTION–SAMPLE VOIR DIRE SCRIPT (CRIMINAL)[1]

[**Greeting**]

1. Good (morning) (afternoon), ladies and gentlemen. This is the time set for the trial of criminal cause number _____. Is the government ready? Is the defense ready?

[**Oath**]

2. Will all of the prospective jurors seated in the courtroom please stand and be sworn.

[*Clerk administers voir dire oath.*]

[*IF THE ARIZONA METHOD IS USED*, the following paragraph applies:]

[**Names of Prospective Jurors Called**]

3. Ladies and gentlemen, we are now going to begin the jury selection process in this case. The clerk will call the names of ___ prospective jurors. As your name is called, please come forward and take your seat in the jury box as the bailiff directs.

NOTE: Usually 28 prospective jurors are seated if no alternates will be utilized. Twenty-eight prospective jurors are

[1]This script for voir dire is intended to encompass the typical criminal voir dire. It is not exhaustive.

required because the defense is entitled to 10 peremptory strikes and the government receives 6 strikes. See, Rule 24(b), Fed. R. Crim. P. If both sides exercise all peremptory strikes without overlap, 12 jurors will remain. If overlap occurs, the first 12 will serve as jurors.

As to alternates, each side is entitled to 1 additional preemptory challenge if 1 or 2 alternates will be empaneled, 2 additional preemptory challenges if 3 or 4 alternates are to be empaneled, and 3 peremptory challenges if 5 or 6 alternates are to be empaneled.

CAVEAT: Additional peremptory challenges allowed as a result of the seating of alternates "may be used against an alternate juror only . . . ." Rule 24(c), Fed. R. Crim. P.

[**Duty to be Candid**]

4. Ladies and gentlemen, you will now be asked a number of questions about yourselves. They are not designed to pry unnecessarily into your personal lives or affairs. Each question is designed to assist the attorneys in selecting the fairest jury possible.

Please do not withhold information in order to be seated on this jury. Be straightforward in your answers rather than answering in the way you feel the lawyers or I expect you to answer. If your answer to a question is "yes," please raise your

hand and give me an opportunity to call upon you. If your answer to a question is "no," you need do nothing.

If at anytime you would prefer to approach the bench to answer a question rather than answer the question in front of the entire panel, feel free to so indicate.

Those jurors whose names have not been called should also listen closely to these questions as some of you may be substituted on the panel as jurors are excused. However, you need not raise your hand if your answer to a question is "yes." Just remember that if you are called to replace a member of the panel, it will be necessary for you to tell me which questions apply to you.

[**Introduction of Court Staff, Attorneys and Parties**]

5. Before we go any further, let me introduce the courtroom personnel. The bailiff is _____; the court reporter is _____and the courtroom clerk is _____. Now let me introduce the attorneys.

A. The government is represented by *(name of attorney)*, who is an Assistant United States Attorney. Do any of you know *(name of attorney)* (or any member of that office) on a social or professional basis?

B. The defendant is represented by *(name of attorney)*, (who is a member of the firm of _____). Do any of you know *(name of attorney)* (or any member of the firm) on a social or professional basis? *(Name of*

attorney) **, will you please introduce your client. [*Client introduced.*] Thank you. Do any of you know the defendant or anyone in the defendant's family?**

[**Description of Charges/Familiarity with Case**]

6. The defendant is charged with committing the crime(s) of *(charge)* on *(date)* (at *(location)*).

A. Have any of you ever seen, heard, or read anything about this case, or have any of you ever heard anyone express an opinion about it?

[*If "Yes":*] Please approach the bench and would counsel please approach the bench.

[*At the bench:*] What have you heard or read about this? From what source did you learn about this matter? Do you think that might have some bearing on your judgment if you were chosen as a juror in this case?

[*If "Yes":*] Thank you for your candor, *(name of prospective juror)* . [*If appropriate:*] Counsel, is there any objection to *(name of prospective juror)* being excused? I am going to excuse you from serving as a juror in this case.

[*In open court:*] The clerk will call another juror.

[*Substitute prospective juror seated.*]

(Name of prospective juror) **, have you heard the questions asked of the other prospective jurors up to**

this point? Would your answer to any of those questions have been "Yes"?

B. Ladies and gentlemen, would anything about this case make it difficult for any of you to serve as a juror?

C. Have you, any members of your family or close friends ever been involved in a case like this?

[**Ethnicity of Defendant, if Applicable**]

7. [*If applicable:*] The defendant is [e.g., Afro-American, Hispanic, Native-American]. Is there anything about this fact which would, in any way, prevent you from being fair and impartial?[2]

[**Witnesses**]

8. I am going to read a list of witnesses who may be called during this trial.[3] **Please raise your hand if you know, or think**

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[2] The Ninth Circuit has not adopted "what amounts to a per se rule that a racial prejudice question must be put to the venire in all cases where the defendant is a member of a minority group [citations omitted], absent some indication that prejudice is likely to arise or that the trial will have racial overtones." *United States v. Rosales-Lopez*, 617 F.2d 1349, 1354 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981).

[3] It is reversible error for the district court to fail to inquire "whether jurors [know] any of the government's witnesses." *United States v. Washington*, 819 F.2d 221, 223-25 (9th Cir. 1987). *See also, United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir 1979) (appropriate to inquire "if any member of the venire is acquainted with or related to any witness in the action").

you might know, any of these people.

[*Read list of witnesses.*]

A. [*If NO hand raised:*] Apparently, none of you think you know any of the possible witnesses in this case.

B. [*If hand raised:*] Yes, *(name of prospective juror)*** , which witness do you think you know? How well do you know him/her? Would that affect your ability to be fair and impartial?**

[**Grand Jury Service**]

9. Have any of you ever served as a member of a grand jury, federal, state or county?

[**Experience as a Witness**]

10. Have any of you ever been a witness in a criminal case?

[**Law Enforcement Experience or Connection with Law Enforcement**]

11. Have you, any members of your family or close friends ever served as law enforcement officers?

[**Ability to Judge All Witnesses Fairly, Including Law Enforcement Officers**]

12. Is there anyone who could not judge the testimony of all the witnesses by the same standards? For example, is there anyone who would give more or less weight to the testimony of

a law enforcement officer than to the testimony of any other witness just because the witness is a police officers?[4]

[**Exposure to Legal Training]**

13. Have you or has anyone in your family ever studied or practiced law? [*If applicable:*] If your understanding of the law differs from my instructions to the jury concerning the law, will you follow the law as I give it to the jury?

[**Principles of Law Applicable to a Criminal Trial**]

14. The law requires the government to prove the defendant guilty beyond a reasonable doubt. The defendant is presumed by law to be innocent, which means the defendant is not required to prove innocence or produce any evidence.

[A defendant in a criminal case has the right not to testify, and a defendant's failure to testify cannot be considered by the jury in determining guilt or innocence.][5]

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[4] In *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979), the Ninth Circuit concluded that the district court erred in failing to inquire as to whether any prospective juror would be inclined to "give greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position . . . ." *See also United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987) (district court committed reversible error when it failed to inquire whether any panel member "would be unduly influenced by the testimony of law enforcement officers").

[5] Before addressing this matter, the court should give defense counsel the opportunity to be heard, *cf. United States v. Kirby*, 838 F.2d 189, 191-92 (6th Cir. 1988) (re jury instruction); *United*

Does anyone disagree with these important principles of law? Would anyone be unable or unwilling to follow these principles?

[**Duty to Follow Law**]

15. As a juror, you are obligated to follow the law given to the jury by the court. Is there anyone who would be unable or unwilling to follow the law as given in the instructions, disregarding your own notions or ideas about what the law is or ought to be?

[**Familiarity with Other Panel Members**]

16. Do any of you know any other members of this prospective jury panel?

[*If applicable:*] Would it pose a problem for you should both you and (name of prospective juror) serve as jurors on this case? Would you be able to exercise independent judgment in deciding this matter? [*If jurors are employed by the same employer:*] Is there a supervisory relationship between the two of you? Would you be able to exercise independent judgment should you both serve as jurors in this matter?

States v. Lauchli, 724 F.2d 1279, 1282-83 (7th Cir.), *cert. denied*, 469 U.S. 1072 (1984), although it is not reversible error to fail to do so. *See Lakeside v. Oregon*, 435 U.S. 333 (1978) (not error to instruct jury, over defendant's objection, that no inferences may be drawn from defendant's decision not to testify).

[**Length of Trial**]

17. Ladies and gentlemen, we recognize that jury service is probably an inconvenience to you, taking you away from your jobs and families and disrupting your daily routine. It is, however, one of the most important duties that citizens of this country are called upon to perform. For this reason, I know that you will not take this duty lightly.

This case is expected to take ___ [days][weeks]. Our daily schedule will usually be as follows: *[hours and recesses]*. Would the length of trial or our daily schedule pose a significant problem for any of you?

[**Health Problems**]

18. Do any of you have a health problem which might make it difficult for you to serve as a juror?

[*Some judges place a board on an easel in front of the panel. Prospective jurors are then asked to read and answer the questions. The written questions typically concern such matters as marital status, employment, and prior jury service. If easel used:*]

19(A). Ladies and gentlemen, there are some questions on the easel I am going to ask each of you to answer. Will you please stand and go first, *[Prospective Juror Number One]*.

[*If easel NOT used:*]

19(B). Ladies and gentlemen, I am going to ask you about prior jury service. If you have, please tell me the type of case, civil or criminal. *(Juror Number One),* have you ever served as a juror before? Have you ever served as the foreperson of a jury?

[Some judges prefer to ask questions 20 and 21, below, in questionnaire form distributed to all prospective jurors, before the panel arrives in the courtroom.]

[**Criminal Convictions of Prospective Juror, Family or Close Friends**]

20. Have you, a close relative or friend ever been convicted of any crime other than a minor traffic offense? [For purposes of this case, a drunk driving or DUI conviction would not be a minor traffic offense.]

[**Victim of Crimes**]

21. Have you, a close relative or friend, ever been the victim of a crime?

[**Additional Questions from Counsel**]

22. Will counsel please approach the bench.

[*At the bench conference, determine what additional questions are to be asked.*]

[*Counsel should be invited to raise any challenges for*

cause at this time.]

[*Ask any additional questions agreed upon by court and counsel, or permit counsel to conduct further voir dire.*]

[*Inquire whether the panel can be passed by counsel.*]

[**General Inquiry**]

23. Ladies and gentlemen, is there anything you think the attorneys or I should know before the jury is selected in this case? If it is something you don't want to mention in open court, just raise your hand and it can be arranged for you to tell us about it privately.

[**Counsels' Approval of Panel**]

24. Do both sides pass the panel for cause?

[**Exercise of Peremptory Strikes**]

25. Ladies and gentlemen, the attorneys will now exercise their peremptory challenges.

[*Follow local practice for exercising peremptory challenges.*]

[***Batson* Challenges**]

26. [*If applicable, outside the presence of panel*]: **Counsel, I understand there are *Batson* challenges both sides wish to make?**

[**Impanelment of Jury**]

27. The record will show the presence of the defendant, counsel, and the prospective jurors. Ladies and gentlemen, the clerk will now read the names of the jurors selected to try this case. As your name is read, please come forward and be seated in the jury box as directed by the bailiff.

[*Clerk reads names of trial jurors.*]

[**Administering of Oath to Jury**]

28. Would those of you who have been chosen as jurors please stand and be sworn.

[*Clerk administers oath.*]

[**Panel Members Not Selected**]

29. Those of you who were not selected as jurors (are to report back to the Jury Commissioner) (may return home, and if you are to return again for jury service, you will be notified). Thank you for assisting us today.

[*Charges read and not guilty plea stated; preliminary instructions read to jury. See Ninth Circuit Manual of Model Jury Instructions, Criminal, 1.1 et seq.*]

* * * * *

Sources: BENCHBOOK FOR SUPERIOR COURT JUDGES, (State of Ariz. 1982).
BENCHBOOK - SUPERIOR COURT, (Jud. C. of Ariz. 1992).
BENCHBOOK FOR UNITED STATES DISTRICT COURT JUDGES, (Fed. Jud. Center).

APPENDIX 6: JURY SELECTION - SAMPLE VOIR DIRE SCRIPT (CIVIL)

[Greeting]

1. Good (morning) (afternoon), ladies and gentlemen. This is the time set for the trial of civil cause number _____. Is the plaintiff ready? Is the defendant?

[Oath Administered to Panel]

2. Will all of the prospective jurors seated in the courtroom please stand and be sworn.

[*Clerk administers voir dire oath.*]

[Names of Prospective Jurors Called]

3. Ladies and gentlemen, we are now going to begin the jury selection process in this case. The clerk will call the names of ____ prospective jurors. As your name is called, please come forward and take your seat in the jury box as the bailiff directs.

NOTE: At least 12 prospective jurors should be seated. At least 12 prospective jurors are required because each side is entitled to 3 peremptory challenges and the minimum number of jurors is 6. Fed. R. Civ. P. 48. If there are multiple defendants and/or plaintiffs, the court may allow additional peremptory challenges. 28 U.S.C. §1870; Fed. R. Civ. P. 47(b).

Alternates are no longer provided for in civil cases, but the court may impanel up to 12 jurors. Fed. R. Civ. P. 48.

[Duty of Candor]

4. Ladies and gentlemen, you will now be asked a number of questions about yourselves. They are not designed to pry unnecessarily into your personal lives or affairs. They are asked to discover if you have any knowledge about this case; if you have any preconceived opinions which you might find difficult to lay aside; if you have had any personal or family experiences which might cause you to identify yourself with any of the parties; and to assure each party that the jury will be fair and impartial.

Please do not withhold information in order to be seated on this jury. Be straightforward in your answers rather than answering in the way you feel the lawyers or I expect you to answer. If your answer to a question is "yes," please raise your hand so that additional questions may be asked. If you answer to a question is "no," you need do nothing.

If at anytime you would prefer to approach the bench to answer a question rather than answer in front of the entire panel, feel free to so indicate.

Those prospective jurors whose names have not been called should also listen closely to these questions, as some of you may be substituted on the panel as jurors are excused. However, you need not raise your hand if your answer to a question is

"yes." Just remember to tell me about it if you are called as a substitute on the panel.

[Introduction of Court Staff, Attorneys and Parties]

5. Before we go any further, let me introduce the courtroom personnel. The bailiff is _____; the court reporter is _____; and the courtroom clerk is _____. Now let me introduce the lawyers and their clients.

A. The plaintiff is represented by _*(Name of attorney)*_, (who is a member of the firm of _____). Do any of you know _*(Name of attorney)*_ (or any member of the firm) on a social or professional basis?

*(Name of attorney)*, will you please introduce your client. [*Client introduced.*] **Thank you. Do any of you know the plaintiff?**

B. The defendant is represented by _*(Name of attorney)*_, (who is a member of the firm of _____). Do any of you know _*(Name of attorney)*_ on a social or professional basis?

*(Name of attorney)*, will you please introduce your client. [*Client introduced.*] **Thank you. Do any of you know the defendant?**

[Description of Case]

6. The case tried today is a civil case. [*Here, briefly describe*

the claim(s), counterclaim(s) and defense(s).]

[Knowledge of Case and/or Familiarity with Similar Cases]

7A. Have any of you ever seen, heard, or read anything about this case, or have any of you ever heard anyone express an opinion about it?

7B. Have you, any members of your family or close friends ever been involved in a case like this? [*If "Yes"*:]

(1) Was a lawsuit filed?

(2) Were you, a member of your family, or a close friend the plaintiff or the defendant?

(3) How was the matter resolved?

(4) Is there anything about the matter which would make it difficult for you to be fair and impartial?

[*If "Yes"*:] Thank you for your candor, *(Name of Prospective Juror)*.

[*If appropriate consult with counsel. If the prospective juror should be excused, so indicate.*] **I am going to excuse you from serving as a juror in this case. Please report back to the Jury Commissioner. The clerk will call another juror.**

[Substitute juror seated.]

***(Name of Prospective Juror)*, have you heard the questions asked of the other jurors up to this point? Would your answer to any of those questions have been "Yes"?**

[List of Potential Witnesses and Others]

8. I am going to read a list of individuals who may be referred to during this trial. Some of these people will be witnesses. Please raise your hand if you know, or think you might know, any of these persons.

[*Read list of individuals.*]

A. [*If no hand raised*:] **Apparently, none of you think you know any of the possible witnesses in this case.**

B. [*If hand raised*:] **Yes, ***(Name of Prospective Juror)*, **which witness do you think you know? How well do you know him/her? Would that affect your ability to be fair and impartial?**

[Schedules]

9. Ladies and gentlemen, I recognize that jury service is probably an inconvenience to you, taking you away from your jobs and families and disrupting your daily routine. It is, however, one of the most important duties that citizens of this country are called upon to perform. For this reason, I know that you will not take this duty lightly.

This case is expected to take _____ (days) (weeks). Our daily schedule will usually be as follows: *(Hours and Recesses)*. Would the length of trial or our daily schedule pose a problem for any of you?

[Health Problems]

10. Do any of you have a health problem which might make it difficult for you to serve as a juror?

[*If easel used*:]

11A. Ladies and gentlemen, there are some questions on the easel I am going to ask each of you to answer. One question asks about your jury service in other trials. Please indicate the type of case, civil or criminal. Will you please stand and go first, *(Prospective Juror Number One)*.

[*If easel NOT used*:]

11B. Ladies and gentlemen, I am going to ask each of you if you have served as a juror in other cases. If you have, please tell me the type of case, civil or criminal. *(Prospective Juror Number One)*, have you ever served as a juror before?

[Duty to Follow Law]

12. After the jury has been empaneled, I will give you some preliminary instructions on the law. At the conclusion of the trial, I will fully instruct you on the applicable law.

As a juror, you are obligated to follow the law given to the jury by the court. Is there anyone who would be unwilling or unable to follow the law as given in the instructions, disregarding your own notions or ideas as to what the law is or ought to be?

[Evaluation of Witnesses]

13. One important task of the jury is to listen to the testimony of the various witnesses and decide how much or how little weight the testimony should be given. Would any of you be unable or unwilling to perform this task?

[Familiarity with other Prospective Jurors]

14. Do any of you know any other member of this prospective jury panel?

[*If applicable*]

A. Would it pose a problem for you should both you and [*name of prospective juror*] serve as jurors in this case?

B. [*If prospective jurors have same employer*:]

(1) Is there a supervisory relationship between the two of you?

(2) Would service on this case place you in an awkward or difficult position should you both be selected to serve?

(3) Should you both be selected to serve, could you exercise independent judgment in considering the evidence and deciding the case.

[NOTE: Remember to question both prospective jurors.]

[Questions Submitted by Counsel]

15. [*If counsel have submitted written voir dire questions, ask those questions deemed to be appropriate.*]

[Additional Questions]

16. Counsel, are there any further questions of the panel?

[*If "Yes"*:] **Will counsel please approach the bench.**

[*At the bench conference, determine what additional questions are to be asked, and after they have been asked, inquire again whether the panel can be passed by counsel*.]

[Counsels' Approval of Panel]

17. Do both sides pass the panel for cause?

[Exercise of Peremptory Strikes]

18. Ladies and gentlemen, the attorneys will exercise their peremptory challenges. Shortly, the name of the six [or however many jurors will be impaneled] **of you who will serve as the jury in this case will be called. While waiting, don't discuss the case or anything connected with it among yourselves or with anyone else. Thank you.**

[*Follow local practice for exercise of peremptory strikes*.]

[*Batson* Challenges]

19. [*If counsel indicates that a Batson challenge to oppose counsel's exercise of one or more peremptory strikes is appropriate, discuss the challenge(s) at this time outside the presence of the panel*.]

[Impanelment of Jury]

20. The record will show the presence of all parties, counsel, and the prospective jurors. Ladies and gentlemen, the clerk will now read the names of the jurors selected to try this case. As your name is read, please come forward and be seated in the jury box as directed by the bailiff.

[*Clerk reads names of trial jurors.*]

[Administering of Oath to Jury]

21. Would those of you who have been chosen as jurors please stand and be sworn.

[Excusing Rest of Panel]

20. Those of you who were not selected as jurors (are to report back to the Jury Commissioner) (may return home and if you are to return again for jury service, you will be notified). Thank you for assisting us today.

APPENDIX 7: FINAL INSTRUCTIONS BEFORE JURY DELIBERATIONS (CRIMINAL)

Are there any **corrections or additions** to the jury instructions?

When you go to the jury room to deliberate, you will have the following items with you:

1) The **verdict form** which I just read to you
2) Your individual set of **jury instructions**[1]
3) Any **notes** you took during the trial
4) Those **exhibits** which were admitted into evidence; [and,
5) A copy of the **indictment**.][2]

Drugs and firearms [*If applicable*]: Drugs and firearms are not left with the jury during deliberations. The bailiff will bring these exhibits to you at the beginning of your deliberations and remain with you while you inspect them. Please do not discuss the case while the bailiff is present. After each of you have had an opportunity to inspect the exhibits, the bailiff will remove it from the jury room. You may then commence deliberations. If you later decide you would like to see the exhibits once again, just notify the bailiff and once again the exhibits will be brought into the jury room.

The **bailiff** will now be sworn.

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[1] The practice varies as to the number of sets of instructions, if any, sent into the jury room. *See* 4.3(C), *supra*.

[2] Some judges prefer not to send the indictment into the jury room. *See* 4.4, *supra*.

TABLE OF AUTHORITIES

STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

FEDERAL RULES OF EVIDENCE

CASES

I N D E X

References are to section numbers.

A—

B—

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V—

W—

Exceptional circumstances required (3.10.C)

X—

Y—

Z—