Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other

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Between 2004 and 2006 the National Center for State Courts conducted three related studies of jury practices in state and federal courts throughout the United States. Combined, the studies make up the *State-of-the-States Survey of Jury Improvement Efforts*, a first-ever effort to survey the entire field of jury issues and practices from state and local jury reform and improvement efforts to in-court use of tools aimed at improving juror comprehension and participation—including note-taking, juror questions and providing jurors with written instructions. The resulting data sets are available in full online, allowing users to review their own states' practices in comparison both to those of other states and of nationwide trends. This article, authored by the principal investigators on this path-breaking study, summarizes the major findings of the *State-of-the-States Survey* and highlights ways in which its data can be mined to assist state and local efforts at jury improvement.

Introduction

Over the past two decades, the American jury system has become the focus of unprecedented interest by the legal com-

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munity and by the broader American public. Some of the interest responds to criticisms about the continued utility of the jury system. The rate of civil and criminal jury trials has steadily declined in recent years, eclipsed by non-trial dispositions such as settlement, plea agreements, and summary judgment.[1] Meanwhile, proponents of the jury system have maintained that trial by jury continues to play a critical role in the American justice system by protecting the rights of criminal defendants, resolving intractable civil disputes, and promoting public trust and confidence in courts.

Beginning in the early 1990s, these debates prompted renewed efforts by judges, lawyers, and scholars to examine jury performance and to consider the potential effects of various proposals for reform. A popular approach adopted by many judiciaries was to create commissions or task forces to examine reform proposals and to make recommendations. National efforts also took place during this time, including the 1992 Brookings Institution symposium on the civil jury and the 2001 National Jury Summit in New York City.[2]

More recently, leadership from courts and lawyer organizations has placed jury trial improvements high up on court systems' action plans. For example, the chief judge of New York, Judith S. Kaye, began a statewide initiative to experiment with innovative jury trial practices. Judges volunteered to try these practices, which ranged from permitting jurors to submit questions to witnesses and using mini-opening statements to the use of preliminary jury instructions and summary jury trials. The positive results from these cases were disseminated to the New York judiciary in *Jury Trial Innovations In New York State: A Practical Guide for Trial Judges*.[3]

Similarly, Robert J. Grey, Jr. made the American jury the focus of his tenure as the 2004-2005 president of the American

1. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

2. VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993); Robert G. Boatright & Elissa Krauss, *Jury Summit 2001: A Report on the First National Meeting of the Ever-Growing Community Concerned with Improving the Jury System,* 86 JUDICATURE 144 (2002).

3. JURY TRIAL PROJECT, OFFICE OF COURT RESEARCH, JURY TRIAL INNOVATIONS IN NEW YORK STATE (2006), *available at* http://www.nyjuryinnovations.org/materials/JTI%20booklet05.pdf.

Bar Association. Under his leadership, the American Bar Association undertook a yearlong effort to update, consolidate, and harmonize the various sets of jury trial standards developed by the association's Criminal Justice Section, the Section on Litigation, and the Judicial Division. The ultimate product, the ABA *Principles for Juries and Jury Trials,* is a set of "gold standards" for managing and conducting jury trials.[4] They rely on a large body of empirical research about juror behavior and provide a philosophical framework for trial innovations. The principles call upon courts and trial lawyers to take specific steps to improve jury trials during the next decade. These efforts are beginning to affect court policies as evidenced by revised court rules and case law and the development of judicial and legal education curricula.

While statewide policy changes are fairly easy to track, most inside-the-courtroom innovative practices are the product of trial court discretion. Until recently, we had little idea how often judges chose to exercise that discretion. Now, the National Center for State Court's *State-of-the-States Survey of Jury Improvement Efforts* carefully documents local practices and jury operations in the context of their respective state infrastructures.[5] These rich data enable court policymakers to assess their own systems vis-à-vis their peers and nationally recognized standards for effective practices.

The *State-of-the-States Survey* was designed to produce an encyclopedic display of data about jury trial practices across America. The entire dataset is accessible at http://www.ncscjurystudies.org. The information was collated uniformly with respect to every state and the District of Columbia in order to enable comparative analyses between one or more states or regions or the nation. In addition, interested persons can undertake cross comparisons that involve a single operational procedure such as jury summoning or a multitude of procedures or innovations.

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4. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

5. GREGORY E. MIZE, PAULA HANNAFORD-AGOR, & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendium Final.pdf.

Website visitors can readily compare their own court system's practices with neighboring jurisdictions or with national averages. Users can then choose a state and a particular trial practice and compare the frequency of its usage in that state with usage in another state or the nation. In addition, a statistical formula is provided to estimate how a particular trial practice might increase or decrease the time duration of jury selection or final deliberations. In short, as soon as anyone identifies a particular interest in a jury trial procedure or innovation, he or she can consult the *State-of-the-States Survey* data to gain a perspective on the frequency of its usage and possible implications for other court practices. We urge readers to engage in their own exploration of the data. In doing so, you will be joining in a growing effort across the country to understand jury trials practices from an empirical perspective.

In Part I of this article, we highlight the major findings in the *State-of-the-States Survey*. In Part II, we describe several practical outcomes resulting from the growing attention given to the survey by bench and bar leaders. We close, in Part III, with suggestions for future innovative undertakings by judges, trial practitioners and empirical researchers.

I. The *State-of-the-States Survey of Jury Improvement Efforts*: A Gold Mine for Prospectors

The *State-of-the-States Survey* is the result of a multiyear effort to gauge jury improvement efforts in the nation's state courts.[6] It included three separate but related surveys:[7] a Statewide Survey completed by court administrators or managers in all 50 states and the District of Columbia; a Local Court Survey, distributed to each state's general jurisdiction trial courts, and completed by representatives of 1,546 individual counties from 49 states and the District of Columbia and encompassing 70% of the total U.S. population; and a Judge and Attorney Survey, resulting in 11,752 completed surveys describing practices employed in state and federal jury trials in all 50 states, the District

6. The survey instruments were distributed and returned during the period 2004 to 2006.

7. MIZE ET. AL., *supra* note 5.

of Columbia, and Puerto Rico. Table 1 describes the Judge and Attorney Survey dataset.[8]

Table 1: Judge and Attorney Survey		
	N	**%**
Respondent Type		
State Trial Judge	4,081	35
Federal Trial Judge	255	2
Attorney	7,209	61
Other/Unknown	207	2
Jurisdiction		
State Court	10,395	92
Federal Court	884	8
Cases		
Criminal*	**5,622**	**48**
Capital Felony	343	6
Felony	3,868	69
Misdemeanor	1,341	24
Civil	**5,819**	**50**
Other	**311**	**3**
Attorneys		
Criminal Prosecution	917	16
Criminal Defense	1,345	23
Civil Plaintiff	1,909	32
Civil Defense	1,714	29
TOTAL	11,752	100
* Includes 70 trials designated as "criminal" only		

A. The Volume and Frequency of Jury Trials and Jury Service

The *State-of-the-States Survey* allows us to estimate the number of jury trials that take place in state courts annually by extrapolating from the proportion of state population reflected in the Local Court Surveys. We now have a solid empirical basis upon which to estimate that state courts conduct 148,558

8. The National Center for State Courts reports that there were 11,349 judicial officers assigned to general jurisdiction courts in 2004. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 17 (Richard Y. Schauffler et al. eds., 2006). It is possible that some of the respondents were limited jurisdiction court judges, especially in trials for misdemeanor and specialized jury-demandable cases broadly categorized as "other" in the survey instrument. But most states restrict trial by jury to courts of general jurisdiction. *See* BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, 265-319 (2006).

jury trials each year. By comparison, federal courts conducted 5,463 jury trials in 2006.[9] California has the largest volume of jury trials — approximately 16,000 per year. Vermont and Wyoming each had the lowest (126 trials annually).

Table 2: National Jury Trial Rates and Characteristics	
# of Counties Represented	**1,546**
% of US Population Represented	70.3
Trial Rate per 100,000 population	**58.6**
Estimated number of jury trials annually	**148,558**
% Felony	46.7
% Misdemeanor	18.7
% Civil	30.6
% Other	4.0
Estimated number of summonses mailed	**31,857,797**
% Adult population represented (age 18+)	14.8
Estimated number of jurors impaneled	**1,526,520**
% Adult population represented (age 18+)	0.8

In order to conduct jury trials, citizens must be summoned to serve as jurors. State courts mail an estimated 31.8 million jury summonses annually to approximately 15% of the adult American population. This percentage varies from state to state, depending on the number of jury trials in each state and local juror utilization practices. In addition, the percentage is affected by the number of jurors to be selected for each trial, which can range from six to 12 jurors, plus alternates.[10] The number of peremptory challenges available to each party also affects the number of people to be sent to a courtroom for jury selection. In non-capital felony trials that number ranges from three per side in Hawaii and New Hampshire to 20 per side in New Jersey.[11] Despite the large quantity of summonses sent each year, only 1.5 million Americans are seated on juries each year, less than 1% of the adult American population.

Although the probability of being impaneled in any given year is quite small, the likelihood of being summoned to serve has been increasing steadily. More than one-third of all Americans (37.6%) are now likely to be impaneled as a trial juror

9. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006, tbl. C-7 (2006).

10. BUREAU OF JUSTICE STATISTICS, *supra* note 8, at tbl. 42 (2006).

11. *Id.* at tbl. 41.

sometime during their lifetime.[12] This represents a tremendous increase in the distribution of the responsibility for jury service over the past three decades. As recently as 1977, a national public opinion survey found that just 6% of adult Americans had served as trial jurors.[13] By 1999, this figure had increased to 24%.[14] In 2004, the American Bar Association reported that 29% of the adult American population had served as trial jurors.[15] Thus, in spite of declining numbers of jury trials,[16] a larger and larger proportion of American citizens have first-hand experience with jury service, due to more inclusive master jury lists, shorter terms of service, and other policies designed to make jury service more convenient and accessible for all citizens.

B. State/Local Infrastructure Differences

1. TERM OF SERVICE

The degree to which local jury operations are directed by state law varies tremendously by jurisdiction. For example, 27 states gave discretion to local courts to establish maximum terms of service.[17] Of the 24 state-mandated jurisdictions, nine states and the District of Columbia set the maximum term of service at one day or one trial (see Table 3). The remaining 14 states permit longer terms of service, but some limit the maximum number of days that a person must serve in any given period of time. For example, Georgia law specifies that citizens cannot be required to serve more than two consecutive weeks in any given term of court or more than four weeks in any 12-month period.[18]

The actual breakdown for term of service for all of the courts represented in the Local Court Survey dataset is described in Table 4. We find that more than one-third of local courts, and nearly two-thirds of the U.S. population, live in ju-

12. *See* MIZE ET AL., *supra* note 5, app. D (detailed information about the methods used to calculate the constituent elements of this percentage).

13. NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 15 (1999).

14. *Id.*

15. HARRIS INTERACTIVE, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? (2004), http://www.abanet.org/media/releases/juryreport.pdf.

16. Galanter, *supra* note 1.

17. These states encompass nearly half (49.3%) of the total U.S. population.

18. GA. CODE ANN. § 15-12-3 (2007).

Table 3: State-Established Maximum Terms of Service		
Term of Service	**States**	**% of US Population**
One Day or One Trial	AZ, CA, CO, CT, DC, FL, HI, IN, MA, OK	29
Two to five days (one week)	NY, SC	8
Six days to 1 month	GA, KY, ME, NH, ND, OH, RI	10
Greater than 1 month to 6 months	NM	1
Longer than 6 months	MT, UT, VT, WV	2
Total Population Included		49

risdictions that have a one-day or one trial term of service.[19] Clearly, courts in more populous jurisdictions are more likely to adopt one day or one trial terms of service than those in less populous jurisdictions.

Table 4: Term of Service in Local Courts				
Term of Service	**# of Courts**	**% of Courts**	**Average # Jury Trials Annually**	**Estimated % of US Population**
One Day or One Trial	490	35	129	63
Two to five days (one week)	213	15	85	18
Six days to 1 month	327	23	46	12
Greater than 1 month to 6 months	283	20	21	6
Longer than 6 months	82	6	15	0

2. JUROR COMPENSATION

All 50 states and the District of Columbia compensate jurors as reimbursement for out-of-pocket expenses as well as token monetary recognition of the value of their service (see Table 5).

States have begun to recognize the relationship between the amount of juror compensation, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool.[20] As a result, a number of states have increased juror compensation, but in doing so, have changed

19. *See* MIZE ET AL., *supra* note 5. Estimates for the proportion of U.S. population were calculated using the methods described in Appendix E.

20. Paula Hannaford-Agor, *Jury News: The Laborer is Worthy of His Hire and Jurors Are Worthy of Their Jury Fees,* 21 CT. MANAGER 38 (2006).

the structure of the payment system from a flat daily rate to a graduated rate in which jurors receive a reduced compensation, or no compensation, for the first day(s) of service and increased compensation if impaneled as a trial juror or required to report for additional days. Over half of the courts responding to the Local Court Survey reported that they pay mileage reimbursement with rates varying from $.02 to $.49 per mile. Arizona has implemented a Lengthy Trial Fund, funded with litigant filing fees, to compensate jurors for lost income up to $300 per day.[21]

3. JURY SOURCE LISTS

Another area of jury operations in which states sometimes delegate authority to local courts is the source list(s) used to compile the master jury list. The choice of source lists is an important policy decision for state courts because it establishes the inclusiveness and initial demographic characteristics of the potential jury pool.[22] Thirty states mandate that courts within the jurisdiction use only the designated source lists, while 15 states and the District of Columbia permit local courts to supplement the required lists with additional lists. The remaining five states do not mandate the use of any specific source list, but enumerate the permissible lists that can be employed for this purpose. The most commonly mandated source lists are the lists of registered voters and licensed drivers, mandated by 13 states. In states that leave the choice of source lists to the discretion of the local courts, many (but not all) local courts choose to supplement the master jury list with the permissible source lists. Only 11 states (representing 14% of the U.S. population) mandate the use of three or more source lists to compile the master jury list, yet 283 local courts reported doing so in the Local Courts Survey of the *State-of-the-States Survey* (see Table

21. G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, 45 JUDGES' J. 18 (Winter 2006).

22. A substantial body of federal and state constitutional and statutory law requires that the pool from which prospective jurors are summoned reflect "a fair cross section of the community," specifically, its racial, ethnic, and gender demographic characteristics. *See* Duren v. Missouri, 439 U.S. 357 (1979). Because a broadly inclusive list of the jury-eligible population is more likely to mirror the demographic characteristics of the community, the National Center for State Courts recommends that the master jury list include at least 85 percent of the total community population. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4-5 (1996).

Table 5: State-Mandated Juror Compensation Structure

State	Initial Rate or Flat Daily Rate	Graduated Rate	Trigger for Graduated Rate
Alabama	$10.00	n/a	
Alaska	$ 5.00	$25.00	Beginning 2nd Day
Arizona*	$ .00	$12.00	Beginning 2nd Day
Arkansas	$15.00	$35.00	Sworn Juror
California	$ .00	$15.00	Beginning 2nd Day
Colorado	$ .00	$50.00	Beginning 4th Day
Connecticut	$ .00	$50.00	Beginning 6th Day
District of Columbia	$30.00	n/a	
Delaware	$20.00	n/a	
Florida	$ .00	$30.00	Beginning 4th Day
Hawaii	$30.00	n/a	
Idaho	$10.00	n/a	
Iowa	$10.00	n/a	
Kentucky	$12.50	n/a	
Louisiana	$25.00	n/a	
Maine	$10.00	n/a	
Massachusetts	$ .00	$50.00	Beginning 4th Day
Michigan	$25.00	$40.00	Beginning 2nd Day
Minnesota	$20.00	n/a	
Montana	$12.00	$25.00	Sworn Juror
Nebraska	$35.00	n/a	
Nevada	$ .00	$40.00	Sworn Juror
New Hampshire	$20.00	n/a	
New Jersey	$ 5.00	$40.00	Beginning 4th Day
New Mexico	$41.20	n/a	
New York	$40.00	n/a	
North Carolina	$12.00	$30.00	Beginning 6th Day
North Dakota	$25.00	$50.00	Beginning 2nd Day
Oklahoma	$20.00	n/a	
Oregon	$10.00	$25.00	Beginning 3rd Day
Pennsylvania	$ 9.00	$25.00	Beginning 4th Day
Rhode Island	$15.00	n/a	
South Dakota	$10.00	$50.00	Sworn Juror
Tennessee	$11.00	n/a	
Texas	$ 6.00	$40.00	Beginning 2nd Day
Utah	$18.50	$49.00	Beginning 2nd Day
Vermont	$30.00	n/a	
Virginia	$30.00	n/a	
West Virginia	$40.00	n/a	

* Arizona's Lengthy Trial Fund compensates jurors up to $300 per day for lost income while on jury service. The LTF is available retroactively to the 4th day of service beginning on the 6th day of trial.

6). By extrapolating these courts to the entire country, we estimate that more than one-third of the U.S. population lives in jurisdictions that use three or more source lists to compile the master jury list.

Table 6: Source Lists Mandated by State Law and Actually Used by Local Courts

Source Lists	# of States	% of US Population	# of Local Courts	% of US Population
Registered Voters Only	2	1	160	5
Licensed Drivers Only	4	6	82	7
Voter and Driver Only	13	19	706	51
3+ Lists Required	11	14	283	37

4. STATUTORY EXEMPTIONS

The trend in recent years has been to eliminate occupational and status exemptions altogether under the theory that no one is too important or too indispensable to be summarily exempted from jury service, particularly in jurisdictions with relatively short terms of service. Instead, local courts are gaining discretion to accommodate or excuse jurors on an individual basis. The Statewide Survey identified 10 distinct categories of exemptions, including previous jury service, the most commonly allowed exemption (see Table 7). The median number of exemption categories was three per state. Louisiana was the only state with no statutory exemptions; Florida, which offers nine exemption categories, had the most of any state.

5. ONE-STEP VERSUS TWO-STEP JURY QUALIFICATION AND SUMMONING

A final area of state versus local control over jury operations involves the process through which local courts qualify and summon citizens for jury service. Eighteen states and the District of Columbia specify that local courts employ a one-step process in which jurors are summoned and qualified simultaneously, while five states mandate that local courts employ a two-step process in which citizens are first surveyed to determine their eligibility for jury service, and then only qualified jurors are summoned for service. The remaining 25 states leave this decision to the discretion of the local courts.[23]

23. Data on this variable is missing for two states.

Table 7: Statutory Exemption Categories	
Categories	**# States**
Previous Jury Service	47
Age	27
Political Officeholder	16
Law Enforcement	12
Other Exemptions	12
Judicial Officers	9
Healthcare Professionals	7
Sole Caregiver	7
Licensed Attorneys	6
Active Military	5

States vary a great deal in how closely jury operations are dictated at the state level or left to the discretion of local courts. Interestingly, the degree of state control over local jury operations has no statistically significant relationship to the number of jury improvement efforts underway in those states. Nor does it appear to be related to the volume of jury trials or the trial rate for each state. This suggests that jury reform has not followed either an exclusively top-down or exclusively grassroots approach, or even one dictated by exigencies associated with the volume or frequency of jury trials. Rather, the various approaches derive from unique institutional and political cultures in each jurisdiction. Given that reality, we now take a closer look at variations in local court operations.

C. Local Court Initiatives

The *State-of-the-States Survey* provides a snapshot of state and local jury improvement efforts. Twenty states reported having a formal organization responsible for managing or overseeing jury operations for the state. The relatively high number of states with permanent jury offices or organizations demonstrates the visibility and prominence of jury operations in court management.

With respect to recent jury improvement efforts, the preferred approach in most states has been a statewide commission or task force to examine issues related to jury operations and trial procedures. The vast majority of these commissions were established by the chief justice or under the authority of the

court of last resort and consisted of 15 to 20 individuals representing a variety of constituencies (see Table 8).

Table 8: Constituencies Represented on Statewide Task Forces and Commissions

Constituencies	% of Task Forces/ Commissions
Trial judges	97
Civil litigation lawyers	86
Criminal defense lawyers	78
Prosecutors	76
Court administrators	70
Jury managers	65
Clerks of court	65
Private citizens/Former jurors	62
Appellate judges	59
Other individuals	46
State legislators	43

The most common focus involved making recommendations for legislative and rule changes related to jury operations and trial procedures. Education of judges and court staff were also reported as a frequent focus of activity (see Table 9).

Table 9: Statewide Jury Improvement Efforts

Focus on . . .	% of States
Legislative or rule changes	65
Judicial education	41
Public education/outreach	31
Court staff education	29
Evaluations	18
Survey research	18
Pilot or demonstration programs	14
Technology	14
Other	14
Attorney education	12
Court observations	10
Juror Fees	6

The Local Courts Survey provides an instructive picture of jury operations nationally by highlighting local jury operations and improvement priorities in greater detail and examining the impact of state infrastructures and statewide initiatives on local

operations and initiatives. Nationally, we find that 52% of courts report some type of jury improvement activities in the past five years. The single most popular focus of local jury improvements was upgrading jury automation, but other, more substantive efforts captured the attention of a substantial portion of courts (see Table 10). The majority of courts (75 %) that reported any improvement efforts focused on multiple areas. Nearly 10% reported seven or more different efforts underway.

Table 10: Local Court Jury Improvement Efforts

Focus on . . .	% of Courts
Upgrade Automation	59
Decrease Non-Response Rate	54
Improve Jury Yield	45
Improve Facilities	43
Improve Juror Utilization	42
Improve Public Outreach	36
Improve Jury Representation	33
Improve Jury Instructions	29
Improve Juror Comprehension	23
Other Improvement Effort	11

The existence and magnitude of local jury improvement efforts correlated, not surprisingly, with population size and jury trial volume.[24] Courts with more jury trials and those in urban communities were more likely than rural courts to initiate improvement efforts. Statewide leadership in the form of a centralized jury management office or statewide task force/ commission also played a substantial role in motivating local court activity. In states with a jury task force, the average number of efforts that local courts undertook was 3.2 compared to 1.6 in states with no statewide task force.[25] Statewide activities focused on court staff education and on changes to legislation or court rules appeared to increase the number of local court efforts on average by 50% to 70%.[26]

24. Population *Rho* = .383, Jury Trial Volume *Rho* = .210, both *p*s < .001.
25. F (1, 1,394) = 44.310, p, .001.
26. Court Staff Education F (1, 46) = 4,323, p = .043; Change Legislation/Court Rules F (1, 46) = 6.873, p = .012.

1. AUTOMATION

As noted in Table 10, upgrades to jury technology were the single most frequently reported focus of local jury improvement efforts, undertaken by 59% of courts reporting any improvement efforts. The Local Courts Survey also examined current use of technology (see Table 11). Courts in rural and smaller suburban jurisdictions were more likely to use commercial jury management software than those in more populous areas that, presumably, can afford to develop and support an in-house system.

Table 11: Percent of Courts Using Various Types of Technology

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
N =	**84**	**233**	**404**	**526**	**1,247**
Commercial Jury Software	57	59	62	76	65
Juror Qualification					
Online	48	20	10	2	11
IVR Technology	33	12	8	1	8
Reporting Technology					
Telephone Call-In System	87	82	71	43	62
Online	41	22	12	2	12
Automated Call-Out System	2	2	4	4	3
Orientation					
Basic Information Online	62	37	18	61	19
Orientation Video Online	23	10	8	2	7
Orientation Video on Cable Television	4	1	1	1	1

The most popular form of technology, by a large margin, continues to be the telephone call-in systems (which allow summoned jurors to call the court to find out if they will be needed). Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes. Less than 20% provide basic juror orientation information online and barely more than half of that percentage use the Internet for juror qualification or for informing jurors about their reporting status. Interestingly, courts that rely on commercial jury management software were

actually *less* likely to employ all of the more sophisticated types of automation, even after controlling for population size.

2. JURY YIELD

The term "jury yield" refers to the number of citizens who are *qualified* and *available* for jury service expressed as a percentage of the total number of summonses mailed. It is a critical concept in jury system management insofar as it provides a standard measure of efficiency for jury operations. Jury yield allows a court to measure the upfront administrative effort and cost that the court undertakes in securing an adequate pool of prospective jurors for jury selection. The Local Court Survey inquired about jury yield with respect to summoning only, without distinguishing between one-step and two-step systems.[27] Typically, urban and larger suburban courts experience lower jury yields than smaller suburban and rural courts (see Table 12).

Table 12: Jury Summoning Yields by Population Size

	Population Size				
	500,000 or More	**100,000 to 500,000**	**25,000 to 100,000**	**Less than 25,000**	**All Courts**
One-Step Courts (n)	39% (60)	41% (134)	45% (207)	50% (265)	46% (666)
Two-Step Courts (n)	43% (18)	54% (76)	59% (170)	63% (210)	60% (474)

An important question for local courts is what happened to those people who were mailed summonses, but were not qualified or available for jury service. Table 13 shows the rates at which summoned jurors are disqualified, exempted or excused, and the rate at which summonses are undeliverable or not responded to. How can courts increase the jury yield? As a practical matter, courts have no options when people sum-

27. Courts employing a two-step qualification and summoning process often differentiate between the qualification yield (the proportion of citizens that is qualified for jury service) and the summoning yield (the proportion of jury-eligible citizens that is available for jury service on the date summoned). In one-step courts, qualification and summoning are combined and therefore the yield is expressed as a unitary measure. For instructions on how to calculate jury yield in one-step versus two-step courts, see COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS, http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure8.pdf.

moned for jury service are disqualified (e.g., non-citizen, non-resident, under age 18, previous felony conviction, not fluent in English). However, courts have developed a number of approaches to minimize undeliverable summonses and non-response rates that affect jury yields. With respect to undeliverable summonses, for example, many courts have borrowed techniques from commercial mail-order companies such as contracting with vendors to provide updated addresses for people who have moved.

Table 13: Average Percent Undeliverable, Disqualification, Exemption, Excusal and Non-Response Rates by Population Size

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts					
Undeliverable	15	14	16	14	15
Disqualified	12	10	8	7	8
Exempted	4	7	8	8	7
Excused	9	10	9	9	9
Non-Response/FTA	15	11	9	7	9
Two-Step Courts					
Undeliverable	7	10	8	10	9
Disqualified	7	10	8	7	8
Exempted	3	3	5	6	5
Excused	4	6	5	7	6
Non-Response/FTA	13	6	6	5	6

The number of exemption categories had a significant effect on exemption rates in one-step courts within those states[28]—from an average of 5% in states with only one exemption to 14% in states with seven exemption categories. Florida had the highest number of exemption categories (9) and the second highest exemption rate (12%).

Similarly, term of service and juror compensation rates affect excusal rates. Courts with a one-day or one-trial term of service had significantly lower excusal rates than those with longer terms of service—6% versus 9% (see Table 14). Moreover, courts with juror fees exceeding the national average ($21.95 flat fee or $32.34 graduated rate) also had significantly

28. We did not calculate the exemption rate in two-step courts because presumably anyone claiming the exemption had already done so at the qualification step.

lower excusal rates—7% compared to 9% for courts whose juror fees were lower than the national average.

Table 14: Average Percent Excused by Term of Service and Juror Compensation

Juror Fee. . .	One Day/ One Trial	Longer than One Day / One Trial	Total
Exceeds National Average	4	8	7
Less than National Average	8	9	9
Total	6	9	8

Citizens who fail to return their qualification questionnaires or who fail to appear for jury service have increasingly challenged courts across the country. Twenty percent of one-step courts reported non-response/failure-to-appear rates of 15% or higher. Even more remarkable, 10% of two-step courts, which had already located and qualified the prospective juror, reported failure-to-appear rates of 16% or higher. To address these problems, 80% of courts in the *State-of-the-States Survey* reported using some type of follow-up program to track down non-responders and those who fail to appear. The most common approach was simply to send a second qualification questionnaire or summons.

Follow-up programs had various degrees of effectiveness. After controlling for population size and one-step versus two-step jury operations, the Local Court Survey data showed that only those follow-up programs that involved sending a second summons or qualification questionnaire, or that involved a stringent approach (e.g., bench warrant), significantly reduced non-response rates. Order to show cause hearings and fines had no effect, possibly due to the infrequency with which they are typically imposed. Courts that had no follow-up program had significantly higher non-response/FTA rates.

3. JUROR PRIVACY

To meet jurors' expectations of privacy, courts increasingly place restrictions on the types of information that prospective jurors are required to disclose, to whom that information may

be subsequently released, and at what point in the trial process (e.g., pre-trial, jury selection, post-trial) it can be released.[29]

Attorneys and their clients arguably have the greatest legitimate interest in access to juror information. Table 15 shows the percentage of local courts that reported providing attorneys with access to juror information before jury selection begins.

Table 15: Attorney Access to Juror Information Before Jury Selection Begins

Type of Juror Information	% of Courts
Name	88
Full Address	64
Zip Code Only	13
Qualification Information	55

In many states, access to juror information is restricted by state statute or court rule. Thus, we find that access to some of these categories of information was restricted in all of the Local Court respondents.[30] Restrictions on access to juror information do not necessarily reduce costs or boost efficiency. However, courts that have reviewed their approach to juror privacy have often declined to collect juror information for which they do not perceive a legitimate administrative or voir dire need.

In addition to basic information such as name and address, the majority of courts obtain preliminary voir dire information from prospective jurors, such as marital status (64%), occupation (72%), number and ages of minor children (52%), and other information not directly related to juror qualification criteria or contact information (28%).

In sum, the Local Court Survey makes clear that state courts differ a great deal in their approaches to automation, jury yield and juror privacy.

29. *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

30. For example, access to jurors' full street addresses was uniformly denied in courts in Arizona, Delaware, Hawaii, New Jersey, and the District of Columbia. New Jersey and the District of Columbia do provide access to jurors' zip codes, however. Similarly, Delaware, Massachusetts, North Carolina, and the District of Columbia restrict access to juror qualification information.

D. Innovations Inside the Courtroom

In most states the trial judge has discretion to determine how to manage the jury trial and what tools or assistance, if any, to provide to jurors. The Judge and Attorney Survey is the first known study to document nationwide the extent to which judges exercise their discretion to employ various practices and procedures during voir dire, trial, and jury deliberations.

1. VOIR DIRE

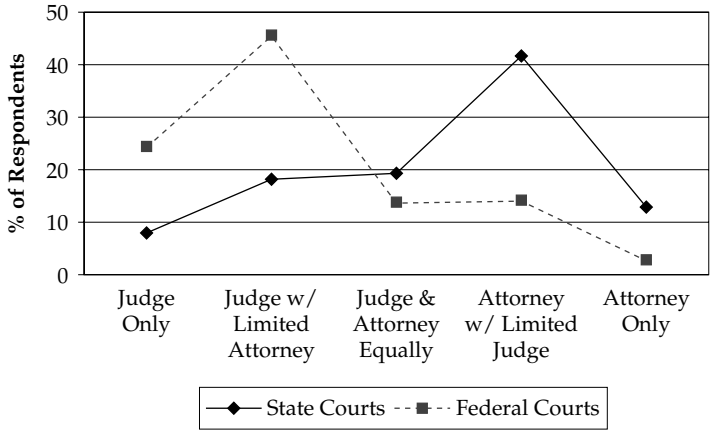
Jury selection practices vary tremendously from state to state across a number of key characteristics. For example, all courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Other key differences in voir dire among states are the number of peremptory challenges available to each side; the legal criteria for ruling on challenges for cause; and the basic mechanics of voir dire such as judge-conducted or lawyer-conducted questioning, the use of general or case-specific questionnaires, and questions addressed to a jury panel as a whole versus individual questioning.

Figure 1 illustrates the continuum of voir dire questioning from exclusively judge-conducted voir dire on the left to exclusively attorney-conducted voir dire on the right. Judge-conducted voir dire is the norm in federal courts and attorney-conducted voir dire is common in state courts. There is substantial state-to-state variation (see Table 16).

The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.[31] Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges. On the other hand, many judges prefer to conduct most

31. Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire*, 11 L. & HUM. BEHAV. 131 (1987).

Figure 1: Who Conducts Voir Dire?



or all of the voir dire themselves. They assert that attorneys waste too much time and unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial.

Table 16: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

The methods used to question jurors also vary considerably (see Table 17). The vast majority of judges and attorneys (86%) reported that in their most recent jury trial, at least some questions were posed to the full panel, usually with instructions to answer by a show of hands. Another common approach is to question each juror individually in the jury box, moving from juror to juror until the entire venire panel has been questioned. This approach was more common in state courts than in federal courts.

Table 17: Voir Dire Methods		
	% of Respondents	
Questions to . . .	**State Courts**	**Federal Courts**
Full Panel	86	86
Individuals in the Jury Box	63	52
Individuals at Sidebar/Chambers	31	31
Questionnaire		
General	34	33
Case Specific	5	10

These techniques are often used in combination with one another. Less than one-third of jury trials relied on a single voir dire technique. In nearly half of the trials, voir dire involved direct questioning of the entire panel with supplemental individual questioning in the jury box or at sidebar. Seventeen percent (17%) of trials involved all three methods. Written questionnaires supplemented oral voir dire in 38% of the trials and were the only form of voir dire in 1% of the trials. Interestingly, use of case specific questionnaires was more common in federal than in state courts.

The Judge and Attorney Survey also captured data about the time duration of voir dire. Capital felony trials required the most time to impanel a jury; the median was six hours in state courts and seven hours in federal courts. Non-capital felony trials and civil trials required two hours, and misdemeanor trials only 1.5 hours in state courts and one hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (one hour or less). Connecticut, which has a constitutional requirement of individual voir dire of each prospective juror, consistently had the longest voir dire time—10 hours in felony trials and 16 hours in civil trials.

2. PRACTICES DURING PRESENTATION OF EVIDENCE

Once the jury has been impaneled, the evidentiary portion of the trial begins. This aspect of trial practice has undergone dramatic changes in recent years as a sea change has occurred in the way judges and attorneys view the jury's role during trial. The traditional view is that jurors are passive receptacles

of evidence and law who can suspend judgment about the evidence until final deliberations, perfectly remember all of the evidence presented, and consider the evidence without reference to preexisting experience or attitudes. This view is giving way to empirically tested understandings of how adults perceive and interpret information. Scientific studies have established that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial.[32] This has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall, comprehension of evidence, and confidence and satisfaction with deliberations.[33] The Judge and Attorney Survey asked trial practitioners to report their experiences with these procedures in their most recent trials. Table 18 provides an overview comparing the responses of practitioners in state court to those in federal court.

a. Note-taking and Notebooks In more than two-thirds of both state and federal trials courts permitted juror note-taking; and in the vast majority of those trials jurors were provided with writing materials. Jurors serving in trials with more complex evidence were significantly more likely to be permitted to take notes and to be provided with note-taking materials than jurors in less complex trials. The presence or absence of positive law had some relationship to use of each of the trial techniques examined in the Judge and Attorney Survey. The Statewide Survey asked respondents whether these trial practices were required, permitted in the discretion of the trial judge, or prohibited and to provide the legal authority (statute, court rule, or court opinion).[34] Table 19 shows the percentage of trials in

32. *See generally* B. Michael Dann, "*Learning Lessons*" *and* "*Speaking Rights*"*: Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993).

33. G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2d ed. 2006); AMERICAN BAR ASSOCIATION, *supra* note 4.

34. Arizona, Colorado, Indiana and Wyoming mandate that trial judges permit jurors to take notes; judges have no discretion to prohibit the practice. ARIZ. R. CIV. P. 39(p); ARIZ. R. CRIM. P.. 18.6(d); COL. R. CIV. P. 47(t); Colo. Pen. R. 16(f); IND. JURY R. 20(a)(4); WYO. R. CIV. P. 39.1(a); WYO. R. CRIM. P. 24.1(a). Only Pennsylvania and South Carolina reported on the Statewide Survey that juror note-taking was prohibited. PA. R. CRIM. P.644. In August 2005, while data collection for the *State-of-the-States Survey* was underway, Pennsylvania temporarily amended its rule and permitted jurors to take notes in trials lasting longer than two days. The Pennsylvania Supreme Court issued an order permanently amend-

Table 18: Use of Trial Innovations		
	% of Respondents	
	State Courts	Federal Courts
Note-taking		
Jurors allowed to take notes	69	71
Jurors given paper for notes	64	68
Jurors given a notebook	6	11
Jurors allowed to submit written questions	15	11
Criminal Trials	14	11
Civil Trials	16	11
Jurors could discuss evidence before deliberations	2	1
Criminal Trials	1	0
Civil Trials	2	1
Juror instruction methods		
Preinstructed on substantive law	18	17
Instructed before closing arguments	41	36
Given guidance on deliberations	54	53
At least 1 copy of written instructions provided	69	79
Each juror received copy of written instructions	33	39

which jurors were permitted to take notes based on responses to the Statewide Survey concerning the existence of legal authority governing juror note-taking. Not surprisingly, in states where juror note-taking is required, the percentage of trials in which jurors were permitted to take notes is extremely high.

Overall, jurors were permitted to take notes in more than two-thirds of the trials in states that leave the decision on juror note-taking to the discretion of the trial judge, but state-by-state rates of juror note-taking ranged from a low of 19% in Rhode Island to a high of 96% in Arkansas. What is particularly surprising is the apparent lack of compliance in those states that prohibit juror note-taking. According to the Judge and Attorney Survey reports, of the 206 criminal trials that took place in

ing the rule rule effective August 1, 2008. South Carolina did not indicate the authority for the prohibition and a search of relevant statutes, court rules, and case law failed to identify the source of the prohibition. The only judicial opinion that discusses juror note-taking in criminal trials – a 1985 appeal from a capital felony trialindicated that juror note-taking is a matter of trial court discretion. South Carolina v. South, 331 S.E.2d 775 (S.C. 1985) "Finally, South Carolina contends the lower court erred in allowing jurors to take notes. Such was a proper exercise of discretion." *Id.* at 778.

Table 19: Note-taking Law and Practice		
	% of Trials in which Jurors were Permitted to Take Notes	
Juror Note-taking . . .	**Civil**	**Criminal**
Prohibited	42	27
Permitted	70	69
Required	97	95

Pennsylvania and South Carolina (the only two states that reported that juror note-taking was prohibited), more than one-fourth of the judges permitted jurors to take notes, and in 42% of the 36 South Carolina civil trials jurors were permitted to take notes. In fact, in 23% of both the criminal and civil trials, jurors were actually given writing materials with which to take notes.[35]

Trial complexity also affects judicial decisions about trial techniques, and thus deserves some additional explanation. Two survey questions asked respondents to rate the level of evidentiary and legal complexity on a scale of one (not at all complex) to seven (extremely complex). Overall, 18% of trials were rated as very complex (six or seven) on at least one measure of complexity and 7% on both measures.

Trials that are highly complex—six or seven on the scale—are trials in which juror notebooks can be extremely helpful, but overall juror notebooks were not very popular, even in complex

35. The apparent non-compliance with the prohibition on juror note-taking by Pennsylvania and South Carolina trial judges is quite puzzling. Certainly one possibility may be that judges and lawyers in those states have learned enough about the benefits of this technique (and the absence of any disadvantages) that they simply ignore the prohibition. As we find throughout this discussion, many of these techniques are employed in combination with one another, suggesting that judicial and lawyer education about these techniques in many jurisdictions may have begun to show measurable effects. The South Carolina Statewide Survey response reported that juror note-taking is prohibited in both criminal and civil trials, but did not report legal authority for the prohibition. Perhaps the individual who completed South Carolina's Statewide Survey was simply mistaken. Or perhaps the report reveals a widespread perception within the South Carolina legal community that juror note-taking is prohibited. There can be little doubt that cultural opposition to these practices in the absence of legal authority prohibiting them affects the extent of their use in states that leave these decisions in the sound discretion of the trial judge. *See also* Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts,* 28 N. ILL. U. L. REV. 407 (2008)

trials.[36] Only 11% of trials involving complex evidence and law provided notebooks for jurors. Notebooks were used twice as often in civil trials (8%) as in criminal trials (4%), and nearly twice as often in federal court (11%) as in state court (6%).

b. Juror Questions to Witnesses One of the more controversial innovations involves permitting jurors to submit written questions to witnesses. A substantial and growing body of empirical research has found that this practice, if properly controlled by the trial judge, improves juror comprehension without prejudicing litigants' rights to a fair trial.[37] The crux of the controversy stems from philosophical arguments about the role of the jury in the context of an adversarial system of justice. The practice is mandated for criminal trials in three states,[38] prohibited by case law in five states,[39] and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in six states,[40] prohibited in 10 states,[41] and left to the discretion of the trial judge in the rest. Despite ongoing controversy in many jurisdictions about whether jurors

36. The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds. MUNSTERMAN ET AL., *supra* note 33, at 102-03.

37. Shari S. Diamond, et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VANDERBILT L. REV. 1927 (2006); Larry Heuer & Steven Penrod, *Juror Note-taking & Question Asking During Trials*, 18 L. & HUMAN BEHAV. 121 (1994).

38. ARIZ. R. CRIM. P. 18.6(e); COLO. R. CRIM. P. 24(g); IND. JURY R. 20(7).

39. Matchette v. Georgia, 364 S.E.2d 545 (1988); Minnesota v. Costello, 646 N.W.2d 204 (2002); Wharton v. Mississippi, 784 So.2d 985 (1998); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). Statewide Survey respondents for Illinois, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina reported that juror questions were prohibited but did not report the legal authority for this prohibition. NCSC staff was unable to locate the source of prohibition in the relevant state statutes, court rules, and case law. After data collection was complete Arkansas became the sixth state to prohibit juror questions. *See* ARK. R. CRIM. P. Rule 33.8.

40. At the time of the survey data gathering, four states reported mandatory jury questioning in civil cases. ARIZ. R. CIV. P. 39(b)(10); COLO. R. CIV. P. 47(u); IND. JURY R. 20; WYO. R. CIV. P. 39.4. Since then, Florida and Washington State have adopted similar rules. FLA. R. CIV. P. 1.452; WASH. C.R. 43(K) & C.R.L.J. 43(K).

41. Minnesota v. Costello, 646 N.W.2d 204 (2002); Nebraska v. Zima, 468 N.W.2d 377 (1991); Morrison v. Texas, 845 S.W.2d 882 (1992). The Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff was unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.

should be permitted to ask questions, jurors were allowed to ask questions in 15% of trials reported on in this study. Evidentiary complexity played a role, with judges permitting juror questions in 17% of the most complex cases, but in only 12% of the least complex cases. Judges were also significantly less likely to permit juror questions in federal court compared to state courts.

c. Discussion of Evidence During Trial Another controversial technique is to allow jurors in civil trials to discuss the evidence among themselves before final deliberations.[42] In most states it is prohibited altogether.[43] Overall, juror discussions were permitted in only 2% of state jury trials and only 1% of federal court trials. Surprisingly, one-third of the trials in which jurors were permitted to discuss the evidence took place in states that prohibit the practice. Given that juror discussions took place in 29 states that expressly prohibited them, it appears that this particular technique has generated enough interest to encourage a small number of judges to ignore the prohibition and secure the consent of counsel to permit juror discussions in individual cases.

d. Legal Instructions A substantial amount of research suggests that juror comprehension of the law is affected by the timing and form of jury instructions. One technique growing in prevalence (18%) is to pre-instruct jurors about the substantive law—that is, to provide a basic overview of the black letter law governing the case in addition to administrative housekeeping rules and general legal principles.[44] Survey respondents from eight states report that judges are required to pre-instruct jurors on the substantive law before the evidentiary portion of the

42. MUNSTERMAN ET AL., *supra* note 33, at 124-25. Arizona, Colorado, and Indiana have enacted court rules explicitly permitting this practice. Maryland has case law that condones the practice. Wilson v. State, 242 A.2d 194 (Md. 1968). Elsewhere, the practice is implicitly permitted by virtue of the fact that no legal authority explicitly prohibits it.

43. *See* Valerie P. Hans, et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J. L. REFORM 349, 352-60 (1999).

44. MUNSTERMAN ET AL., *supra* note 33, at 132-33.

trial.[45] However, most of the required instructions deal with basic legal principles such as burden of proof and admonitions concerning juror conduct rather than specific instructions on the elements of crimes or claims to be proven at trial.[46]

Judges were significantly less likely to pre-instruct in civil trials than in criminal trials. Federal judges were marginally more likely to pre-instruct than were state judges. Trial complexity was unrelated to judges' decisions to pre-instruct. It does appear that many judges who pre-instructed juries view this technique as part of a set of jury trial practices. Those that did so were also significantly more likely to permit jurors to take notes, to submit questions to witnesses, to permit juror discussions before deliberations, to deliver final instructions before closing arguments, and to provide jurors with a written copy of the instructions.

Other techniques to improve juror comprehension of the law involve instructing the jury before closing arguments and providing written copies of the instructions to jurors for use during deliberations.[47] Fewer than half of the trials in the study did so. At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials and in nearly three-quarters of federal jury trials.

II. The "S.O.S. Effect"

Since completion of the survey and publication at the National Center for State Courts' Center for Jury Studies website, its content has repeatedly provided a useful baseline against which state and local policymakers could assess their own systems and make appropriate adjustments. A variety of legal organizations and governmental entities in more than a dozen states have focused upon the *State-of-the-States Survey*. Their

45. COLO. R. CIV. P. 47(a)(2)(V), 47(a)(5); COLO. R. CRIM. P. 24(a)(5); IND. R. CT. Jury Rules 20(a); MO. R. S. CT. Rule 27.02; N.Y. CRIM. PROC. LAW §§ 260.30, 270.40; OR. R. CIV. PROC. Rule 58B(2); OR. REV. STAT. § 136.330; TENN. R. CRIM. PROC. Rule 51.03(1); TENN. R. CIV. PROC. Rule 30(d)(1); WYO. R. CIV. PROC. Rule 39.3, WYO. R. CRIM. PROC. Rule 24.3. No legal authority could be found for the requirement in South Carolina.

46. Respondents from Nevada and Texas reported that pre-instruction is prohibited without citing any legal authority.

47. MUNSTERMAN ET AL., *supra* note 33, at 142-43, 151-52.

deliberations occurred at bench and bar conferences, judicial educational programs, court manager meetings, and in state legislatures. These focused gatherings have often resulted in lively debate, jury-centered educational programming and, in some instances, legislative action. This might be called the *State-of-the-States Survey*—or S.O.S.—Effect.[48]

A. Judge and Lawyer Dialogues

The *State-of-the-States Survey* has been a focal point at judge-lawyer conferences in California, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New York, Ohio, Pennsylvania, Texas, Virginia, Wisconsin, Washington, and West Virginia. These conferences have typically been hosted by the state judicial conference, a state bar association or national lawyer organizations like the American Board of Trial Advocates. Staff from the National Center for State Court's Center for Jury Studies have been presenters at the meetings, explaining the survey's core findings and comparing practices in the host state with those in other jurisdictions. There has been recurring interest in jury management practices such as summoning methods and in the extent to which trial judges embrace the latest in-trial innovations.

Discussions have often turned to an assessment of one or more key assumptions underlying the innovations charted in the *State-of-the-States Survey*. These assumptions include:

> (1) Courts that increase their use of technology, improved records management, and "customer care" of jurors, will achieve greater efficiency and inspire public trust and confidence.
>
> (2) To honor the oft-stated instruction to juries that they are the sole "judges" of the facts, trial judges and lawyers must give jurors a full package of tools to facilitate their recall of evidence and comprehension of the applicable law.
>
> (3) In managing our adversarial justice system, courts must attend to the jurors' needs for education, respect, safety and privacy.

Our recent experience tells us that open-minded discussion of the *State-of-the-States Survey* and of the ABA *Principles* inspires

48. The Survey's utility has not been limited to public policy discourse. A mere three months after its public release, Associate Justice John Paul Stevens cited the *State-of-the-States Survey* in his dissent in Fry v. Pliler, 127 S.Ct. 2321, 2329 (2007) (Stevens, J., dissenting) as a criterion for the average length of jury deliberations in capital cases in California.

robust reflection on the purposes and values undergirding trial by jury. In turn, these conversations about fundamentals result in action plans.

B. Legislation and Court Rules

A pre-publication version of the *State-of-the-States Survey* was examined during the first-ever Texas Civil Jury Trial Summit in 2006. Judges, including the chief justice of the Texas Supreme Court, and trial lawyers from across the state discussed jury trial innovations during the two-day summit. At the end of the summit, the chairman of the Texas Senate Judiciary Committee, Jeff Wentworth, announced his intention to introduce a bill to implement several of the innovations described in the ABA *Principles* and quantified in the *State-of-the-States Survey*. In 2007, Senate Bill No. 1300 was the subject of a Committee hearing in Austin. The bill would authorize, among other things, in civil cases: preliminary instructions to the jury at the beginning of trials regarding basic legal rules, juror ability to take notes and to ask written questions to witnesses (after vetting by the court and counsel), and interim summations by counsel during trial. Although the legislation was not adopted by the full legislature before its adjournment, the public hearing energized additional segments of the legal community to evaluate innovations aimed at enhancing juror understanding of facts and law.

Similarly, the Illinois State Bar Association organized a two-day statewide conference to discuss appropriate jury innovations for Illinois in 2006. The ABA *Principles* and the *State-of-the-States Survey* statistics provided the framework for the discussion. Attendees discussed, evaluated, and ranked a variety of possible jury trial innovations. At the end of the conference, participant voting yielded broad support for certain reforms, including increased use of substantive jury instructions during civil trials, greater opportunities for jurors to submit written questions in civil trials, more statewide uniformity in early juror screening, greater use of questionnaires in voir dire, and higher juror pay.[49] Thereafter a bar committee was tasked with draft-

49. *See* Jeffrey A. Parness, *Reforming the Civil Jury in Illinois: the 2006 Allerton Conference*, 94 ILL. B.J. 608 (2006).

ing rules for adoption by the Illinois Supreme Court. At the time of this printing, the Rules Committee of the Court was scheduled to recommend a new rule to require trial courts to give a written copy of final instructions to each member of a deliberating jury and to authorize the rendering of final instruction to juries prior to closing arguments.

In Nebraska, the *State-of-the-States* data provided the legislature with important factual premises to support adoption of a statute overturning case law prohibiting juror note-taking during trials absent consent of all parties.[50] Nebraska Bill LB 804 had been introduced by a state senator at the behest of one of his constituents, a trial lawyer. Discussion of the bill before the Nebraska Senate Judiciary Committee was unusually contentious.[51] Representatives of the Legislative Committee of the Nebraska State Bar testified against the bill, arguing that the prohibition on juror note-taking was believed to be tactically advantageous to trial lawyers in cases in which the evidence was weak or ambiguous.

Proponents of the bill, countering that the strategic considerations of lawyers should not prevail over the interests of justice, presented information from the *State-of-the-States Survey* showing that Nebraska had the fourth lowest rate of juror note-taking in the country (23% compared to the 69% national rate in state courts). The *State-of-the-States Survey* information combined with findings from empirical research documenting the positive impact of juror note-taking on jurors' ability to recall trial evidence prompted the Nebraska Criminal Defense Attorneys Association, whose membership was strongly divided on the bill, to change its official position from opposition to neutrality, and the bill itself was overwhelming passed by the Nebraska legislature.[52]

The Judiciary Committee of the Pennsylvania House of Representatives found the *State-of-the-States Survey* useful on two fronts. Survey information on juror compensation was

50. State v. Kipf, 450 N.W.2d 397, 415 (Neb. 1990).

51. Based on authors' personal communication with a Nebraska legislator.

52. This summary of the legislative history is based on a series of e-mails between January 24 and February 1, 2008 to the NCSC from Judge Jan Gradwol, a retired Nebraska judge who presided in the trial that resulted in the *Kipf* prohibition on juror note-taking. Judge Gradwol was one of the proponents of LB 804 who testified before the Nebraska Senate Judiciary Committee.

used to assess Pennsylvania's current jury compensation system which places an unusually great funding burden upon its county courts. During the same session, the committee passed a resolution urging the state Supreme Court to enact a rule permitting judges to give juries written jury instructions in criminal trials. The resolution specifically cited the *State-of-the-States Survey* finding that only Pennsylvania, Georgia, and Alabama prohibited criminal jurors from being given copies of the jury instructions.

In Wisconsin, the Supreme Court is considering a petition restricting attorney and public access to juror information after voir dire has been completed. The proposal cited the *State-of-the-States Survey* information concerning juror privacy concerns.[53]

Finally, on April 8, 2008 the Louisiana Senate Judiciary Committee favorably reported out a bill prohibiting courts from giving deliberating juries a written copy of the final legal instructions of the trial judge. *State-of-the-States Survey* information helped concerned practitioners successfully argue that the trend in the United States is for trial judges to give written copies of final charges to jurors in order to aid their recall of relevant legal requirements. The proposed legislation was not adopted by the full Senate.

C. Legal Education Programming

Gatherings of legal professionals and legislators concerned with jury issues have exhibited two recurring areas of interest to judges and lawyers: (1) improving the efficiency and effectiveness of jury selection; and (2) managing jury deliberations that become troubled due to, for example, juror misconduct or apparent deadlock.

Regarding jury selection, the perennial challenge in conducting voir dire is to elicit meaningful information within a reasonable time allotment about prospective jurors' abilities to maintain fairness and impartiality. An inherent tension exists between the major actors in the jury selection portion of a trial. The parties and their lawyers want to gain as much information

53. *In re Amendment of Rules of Pleading, Practice and Procedure: Wis. Stats. Ch. 756, Juries* (Jan. 3. 2008). (On file with the author.)

as possible about the attitudes and life experiences of each venire member. They also want to retain maximum flexibility and discretion to remove prospective jurors based upon that information. A trial judge, with dozens or hundreds of cases on her docket, wants to administer justice in a timely and efficient manner so that other cases can be given prompt attention. Many judges also insist that voir dire questions be reasonably related to issues that are likely to arise during trial so as not to intrude upon juror privacy. These competing professional interests are often not resolved to the satisfaction of anyone. Consequently judges and lawyers alike believe there is a great need for improvements in jury selection methods.[54]

At the 2008 Annual Convention of the American Association for Justice NCSC staff conducted a program on ways to replace judge-lawyer competition during voir dire with collaboration. The *State-of-the-States Survey* and the ABA *Principles* were contrasted to show how far actual voir dire practices differ from the gold standards espoused in the *Principles*.

There is also a need for education about the ways that judges respond to troubled deliberating juries, such as those with jurors accused of misconduct or who are deadlocked. To address these concerns, the National Center for State Courts and the National Judicial College recently teamed up to design and test judicial education curricula for presentation to judicial conferences around the country.[55] The learning objectives will include: (1) proficiency at obtaining high-quality information from prospective jurors while remaining sensitive to time limits and citizen privacy, and (2) gaining confidence to address juror needs or misconduct arising during final deliberations. The course offerings will be adjustable to meet the particular needs of a requesting jurisdiction. Each module will give judicial education directors the option to engage a program lasting from a half day or to a whole day. Components will include the *State-of-the-States Survey* and additional research on jury selection and managing deliberating juries.

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54. Gregory E. Mize & Paula Hannaford-Agor, *Toward a Better Voir Dire Process*, 44 Trial 50, 50 (March 2008); Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process* 47 JUDGES' J. 4 (2008).

55. This effort is made possible by a grant from the State Justice Institute and the largesse of the International Academy of Trial Lawyers Foundation.

Another example of judicial education programming using the *State-of-the-States Survey* occurred at the 2008 Annual Conference of the American Judges Association. In designing the educational components of the conference, planners took notice of the survey figures regarding the high frequency of citizen involvement with jury trials. They focused on the survey research showing: (1) there are approximately 148,000 jury trials conducted in state and federal courts each year; (2) close to 32 million citizens are summoned to courthouses for jury duty; and (3) over 1.5 million Americans are impaneled on juries each year. It is evident from this information that jury trials present a tremendous opportunity for judges to educate citizens and build public trust in our judicial system. Hence, the American Judges Association showcased a half-day program, entitled, "Jury Trials: Recurring Opportunities to Build Public Trust in Courts," demonstrating how portions of trial by jury present opportune moments to teach and inspire citizens about courts and the administration of justice.

D. Improving Pattern Jury Instructions

Judges and lawyers have repeatedly commented upon the need to make jury instructions both legally accurate and comprehensible to the lay juror. That chorus led the National Center for State Courts, the Supreme Court of Ohio, and the Ohio Judicial Conference to assemble representatives from 27 states for a National Conference on Pattern Jury Instructions in Columbus, Ohio, in April 2008.[56] Three objectives were achieved: (1) To provide pattern jury instruction chairs, reporters, and members with the latest research and information on improving the comprehensibility of pattern jury instructions; (2) To provide an opportunity for pattern jury instruction committees to exchange information about internal pattern jury instruction committee operations and management techniques; and (3) To establish a mechanism for future collaborative relationships among pattern jury instruction members and the development of pooled expertise and resources (e.g., website,

56. Made possible by a grant from the State Justice Institute and generous contributions from the ABA Section on Litigation and the Product Liability Advisory Council (PLAC) Foundation.

listserv, blog) from which pattern jury instruction committees can draw.

Attendees identified a number of areas for potential improvement in pattern jury instruction management. They were particularly intrigued by the session on communication technologies and their implications for efficient pattern jury instruction committee efforts. Conferees advocated creation of an online database of existing state pattern jury instructions that committee members could consult when drafting instructions in new areas of law and revising instructions to be more understandable to jurors. They also called for renewed empirical research on juror comprehension of instructions in order to assess the effectiveness of recently revised instructions and of providing written copies of instructions to jurors during deliberations.

III. Where Do We Go From Here?

The *State-of-the-States Survey* resulted in many revelations, not the least of which was the solid number of jury trials conducted annually in state courts. Previous estimates of the number of jury trials were limited to general jurisdiction courts.[57] The *State-of-the-States Survey* found that a considerable proportion of jury trials—perhaps as much as 40%—are actually conducted by limited jurisdiction courts. The volume of jury trial activity in these courts is certainly a surprise and suggests that recent trends to eliminate the right to trial by jury for low-level offenses and low-value civil cases in many jurisdictions has not been as widespread and as successful as previously imagined. It also helps to explain the relatively high summoning rates—15% of the adult American population each year—and the increasing proportion of Americans that report having served as trial jurors.

Another important finding from the *State-of-the-States Survey* is that, in spite of statewide efforts to regulate jury operations and trial practices in some jurisdictions, most jury operations and practices are still governed on a local, and even individual, basis. The use of general terminology to describe

57. BRIAN J. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS 102-03 (2001).

jury practices (e.g., term of service, statutory exemptions, and one-step versus two-step summoning procedures) tends to mask a great deal of local variation. As we discovered during the long, slow process of collecting data for the survey, the extent of continued local autonomy not only makes it difficult to collect data, but also makes it difficult to define terms and to compare data across jurisdictions. It also indicates the inherent challenge—and the likelihood of substantial local resistance—that states face in attempting to implement statewide changes in jury procedures.

A curious finding from the Judge and Attorney Survey is the extent to which judges and lawyers reported the use of various trial practices (e.g., juror note-taking, juror questions to witnesses, and written copies of instructions) that apparently conflict with existing court rules, policies, or custom. As a general matter, judges and lawyers are more likely to use these techniques in jurisdictions that prohibit them than to not use them in jurisdictions that mandate them. Some of these inconsistencies may be the result of mistakes or misunderstandings on the part of the individuals who completed the Judge and Attorney or the Statewide surveys. However, strong correlations among the different trial techniques suggests that, at least in some cases, judges and lawyers have concluded the benefits of these techniques, in terms of improved juror performance and satisfaction, outweigh potential disadvantages. This decidedly Ghandi-esque approach to jury improvement at a grassroots level is intriguing, to say the least.

The *State-of-the-States Survey* shows that jury operations and practices are prominent in statewide and local court improvement efforts. To some extent, local court efforts are affected by statewide initiatives, especially those involving mandated changes in jury procedures. But the level of local court activity, even in jurisdictions that had not undertaken a statewide jury improvement initiative, was considerable. A number of factors may be driving local court efforts. More sophisticated technologies can reduce staff time and associated costs as well as provide better management information to court administrators to assess performance and focus on problem areas. Improved jury yields essentially translate as reduced administrative costs per juror summoned for service. Jury sys-

tem operations provide citizens with their first impressions of jury service. Daily courthouse routines establish what citizens can expect from courts in terms of convenience, communication with court staff, demands on their time, reimbursement for out-of-pocket expenses, and respect for privacy.

Trial practitioners, jury boosters, and students of trial by jury should be encouraged by the increasing dialogue and research that has followed the release of the survey. It is reasonable to assume that legislative debates, pilot projects, and education programs will continue in the years ahead.

A. Future Research Possibilities

How can policy makers and administrators use the state-by-state data in this survey? We hope the comparative information and analysis will encourage courts that do not routinely collect and review data on their jury operations and practices to begin doing so. Courts that do not do so already, could begin to regularly track and compare their jury yield and juror utilization statistics against those of comparable courts, and use the information to identify areas needing improvement. This type of performance metric is invaluable for identifying relative strengths and weaknesses of summoning methods and formulating effective strategies for addressing shortcomings. With data from the *State-of-the-States Survey*, judges and court administrators can evaluate their own practices in comparison with their peers across the country.

The *State-of-the-States Survey* also provides direction to the National Center for State Courts' Center for Jury Studies concerning the types of activities that it should pursue to better assist state and local courts. For example, how effective are various techniques to improve the accuracy of addresses on the master jury list, thus enhancing the overall jury yield? Which voir dire methods best elicit candid and complete information from jurors? What implications do these methods have on juror privacy expectations? To what extent do jurors make use of decision-making aids when they are offered them during trial?

Other areas for future research include topics that the *State-of-the-States Survey* did not address, either because we believed that too few courts could easily report on these topics or because we overlooked the issue while designing the surveys.

The former category includes the extent to which courts collect and analyze information about the demographic characteristics of their jury pools and how well those jury pools reflect a fair cross section of their respective communities.[58] Questions concerning juror utilization were also omitted from the Local Court Survey but are critically important to court efficiency and citizen satisfaction with jury service.

The Judge and Attorney Survey did not include questions on trial outcomes and trial length. Nor did it seek opinions about voir dire and trial practices (regardless of whether these were used at trial). Importantly, the survey did not reach out to former jurors to gain their assessments of their jury service and suggestions for improvements. Without question, it would be enlightening to gain that information in a new outreach to judges, lawyers and, very importantly, recent jurors.

B. Future Work Agendas

The *State-of-the-States Survey* demonstrated how voir dire practices tend to be either judge dominated or lawyer dominated.[59] In this context, as discussed earlier, a competition often occurs between judges and lawyers during the jury selection portion of a trial. This dynamic can stand in the way of discerning potential juror bias in the efficient and effective ways suggested by the ABA *Principles*.[60]

The availability of *State-of-the-States Survey* data for each state now enables us to ponder the real world dynamics playing out between lawyers and judges during voir dire in our home jurisdiction and to compare those processes against the ideals espoused in the ABA *Principles*.[61] The coming together of the ideal and real creates a recurring opportunity for judges and lawyers to begin discussing what a more mutually desirable voir dire might look like. We suggest several issues and ques-

58. AMERICAN BAR ASSOCIATION *supra* note 4, pr. 10 A. 3 which provides that courts should "periodically review the jury source list and the assembled jury pool for their respective representativeness and inclusiveness of the eligible population in the jurisdiction."

59. *Supra* Figure 1.

60. AMERICAN BAR ASSOCIATION, *supra* note 4, at 13-17.

61. *Id*. Principle 11 suggests proper purposes of for-cause and peremptory strikes and recommends a workable standard by which a court might make a ruling on motions to strike for cause.

tions that dialogues might address. Can there be agreement among bench and bar in one's home jurisdiction that the "system" would be better served if we worked together to attain greater juror candor in cases? Would expanded inquiries about the life experience of venire members lead to increased discernment of citizen bias and incapacity to serve? If so, would the exercise of for-cause and peremptory challenges become more reason-based? More efficient?

As we pause to think carefully about the why's and how's of jury selection, more questions naturally arise. If a trial judge, following the teaching of *Batson v. Kentucky*,[62] is expected to protect the civic rights of prospective jurors and promote public trust and confidence in the courts, what is the role of the trial advocate in those regards? To the degree any potential juror observes that he or she is being struck from jury service for no seemingly rational reason, or for a discriminatory purpose, is public trust undermined? Do members of the trial bar have any obligation toward making jury selection a more rational process?

Can practitioners agree that a jury panel free of predispositions toward any party—even a lawyer's client—leads to a "better" jury? Do trial lawyers have a duty to explain an answer to any of these questions to their clients?

Are there voir dire practices or procedures that attorneys would like to see utilized more often in their jurisdictions? For example, an opportunity to ask at least a couple of individualized questions to venire members? Voir dire less dominated by judges, but still subject to meaningful judicial oversight? As in the new discovery provisions of the Federal Rules of Civil Procedure,[63] would it be advisable for opposing counsel to regularly "meet and confer" prior to trial regarding the use of a simple juror questionnaire or regarding filing a joint motion for approval of several voir dire procedures recommended in the ABA *Principles*? Are practitioners willing to give up some of their anchored customs in order to achieve a more information-filled voir dire?

62. Batson v. Kentucky, 476 U.S. 79 (1986).
63. FED. R. CIV. P. 26(f).

Do our judicial readers feel their local legal culture would do well to attempt new practices or procedures during jury selection? Would they prefer trial lawyers refrain from arguing their case prematurely during voir dire? Would they be willing to invite more lawyer participation in exchange for prompt and economical voir dire questioning by attorneys? Would they advocate promulgation of a court rule defining the meaning and standards for excusing a prospective juror for cause? Conversely what might judges be willing to give up in order to gain a more effective voir dire? Exclusive, judge-conducted questioning? Fewer questions posed to the entire panel? The list of pregnant questions can go on.

If these reflections and open questions resonate with readers, we hope they might inspire, if not lead, an action plan in their home jurisdictions to elevate the quality of jury selection practices. Action plans could include the launch of bench-bar conferences to refine needs and desires and to distill practical options. Volunteer judges and lawyers might design and implement pilot projects including:

- drafting of model voir dire questionnaires to be used in a sampling of cases and evaluated over a specified period of time;
- undertaking individualized voir dire in some courtrooms followed by an evaluation by host judges and shared with other judges and the trial bar;
- experimenting with balanced judge-lawyer voir dire questioning of prospective jurors; or
- trying out new procedures for the elimination of unfit venire members utilizing a clearly defined concept of "for-cause."

The possibilities are innumerable. Reader willingness to start such efforts is essential.

The National Center for State Courts has developed court performance measures, including assessments related to jury operations such as CourTools Measure 8 (Effective Use of Jurors).[64] The *State-of-the-States Survey* provides courts with analytical tools to help identify areas of weak performance and estimate the potential impact in terms of improved efficiency and reduced administrative costs. The National Center for

64. NATIONAL CENTER FOR STATE COURTS, COURTOOLS (2005), http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm. The NCSC CourTools are a series of court performance measures based on Trial Court Performance Standards. CourTools Measure 8 (Effective Use of Jurors) provides a detailed template that courts can use to calculate jury yield and juror utilization rates.

State Courts is using the *State-of-the-States Survey* to develop a *Jury Managers' Toolbox,* an online diagnostic tool to help jury and court administrators estimate the impact of improved efficiency on key jury performance measures and associated operational costs.

We also are attempting to develop an Urban Courts Workshop to provide urban and statewide jury systems an opportunity to share information about innovative approaches they have developed to address the unique issues associated with heavy volume jury systems. We need to document the various funding streams that support the American jury system. Our understanding of juries would benefit from a series of demonstration projects implementing the ideals of the ABA *Principles for Juries and Jury Trials*.[65]

In closing, we recite the old adage, "Round and round it goes, where it stops nobody knows." Enthusiasm for juries and jury trial studies is in full bloom. We hope practitioners and policymakers will continue to gain—and apply—new knowledge about jury trials in their home jurisdictions and beyond.

65. The Seventh Circuit Bar Association Jury Project Commission is a model for testing the merits of the ABA *Principles*. AMERICAN BAR ASSOCIATION, *supra* note 4. Volunteer judges and lawyers in that federal circuit used seven practices encouraged by the *Principles* and carefully analyzed their effectiveness. The project manual is online at http://www.7thcircuitbar.org/associations/1507/files/01 ProjectManual.pdf. At least two articles have addressed initial findings from the project. Stephan Landsman, *An Experiment in Larger Juries in Civil Trials*, 78 N.Y.ST.B.A. J. 21 (October 2006); Shari Seidman Diamond, *Juror Questions at Trial: In Principle and In Fact*, 78 N.Y.ST.B.A. J. 23 (October 2006).