COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **May 23, 1995**

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

1. Action on Proposed Amendments to Rules 16(a)(1)(E) & (b)(1)(D). Disclosure of Expert Witnesses.

Minor stylistic changes were made to the proposed amendments to Rules 16(a)(1)(E) and (b)(1)D) which address the issue of disclosure of the names and statements of expert witnesses who may be called to testify about the defendant's mental condition.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(E) and (b)(1)(C) and forward them to the Judicial Conference for approval.

2. Action on Proposed Amendments to Rule 16(a)(1)(F) and (b)(1)(D). Pretrial Disclosure of Witness Names and Statements.

As noted in the attached GAP Report, the Committee made several minor changes to the proposed amendment and the accompanying Committee Note. The Committee considered again the view that the amendments are inconsistent with the Jencks Act; it continues to believe that forwarding the proposed changes to Congress is appropriate under the Rules Enabling Act.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(F) and (b)(1)D) and forward them to the Judicial Conference for approval.

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

B. Action on Proposed Rule 24(a). Voir Dire.

At its meeting in April 1995, the Advisory Committee considered amendments to Rule 24(a) which would provide for supplemental questioning of jurors by counsel. During its discussion, the Committee considered formal and informal surveys of judges on the issue as well as a draft circulated by the Civil Rules Committee which would amend

Civil Rule 47. The Criminal Rules Committee determined that the proposed amendment should go forward for public comment. The proposed amendment to Criminal Rule 24(a) and its accompanying Note are attached.

The Advisory Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 24(a).

III. INFORMATION ITEMS

1. Proposed Amendments Considered by the Advisory Committee

At its April 1995 meeting the Advisory Committee considered proposed amendments to Rule 11 (questioning the defendant re prior discussions with the prosecutor), Rule 26 (proposal to require trial court to determine if defendant had been apprised of right to testify), Rule 35(c)(proposal to consider further definition of term "imposition of sentence" in rule), and Rule 58 (proposal to specify in rule whether forfeiture of collateral amounts to a conviction).

As noted in the attached minutes, the Committee decided to take no action on the proposed amendments to Rules 11, 26 and 58. With regard to Rule 35(c), the Committee decided to defer any amendments pending re-stylization of the Criminal Rules.

2. ABA Liaison with Committee

The Committee briefly discussed the issue of formal liaisons from various bar associations and was apprised that because no such procedure exists, it would be better to simply establish points of contact with such organizations.

Attachments

GAP Report on Rules 16 and 32
Proposed Amendment to Rule 24(a)
Minutes of Committee Meeting

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **GAP REPORT: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16 and 32.**

DATE: **May 23, 1995**

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the writtent submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(E) & (b)(1)(C). Disclosure of Expert Witnesses.

The Committee made only minor stylistic changes to the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C). Very few comments were received on these particular provisions in Rule 16.

2. Rule 16(a)(1)(F) & (b)(1)(D). Pretrial Disclosure of Witness Names and Statements

After considering the numerous written submissions and oral testimony on the proposed amendments to Rule 16(a)(1)(F) and (b)(1)(D). the Committee made several minor amendments to the Rule and the accompanying Note. The Committee changed the Rule to limit the disclosure requirements to *felony*, non-capitol cases. It also clarified language in Rule 16(a)(1)(F) concerning the content of the nonreviewable statement by the attorney for the government. As rewritten, the rule explicitly recognizes that the government may decline to disclose either the name or the statement, or both, of a particular witness. Finally, the Committee made stylistic changes consistent with Mr. Garner's suggestions at the June 1994 Standing Committee meeting.

The changes to the Committee Note accompanying Rule 16 sharpen the Committee's position that the proposed amendment is consistent with other amendments to the Rules of Criminal Procedure, already approved by Congress, which technically violate the Jencks Act. Those amendments provide for some limited *pretrial* disclosure of a government witness' statement before the witness testifies on direct examination at trial, as provided in the Jencks Act.

3. Rule 32(d). Forfeiture Proceedings.

Five commentators, including the Department of Justice, which had proposed the amendment, supported the proposed amendment to Rule 32(d) which permits the trial court to enter a forfeiture order prior to sentencing. The Department of Justice's comments suggested changes which might have been considered significant enough to require republication for public comment. Ultimately, the Committee changed the rule in the following respects: (1) the amendment now provides that the procedures in Rule 32(d) may be applied where the defendant has entered a plea of guilty subjecting property to forfeiture; (2) the Committee eliminated any reference to specific timing requirements; and (3) the Committee added the last sentence which recognizes the authority of the court to include conditions in its final order which preserve the value of the property pending any appeals.

Given the relatively minor nature of these changes and the low number of public comments on the published version, the Committee believes that republication of this amendment is unnecessary.

Attachments:

Rule 16 and Committee Note; Summary of Comments and Testimony
Rule 32 and Committee Note; Summary of Comments

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government ~~shall~~ must disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government must, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision must describe the witnesses' opinions,

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[1]. New matter is underlined and matter to be omitted is lined through.

the bases and the reasons therefor, and the witnesses' qualifications.

(F) NAMES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital felony case, the government must, no later than seven days before trial, disclose to the defendant the names of the witnesses that the government intends to call during its case-in-chief as well as any statements, as defined in Rule 26.2(f), made by those witnesses. But disclosure of that information is not required under the following conditions: (1) if the attorney for the government believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice, and (2) if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness, or both, cannot be disclosed.

(2) *Information Not Subject to Disclosure*. Except as provided in paragraphs (A), (B), (D), ~~and~~ (E), and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agents ~~in connection with the investigation or prosecution of~~ investigating or prosecuting the case. ~~Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.~~

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(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

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(C) EXPERT WITNESSES. Under the following circumstances, the defendant must, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under

Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary must describe the witnesses' opinions ~~of the witnesses~~ , the bases and reasons therefor, and the witnesses' qualifications.

(D) NAMES AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant must, at the government's request, disclose to the government before trial the names and statements of witnesses -- as defined in Rule 26.2(f) -- that the defense intends to call

during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed an ex parte statement under subdivision (a)(1)(F).

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COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names and addresses.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in state courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the

following three assumptions. First, the government will act in good faith, and there will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses and their statements unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to non-capital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name and statement even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

The most critical aspect of the amendment is the requirement that the government disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. The amendment creates a conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' *statements* at trial, *after* they have testified. *Palermo v. United States*, 360 U.S. 343 (1959). But the amendment is

consistent with the spirit of the Act to the extent that it reflects the importance of defense discovery in criminal cases. In *Campbell v. United States*, 365 U.S. 85, 92 (1961) the Court stated that to the extent the Act requires disclosure of any statements by government witnesses after they have testified, the statute "reaffirms" the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for the purposes of impeachment. In promulgating the Jencks Act, Congress recognized the potential dangers of witness tampering and safety and obstruction of justice and attempted to strike a balance between those concerns and the value of discovery to the defense. Considering the ability of the prosecution to block disclosure, the amendment to Rule 16 is harmonious with that approach. It permits the government to block pretrial disclosure where there is a danger to a person's safety or there is a risk of obstruction of justice.

The amendment is also clearly consistent with other amendments to other Federal Rules of Criminal Procedure, previously approved by Congress. Those amendments, which provide for defense discovery of statements in some pretrial proceedings, are technically inconsistent with the Jencks Act in that they require disclosure before the witness testifies at *trial. See, e.g.*, 26.2(g)(3)(disclosure of witness statements at detention hearing); Rule 12(i)(disclosure of witness statements at suppression hearings); Rule 46(i)(disclosure of witness statements at detention hearings) and Rule 16(a)(1)(E)(pretrial disclosure of expert witness testimony). The amendment is also consistent with other rules which require the government to provide pretrial disclosure of the names of its witnesses and addresses. *See, e.g.*, Rule 12.1(b)(disclosure of names and addresses of government witnesses re rebuttal of alibi defense); Rule 12.3(a)(2)(pretrial disclosure of names and addresses of government witnesses re defense based upon public authority).

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit it to supersede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supersession and assuming responsibility for a review of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the

government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra.*

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names and statements, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

I. SUMMARY OF COMMENTS: Rule 16

The Committee received 23 written submissions and heard testimony from three witnesses; two of those witnesses also supplied written comments. While several were statements filed by organizations, most of those commenting were in private practice. No current federal prosecutor filed a statement. Several were members of the judiciary.

With one exception (who declined to make any comments) all those submitting comments were in favor of the general expansion of federal criminal discovery in Rule 16. Most favored the amendments as published with one or two suggested changes. Beyond that, there were various levels of support for the key features in the amendment: One specifically favored the 7-day provision; four were opposed to it as being too short. With regard to the provision for an ex parte statement by the prosecution, 8 were opposed to it and two explicitly stated that the procedure was appropriate. Three specifically stated that the concern about danger to witnesses was overstated. One commentator stated that the Jencks Act should not be a problem. Several encouraged the Committee to extend production to FBI 302's. Three were in favor of requiring production of addresses of the witnesses. Several mentioned the issue of reciprocal discovery; one was opposed to it altogether and several indicated that the defense should have the opportunity to also refuse to disclose its witnesses under a procedure similar to that available for the prosecution.

II. LIST OF COMMENTATORS: Rule 16

CR-01	Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.
CR-02	Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark., 10-7-94.
CR-03	Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.
CR-04	James E. Seibert, United States Magistrate Judge, Wheeling, W.V.,11-4-94.
CR-05	David A. Schwartz, Esq., San Francisco, CA, 11-8-94.

CR-06	Edward F. Marek, Esq., Cleveland, OH, 11-16-94.
CR-07	William H. Jeffress, Jr., Esq., Wash. D.C., 12-6-94.
CR-08	Norman Sepenuk, Esq., Portland, OR, 12-16-94.
CR-09	Michael Leonard, Alexandria, VA, 1-18-95.
CR-10	John Witt, City of San Diego, CA., 1-6-95
CR-11	Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95
CR-12	New Jersey Bar Assoc.(Raymond Noble), 2-24-95
CR-13	Irvin B. Nathan, Esq., Wash. D.C., 2-7-94.
CR-14	Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.
CR-15	Paul M. Rosenberg, United States Magistrate Judge, Baltimore, MD, 2-17-95.
CR-16	Federal Public and Community Defenders, Chicago, IL, 2-21-95.
CR-17	Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.
CR-18	Federal Bar Association, Philadelphia Chapter, Philadelphia, PA, 2-27-95.
CR-19	ABA Section of Criminal Justice, Wash., D.C., 2-27-95.
CR-20	Maryland State Bar Association, Roger W. Titus, Rockville, MD, 2-21-95.
CR-21	Leslie R. Weatherhead, Esq., Spokane, WA, 2-28-95.
CR-22	Section on Courts, Lawyers and Administration of Justice of D.C. Bar, Anthony C. Epstein, Wash., D.C., 2-28-95.
CR-23	National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95.

III. LIST OF WITNESSES (Hearing in Los Angeles, Jan. 27, 1995) -- Rule 16

1. Norman Sepenuk, Esq., Attorney at Law

2. David A. Schwartz, Esq., Attorney at Law

3. Maria E. Stratton, Esq., Federal Public Defender

IV. COMMENTS: Rule 16

Hon. Graham C. Mullen (CR-01)
Federal District Judge, Western District of North Carolina
Charlotte, N.C.
Sept. 19, 1994

Judge Mullen believes the proposed new Rule 16 is long overdue. His only concern is that the requirement of seven days before trial for disclosure of witnesses may be too close to trial date to benefit anyone. Additionally, Judge Mullen feels that although objections will arise concerning witness safety, the committee has correctly concluded that such is confined to the minority of cases and has provided an appropriate mechanism to afford confidentiality.

Robert L. Jones, III (CR-02)
President, Arkansas Bar Association
Fort Smith, Ark.
Oct. 7, 1994

Mr. Jones, commenting on behalf of the Arkansas Bar Association, agrees with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

Hon. Prentice H. Marshall (CR-03)
Federal District Judge, Northern District of Illinois
Chicago, IL.
Sept. 30, 1994

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony. Additionally, in addressing the amendments regarding witness disclosure, he agrees with the Committee that risk to witnesses is greatly exaggerated by prosecutors, citing one minor incident in his 41 years of criminal trial experience. He concludes that knowledge of witnesses and their pretrial statements expedites cross-examination.

Hon. James E. Seibert (CR-04)
United States Magistrate Judge, Northern District of West Virginia
Wheeling, W.V..
Nov. 4, 1994

Judge Seibert strongly supports the proposed amendments and believes there exists an adequate safety valve in those limited cases where a witness list would not be appropriate. He notes that for the past four years he has required witness lists seven days prior to trial and that such has come to be accepted by the practicing U.S. Attorneys and defense bar (an initial scheduling order containing the requirements for witness lists is enclosed). He comments that a witness list allows the defense some reasonable assistance in trial preparation and that until a defendant has knowledge of the witnesses against him, it is difficult to properly decide whether to plead or go to trial.

David A. Schwartz (CR-05)
Private Practice
San Francisco, CA
Nov. 8, 1994

Mr. Schwartz supports the proposed amendment dealing with witness statements and names and suggests several changes. First, in support of the proposed amendments, he suggests that more liberal pretrial disclosure of witness information will advance the search for truth and cause of justice. Along these lines, he adds that the present practice of revealing witness information under the *Jencks* standards is unconscionable. Second, in support of the Rule 16 proposal, Mr. Schwartz explains that such alterations to the Rule will aid in negotiating plea agreements. Third, in support of the proposed amendments, Mr.

Schwartz suggests that such will cause the entire system to run more efficiently and force prosecutors to confront weaknesses in their case. Fourth, in support, he explains that forcing the government to reveal more information is consistent with due process and fundamental fairness. Finally, in support of the amendments, Mr. Schwartz comments that the arguments made by the Department of Justice regarding witness safety are inflated. He suggest several changes to the proposed amendments. First, he suggests that the seven day rule may be of little use to the defendant and that such should be expanded to thirty or sixty days prior to trial. Second, he suggests that prosecutors should not be given unreviewable carte blanche to deny discovery by claiming witness intimidation. He favors judicial intervention, through hearing, to determine the validity of the claim of witness intimidation. In the alternative, absent *pro se* representation, he suggests that undisclosed information be made available to defense counsel as an officer of the court under the stipulation that the defendant will not be privy to this information absent further court order.

Edward F. Marek (CR-06)
Private Practice
Cleveland, OH
Nov. 16, 1994

Mr. Marek (a former member of the Advisory Committee) supports the proposed amendments to Rule 16. He argues that such amendments should not be defeated because they may conflict with the Jencks Act. Mr. Marek explains that one can point to a number of amendments enacted through the rules enactment process which conflict with the Jencks Act but which Congress has seen fit to approve. For example, Rules 412 and 413 of the Federal Rules of Evidence as contained in the Violent Crime Control and Law Enforcement Act of 1994 represent Congress' belief that in sexual assault and child molestation cases government witness disclosure prior to trial is necessary. Mr. Marek suggests that these new evidence rules clearly show that Congress believes that the Jencks Act should not stand as a barrier to more enlightened discovery in Federal Courts. Mr. Marek points out that proposed amendments to Rule 16 are modest compared to Federal Rules of Evidence 412 and 413. Finally, he adds that the proposed Advisory Committee Note is important in that it provides that the prosecutor's *ex parte* statement must contain facts concerning witness safety or evidence which relate to the individual case. This language, Mr. Marek suggests, properly represents the Committee's intention that any argument, for example, that danger to safety of witnesses exists in all drug cases, would not be sufficient showing to block production of statements.

William H. Jeffress, Jr. (CR-07)
Private Practice
Washington, D.C.
Dec. 6, 1994

Although Mr. Jeffress is Chair of the ABA's Criminal Justice Standards Committee, the views stated in his comments are personal. Mr. Jeffress supports the proposed amendments to Rule 16. Mr. Jeffress does believe three aspects of the amendments could be and should be improved. First, he believes that the Committee's proposed amendment to Rule 16 does not require the prosecution to disclose witnesses it may call in rebuttal at trial, yet requires the defense to disclose all witnesses even if solely to be used to impeach. To Mr. Jeffress this seems an inappropriate balance of obligations. Second, Mr. Jeffress believes the Committee's accommodation of the witness safety concern goes so far that it undermines the utility and fairness of the Rule. Third, he argues that any rule giving the government the absolute right to refuse disclosure, without incurring significant adverse consequences for so refusing, is unsound. He suggests that the prosecutor's ability to refuse pretrial disclosure of names and statements of witnesses should depend on judicial approval, based upon *ex parte* submission, in accordance with Rule 16(d)(1). Mr. Jeffress disagrees with the Committee Note suggesting a hearing on this matter requires vast judicial resources. For the Committee's information he encloses a copy of the Third Edition Discovery Standards approved by the ABA of which he makes reference to in his comments.

Norman Sepenuk (CR-08)
Private Practice
Portland, OR
Dec. 16, 1994

Mr. Sepenuk favors the proposed amendments to Rule 16. He comments that complete disclosure of the government's case prior to trial is the best tool to facilitation of case disposition and to loosening up the criminal trial dockets. Mr. Sepenuk explains that such facilitation will be in the form of plea dispositions due to knowledge of the government case and the reaching of stipulations in advance of trial. He believes that the proposed Rule 16(a)(1)(F) should be amended to provide for pretrial disclosure of names and statements no later than ten days after arraignment. He also suggests amendment to Rule 26.2(f) to expand the definition of a "statement" required to be disclosed in advance of trial. Additionally, he believes that FBI memoranda of interview and similar interview statements should be explicitly made available under the Rules, and federal agents' reports should be subject to discovery to the extent they present a factual recitation of events, much like that of expert reports, which under the rules need not be produced.

Michael Leonard (CR-09)
Military Counsel
Alexandria, VA
Jan. 18, 1995

Mr. Leonard offers the views of someone who has been associated with the military criminal justice system for seven years and provides an overview of the discovery procedures in the military. In his experience, disclosure of the prosecution's witnesses takes place well in advance of trial, including any copies of witnesses' statements. The rules, he notes, are intended to reduce gamesmanship. Those interests, he asserts, are the same in federal practice. If the Committee is looking for a middle ground, he states, a review of the discovery rules followed by "other" federal prosecutors on a daily basis in military criminal practice my assist the Committee.

John Witt (CR-10)
City of San Diego
San Diego, CA
Jan 6, 1995

Mr. Witt thanks the Committee for an opportunity to provide input on the proposed amendments and notes that his counsel have informed him that nothing the amendments will have enough impact to justify any comments.

Ms Jane Bell (CR-11)
Akron Bar Assoc.
Akron, Ohio
Jan. 27, 1995

The Akron Bar Assoc. supports the proposed amendments to Rule 16. But it objects to the fact that the government may file an "unreviewable" statement for not providing the information. The Bar Assoc. suggests that provision be made for ex parte review of the government's reasons. No hearing would be necessary on that statement. The Assoc. also recommends substitute language for accomplishing that proposal. It also supports the provisions for discovery concerning experts.

The New Jersey Bar Assoc. (CR-12)
Raymond Noble
New Brunswick, NJ
Feb. 24, 1995

While the New Jersey Bar Assoc. supports the amendments to Rule 16, it recommends that the word "unreviewable" be removed from the amendment.

Mr. Irvin B. Nathan (CR-13)
Private Practice
Washington, D.C.
Feb. 7, 1995

Mr. Nathan (former Associate Deputy Attorney General who appeared before the Standing Committee on this issue at its January 1994 meeting) supports the proposed amendments to Rule 16 and requests incorporation of his article published in the New York Times endorsing the Committee's proposal. He points to state rules of discovery such as in California as examples of the growing sentiment of legislative bodies that fairness, efficiency and elimination of trial by ambush are better served by broader criminal discovery concerning witnesses. Mr. Nathan urges that the Justice Department withdraw its opposition to the proposed amendments.

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 15, 1995

Mr. Otto agrees with the proposed amendments to Rule 16 concerning witness names and statements. Mr. Otto further concurs on letting the trial court rule on the amount of defense discovery and the proposals regarding witness safety and risk of obstruction of justice.

Judge Paul M. Rosenberg (CR-15)
United States Magistrate Judge
Baltimore, MD
Feb. 17, 1995

Judge Rosenberg suggests that the proposed amendments concerning witness names and statements be modified to exclude misdemeanor and petty offenses. He explains that the requirement of supplying witness information seven days in advance of trial would be unduly burdensome in these cases especially in light of the fact that many U.S. Magistrate Judges handle large misdemeanor and petty offense dockets.

Federal Public and Community Defenders (CR-16)
Carol A. Brook and Lee T. Lawless
Chicago, IL
Feb. 21, 1995

The comments submitted are an expanded version of those provided the Committee prior to testifying in Los Angeles. The comments fall into two main categories. First, support is given to the proposed Rule 16 amendments as much needed and an improvement in the administration of justice. Second, comments are submitted on specific parts of the proposed amendments that the Federal Defenders feel will lead to unfair results not intended by the Committee. It is believed that disclosure of witness names and statements will enhance the ability to seek the truth, will provide information necessary to the decision of pleading guilty or going to trial, will contribute to the exercise of confrontation and compulsory process rights, and will save time and money. It is suggested that witness intimidation and perjury are exceptions to the rule and that ex parte, unreviewable proceedings are contrary to the adversary system of justice. Additionally, concern is expressed regarding the lack of reciprocity in the proposed amendment to Rule 16(b)(1)(D) which states that the court may limit the government's right to obtain disclosure if it has filed an ex parte statement. Also, concern is expressed over the requirement of defense witness disclosure prior to trial as such witnesses are not always known beforehand. Finally, it is suggested that witness addresses be disclosed.

Ms. Lee Ann Huntington (CR-17)
Chair, Committee on Federal Courts, State Bar of California
San Francisco, CA
Feb. 24, 1995

The Committee on Federal Courts of the State Bar of California supports the proposed amendments to Rule 16 in their aim to make reciprocal prosecution and defense discovery obligations. The Committee on Federal Courts suggests one further amendment to Rule 16. It is proposed that defendants be afforded the reciprocal right to refuse disclosure of witnesses who fear testifying and their statements (i.e., because of community harassment or pressure from victims' families) and that they be allowed to file a similar nonreviewable, ex parte statement under seal.

Criminal Law Committee, Federal Bar Association (CR-18)
James M. Becker, James A. Backstrom and Anna M. Durbin
Philadelphia Chapter
Philadelphia, PA
Feb. 27, 1995

The Committee supports reform of Rule 16, but suggests modification to what it deems to be two unwise elements of the proposed Rule change. First, the Committee suggests that the unreviewable nature of the government's decision to withhold disclosure should be made reviewable. Second, the Committee believes there should be no reciprocal duty on the defense to disclose any witness or statements before trial because the prosecution and the defense are not in like positions vis-a-vis the burden of proof or resources for investigation. The Committee feels there is no reason to obligate defendants beyond the present Rules.

ABA Criminal Justice Section (CR-19)
Arthur L. Burnett, Sr.
Washington, D.C.
Feb. 27, 1995

Judge Burnett, writing on behalf of the American Bar Association, expresses the Association's strong support for the proposed amendments to Rule 16. Although, in the Association's view, the proposed amendments to Rule 16 do not go as far as the ABA approved Third Edition Criminal Discovery Standards, the Association believes the changes are a step forward in more open discovery. The Association, in addressing disclosure of defense impeachment witnesses and statements, does suggest that the Committee

commentary recognize that reciprocal obligations of disclosure must be consistent with the constitutional rights of the defendant and the differing burdens on each side in criminal cases. The Association feels that the proposed changes would not substantially conflict with the Jencks Act and that where conflict may arise, Congressional approval would act as a partial amendment of the Act.

Criminal Law and Practice Section (CR-20)
Maryland State Bar Association
Mr. Roger Titus
Rockville, MD
Feb. 21, 1995

The Maryland State Bar Association endorses the adoption of the proposed amendments to Rule 16. The Association does express concern over the government's veto power of defense requests for pre-trial witnesses and statement disclosure through use of an unreviewable, ex parte statement under seal of the court. Additionally, the Association believes that the language of Rule 16(b)(1)(D) should not be discretionary. Where the government has avoided discovery by resort to the ex parte statement, it should thereby lose its right of reciprocal discovery.

Leslie R. Weatherhead (CR-21)
Witherspoon, Kelley, Davenport and Toole
Spokane, WA
Feb. 28, 1995

Ms. Weatherhead applauds the proposed amendments to Rule 16 as a small step in the right direction. Ms. Weatherhead strongly opposes the provision allowing for government refusal to disclose certain witnesses and statements through an unreviewable, ex parte statement.

Section on Courts, Lawyers and the Administration of Justice (CR-22)
District of Columbia Bar
Anthony C. Epstein, Cochair
Washington, D.C.
Feb. 28, 1995

The Section agrees with the basic premise of the proposed amendments to Rule 16. In general, these amendments make trials fairer and more efficient and facilitate appropriate

resolutions before trial. Specifically, the Section agrees with the Committee's decision to recommend the unreviewable, ex parte statement method of government non-disclosure. The Section believes it is appropriate to try this approach and to determine how it works in practice. Additionally, the Section seeks clarification on the Committee's "good faith" requirement for refusal to disclose and suggests that the defense be required to provide reciprocal discovery no more than three days prior to trial.

National Association of Criminal Defense Lawyers (CR-23)
Gerald H. Goldstein, William J. Genego & Peter Goldberger
Washington, D.C.
Feb. 28, 1995

Citing its long standing support of extensive broadening of the scope of criminal discovery, the NACDL supports what it terms the Committee's modest step in this direction. The NACDL suggests several changes to expand the Committee's movement towards more liberal discover. First, the NACDL believes that addresses of witnesses should be included in the disclosure. Second, the NACDL suggests that the seven day requirement does not afford enough time and that the three day rule for capital defendants is inadequate. Third, the NACDL believes that the definition of statement in Rule 26.1(f) must be amended to include such reports as DEA 6's and FBI 302's. Such amendment would also require modification to Rule 16(a)(2). Fourth, The NACDL expresses concern over the unreviewable, ex parte statement veto power of the government. Fifth, the NACDL suggests that no reciprocal disclosure requirement should be placed in the defendant and that if any duty is to exist that the time limit should be no earlier than when the government informs the defense that it is calling its final witness. In any event, the NACDL feels that the wording of Rule 16(b)(1)(D) should be amended to alleviate the discretionary language and should impose no duty on defense disclosure where the government withholds.

V. TESTIMONY

Three witnesses testified at a public hearing on the proposed amendments to Rule 16 at the Federal Courthouse in Los Angeles, California on January 27, 1995. Present were Hon. D. Lowell Jensen, Chair, Mr. Henry Martin, member, Professor Dave Schlueter, Reporter, and Mr. John Rabiej, Administrative Office.

Norman Sepenuk, Esq.
Attorney at Law
Portland, Oregon

Mr Sepenuk (who also submitted written comments which are summarized supra) indicated that as a former federal prosecutor he believed in an open file system, which in his view, expedited plea bargains and stipulations and provided for cleaner and crisper trials.. He stated that the 7-day provision is too short and proposes that the Committee change the amendment to provide for disclosure 10 days before trial. He pointed out that the prosecutors should be pushing for full and early disclosure to encourage plea bargaining. In return the defense should be required to turn over its names well before trial. He added that the definition of statement should include a specific reference to "302's" and require production of the witness's address. He would also require the government to show good faith for its belief that disclosure would harm an individual. Mr. Sepenuk also stated that he did not believe that it would be necessary to differentiate between types of cases vis a vis threats to witnesses; he believes that the prosecution and defense should be able to work it out. He noted that he had personal experience with delays resulting from failure of the government to make timely disclosure of a witness.

Mr. David A. Schwartz, Esq.
Attorney at Law
San Francisco, California

Mr. Schwartz (who had submitted written comments summarized, supra) testified that in his opinion the amendment does not coddle defendants. Nor does it have any effect on victims' rights. In his experience he often received witness statements the day before they testified. He is also aware of office policy to turn witness statements over on the Friday before the trial begins. In his experience, the public is aghast that federal criminal defendants do not receive more discovery. While he recognizes that there is a problem with witness intimidation and harassment, he has heard from friends who are prosecutors that they do not want to turn over too much information which may give the defense something to work with in the case. He does not believe that the Jencks act is reasonable and is unsure whether seven days is sufficient time. He noted that in his experience with white collar crime cases that the defendants often knew who the witnesses were but did not know what they would say. Mr. Schwartz also testified that he had some witnesses tell him that government investigators had discouraged them from talking to the defense. He stated that he was opposed to the provision for ex parte reasons being filed by the prosecutor; he stated that in California, defense counsel are precluded from disclosing the names and addresses of the government witnesses to the defendant. He proposes some sort of evidentiary hearing to determine the propriety of disclosure -- or at least to have the opportunity to refute the

government's reasons for nondisclosure. In his experience, he did know of cases which had been postponed because of delays in disclosing witnesses to the defense. It was also his experience in various state courts that the defense was provided an open file and that that often induced plea bargaining at an early stage. He does not object to reciprocal discovery although he does believe that there may be self-incrimination problems. And while he could live with an amendment which deleted reference to witness statements, he would want as much as he could get in discovery.

Ms. Maria Elena Stratton, Esq.
Federal Public Defender
Los Angeles, California

Ms. Statton testified that she works in a district with the second largest US Attorney's Office -- 170 assistants in the criminal division -- and that there is no uniform discovery policy. She noted that there are three areas of problems: First, the rogue agents and rogue prosecutors who operate in bad faith. Because these seem to be rare the amendment should not be geared to those situations. Second, there are inexperienced investigators and prosecutors who make uninformed decisions. Third, there are situations where the cases are weak and the prosecutors do not want to turn over information helpful to the defense. In her view, a real problem with the amendment is the lack of review of the prosecutor's ex parte statements. She noted that similar problems arise with regard to disclosing informants and that that procedure should work. She also suggested that the defense should also be permitted to decline to produce its witness' names. Just as there are dangers that the defendant may harass the government witness, she has experience the reverse situation; agents were harassing defense witnesses. Ms Stratton noted that there may be a problem with a note on page 124 of the booklet which indicates that the amendment does not address discovery of memoranda and other documents. She also expresses concern about the seven day requirement; she would move up the time to 14 or 21 days. She testified that she has had experience with continuances being granted because of last minute discovery. Ms. Stratton also stated that she has heard US attorneys candidly admit that the amendment is a good amendment; in that regard she indicated that she did not believe that the folks in Washington were really aware of what was happening in the field. With regard to the Jencks Act issue, she noted that in the Los Angeles federal courthouse there were no judges who enforces that Act. At arraignments, the judges indicate to the prosecutors indirectly that they would like to see the information disclosed. She also expressed some concern about the fact that the judge who sees the ex parte statement by the prosecutor may also sentence the defendant -- and the defense may not know what was in that statement which might otherwise affect the sentence.

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture must be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing. Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature of the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing. Before entering the order of forfeiture, however, the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32(d)

I. SUMMARY OF COMMENTS: Rule 32(d)

The Committee received 4 written submissions on the proposed amendment to Rule 32(d). The commentators were in accord in their view that the amendment is necessary and clarifies the procedures for entering forfeiture orders before sentencing.

II. LIST OF COMMENTATORS: Rule 32(d)

CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95

CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.

CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.

CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95

Mr. Roger Pauley, Department of Justice, Wash. D.C., 3-3-95

III. COMMENTS: Rule 32(d)

Mr. Raymond Noble (CR-12)
New Jersey Bar Assoc.
New Brunswick, N.J.
Feb. 24, 1995

Mr. Noble, on behalf of the New Jersey Bar Association. briefly notes that the proposed amendment is a sensible response to procedural problems which have arisen.

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 2-1995

Mr. Patrick Otto of Mohave Community College registers agreement with the Committee's proposed amendment; trial courts should have jurisdiction for the third party protection weighted more for "them" than for the government.

Lee Ann Huntington (CR-17)
State Bar of California
San Francisco, CA
Feb.24, 1995

Writing on behalf of the Committee on Federal Courts, State Bar of California, Ms. Huntington endorses the proposal, noting that the amendment recognizes the penal aspects of forfeiture and that it codifies double jeopardy concerns.

Mr. G. Goldstein, Mr. W. Genego & Mr. P. Goldberger
National Association of Criminal Defense Lawyers
Wash., D.C.,
Feb. 28, 1995

The National Assoc. of Criminal Defense Lawyers (Mr. Goldstein, Mr. Genego & Mr. Goldberger) welcomes and endorse the amendment to the extent that it clarifies procedure for turning a verdict of forfeiture into an order. The commentators also are glad to see that the rule encourages judges to hold separate hearings on criminal forfeitures. But two aspects of the amendment trouble them. First, they are concerned that the early entry of an order may interfere with the trial court's duty under the Eighth Amendment to determine that the forfeiture is proportional.. And second, they have not noticed the government's ability to conduct investigations into the defendant's potential forfeitable property. They believe that the amendment should include language to show that an order of forfeiture may be modified at any time until formal entry of the judgment. Also, the rule or the note should indicate that the court has the power under Rule 38(e) to stay enforcement of the order.

Mr. Roger Pauley
Department of Justice
Washington, D.C.
March 3, 1995

Finally, Mr.Roger Pauley has indicated that the Justice Department has modified its proposed changes to Rule 32(d) and wishes to have that change considered as a comment. The submitted revision would make three changes to the rule. The first is the elimination of the 8-day time limit in the published version.. The Department believes that there may well be cases where courts will have made up their minds that they will not grant new trials, etc. and they should be permitted to begin the proceedings as soon as possible after the verdict. Second, the new draft eliminates the absolute requirement for notice and a hearing as to the timing and form of the order of forfeiture. While a court would clearly have the discretion to hold a hearing, the very narrowness of the contemplated hearing that is contemplated indicates that a hearing is not necessary in every case and will normally serve no purpose. Third, the newer version seens to place greater emphasis on the fact that the court should enter the order. The Department, Mr. Pauley notes, believes that the newer version is simplified.

Rule 24. Trial Jurors.

(a) VOIR DIRE EXAMINATION. The court will conduct the preliminary voir dire examination of the trial jurors . Upon timely request, the court must permit the defendant or the defendant's attorney and the attorney for the government to conduct a supplemental examination of prospective jurors, subject to the following:

(1). The court may place reasonable limits on the time, manner, and subject matter of such supplemental examination; and

(2) The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality

The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

* * * * *

COMMITTEE NOTE

The amendment is intended to insure that the parties are given an opportunity to participate in the critical stage of jury selection. While a recent survey from the Federal Judicial Center indicates that a majority of district courts permit participation by counsel, Shapard & Johnson, *Survey Concerning Voir Dire* (Federal Judicial Center 1994), the Committee recognizes that in many cases the right to participation is completely precluded under the present rule. Those opposing greater participation by counsel assert that providing an opportunity for such participation will extend the time for selecting a jury and that counsel may use the examination for improper means, e.g., attempting to influence or educate the jury regarding their client's view of the case.

Those supporting greater counsel participation assert that it is important for the parties to participate personally in the process because jurors may be intimidated by the trial court and that their answers to the judge may be less than candid. See generally D. Suggs & B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56

Indiana L. Jour. 245, 256-257 (1981)(authors note that unintentional, nonverbal, communication from judge during voir dire may affect jurors' response); S. Jones, *Judge-Versus Attorney-Conducted Voir Dire,* 11 Law and Human Behavior 131, 143 (1987))(study showed the jurors attempted to report not what they truly felt but "what they believed the judge wanted to hear"). Second, in order to insure a fair opportunity to obtain information relevant to the exercise of peremptory challenges and challenges for cause, it is important that at a minimum counsel be given the opportunity to conduct supplemental examination.

Although the concerns expressed by the opponents are not without merit, the Committee believed that on balance, the need for counsel participation outweighed the risk of potential abuse. The amendment recognizes that, particularly in criminal cases, there are good reasons for permitting supplemental inquiries by counsel, without regard to whether counsel or the courts can do a better job of picking an impartial jury. The amendment avoids that debate and at the same time recognizes that the defendant or defendant's counsel should have the right, even if limited, to question the potential jurors.

While the amendment recognizes the long-standing tradition in federal courts that the primary responsibility for conducting voir dire rests with the trial judge, it creates a presumptive right of counsel to participate in supplemental examinations. The right to supplemental questioning, however, is not absolute and may be conditioned on one of serveral factors.

First, the rule requires counsel to make a timely request to conduct supplemental questioning. This is designed to encourage the parties to give some forethought to the process, especially in those courts where extensive use is made of questionaires which may require time and effort to tailor the questionaire to a particular case. The rule leaves to the court to decide under the facts of the case whether the request is timely; the question will be one of reasonableness.

Second, the court may place reasonable limits on the time, manner, and subject matter of the examination. This condition probably reflects current practice in some courts. That is, at the present time, judges already permit counsel to pose supplemental questions, subject to such reasonable limitations in cases where attorney-conducted voir dire is permitted.

The final condition reflects the Committee's view that the court should retain the authority in particular cases to cut off absolutely any supplemental questioning. The amendment assumes that the supplemental examination has begun and that at some point, the defendant or trial counsel has engaged in conduct which demonstrates a purpose to use the voir dire process for some reason other than determining the ability of a potential juror to serve impartialy.. The amendment also assumes that the court should have an articulable reason for absolutely barring supplemental questioning by the parties.

Research Division
202-273-4070

memorandum

DATE: 9/26/94
TO: Advisory Committee on Civil Rules
FROM: John Shapard, Molly Johnson
SUBJECT: Survey Concerning Voir Dire

At the request of the Chairman of your Committee, the Center initiated a survey of active district judges concerning certain of their practices in conducting voir dire, as well as their opinions about counsel participation in voir dire and their impressions of the effect on voir dire of the line of cases beginning with *Batson v Kentucky*, 476 U.S. 79. A copy of the questionnaire is attached as exhibit A. This memorandum explains the results of the survey, and provides in a few instances comparisons to the results of a similar survey conducted by the Judicial Center in 1977.[1]

The survey was mailed to a randomly selected sample of 150 active district judges, with the sampling designed to achieve proportional representation of districts, chief judges, and time since appointment to the district bench. 124 Judges (83%) completed and returned the questionnaire. Because the information provided here is based on a sample, the results must be understood as estimates. The fact, for example, that 59% of respondents indicated that they ordinarily allowed counsel to ask questions during civil voir dire does not necessarily mean that 59% of all district judges allow some counsel questioning. There is a margin of error of roughly plus or minus 8% (hence somewhere between 51% and 67% of all district judges allow counsel questioning).[2]

Extent of Counsels' Participation in Voir Dire

One focus of the survey was the extent to which judges permit counsel to address prospective jurors directly—as opposed to the court asking all questions—in the course of voir dire. Asked about their "standard" practice, 59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries. In the Center's 1977 study, less than 30% of district judges reported allowing any questioning by counsel during voir dire in "typical" civil or criminal cases. There was no marked difference in responses to a second question asking about practices in "exceptional" cases, the percentages being 67% (civil) and 51% (criminal). The extent of permitted counsel participation was indicated by three different responses, distinguished by unavoidably subjective terms. One response indicated that the judge allows counsel to "conduct most or all of voir dire," another

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[1] See Bermant, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges, Federal Judicial Center, 1977.

[2] To be a bit more specific, the plus-or-minus 8% figure is the size of the 95% confidence interval, which means that with random sampling from the population of active district judges, there is at most a 5% chance that the percentage given for the sample (here 59%) would occur if in fact the percentage for the entire population of active district judges was more than 8% different (i.e., below 43% or greater than 59%).

indicated that the judge conducts a preliminary examination and then gives " counsel a fairly extended opportunity to ask additional questions", and the third indicated that after the judge's examination, counsel were given "a very limited opportunity to ask additional questions." The percentages of these answers selected by the respondents are shown in Table 1.

TABLE 1

RESPONSE	"Standard Practice" Civil	"Standard Practice" Criminal	"Exceptional Cases" Civil	"Exceptional Cases" Criminal
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	9%	7%	8%	6%
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	18%	18%	27%	26%
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	33%	29%	29%	28%
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	41%	46%	34%	38%
e. Other	2%	1%	2%	3%

Another question asked the judge to estimate the average time taken in questioning jurors during voir dire, broken down between time spent by counsel and by the court, and by civil and criminal cases. The average total time—court and counsel—reported was 1:12 for civil cases and 1:39 for criminal cases. The range of the responses is shown in Table 2, together with figures for a similar question asked in the Center's 1977 study.

TABLE 2

Total Average Time Spent Questioning Prospective Jurors	Percent of Respondents: Current Study Civil	Current Study Criminal	1977 Study Civil	1977 Study Criminal
less than 30 minutes	4%	2%	33%	16%
30 min - 1 hour	25%	10%	49%	49%
1 - 2 hours	56%	55%	14%	28%
2 or more hours	15%	34%	1%	7%

Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire (which is summarized above in Table 1). Table 3 shows the reported times broken down by standard voir dire practice.

TABLE 3

Standard Voir Dire Practice	Average Voir Dire Time					
	Civil			Criminal		
	Ct	Cnsl	**Tot**	Ct	Cnsl	**Tot**
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	0:13	0:55	**1:09**	0:20	1:08	**1:28**
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	0:43	0:32	**1:15**	0:57	0:42	**1:39**
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	0:54	0:20	**1:15**	1:19	0:25	**1:44**
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	1:05	0:00	**1:05**	1:32	0:00	**1:32**

Effects of *Batson*

The survey also asked questions pertaining to the influence of *Batson* and its progeny (hereafter, simply "*Batson*"). When asked what percentage of their jury trials in the last year had involved a *Batson-type* objection,[3] 36% answered "none." The average percentage reported was 7%, with a median of 2%. (15% reported that such objections occurred in more than 10% of their trials).

It can be argued that *Batson* creates a need for increased attorney participation in voir dire (or at least for more probing voir dire) to afford counsel more information on which to base their exercise of peremptories. *Batson* prohibits exercise of peremptories based simply on stereotypes of certain kinds. Hence counsel may need more information to determine, for instance, if a particular prospective juror harbors the bias that counsel suspects is common among persons of that class (e.g., that race, gender). To help illuminate this issue, we asked judges how often they though the explanation for a peremptory that is offered in response to a Batson objection was an explanation based on information that would be adduced from a routine voir dire (as opposed to information obtained only from a somewhat probing voir dire). The average answer was 84%, with a median of 90% (fully 47% of responses were 95% or greater). Hence a large majority of judges think it rare that explanations for peremptories are based on information other than that "routinely elicited in voir dire or otherwise routinely available to counsel."[4]

When asked whether *Batson* "led you to alter your practice with regard to voir dire," fewer than 20% of the judges gave any affirmative response. Of those, most noted changes regarding the method of exercising peremptories. Only about 5% indicated that they had changed their

[3] See the attached survey for the definition of "*Batson-type* objection."

[4] Of course, if the only information available to counsel is that which is "routinely elicited," then the explanation can hardly be based on anything else. It that were the basis for the answers to this questions, however, one might expect to see a correlation between the answer to this question and the extent of counsel participation in voir dire reflected in questions 1 and 3. There was no significant correlation, and the only one even suggested by the data suggests that numerically larger answers to this question are most common among judges who allow counsel to conduct all or most of the voir dire.

practices regarding voir dire questioning, all but one indicating that voir dire questioning is more probing than in the past, at least in "exceptional" cases.[5]

Asked whether *Batson* had led to changes in regard to challenges for cause, 18% indicated that counsel "have increased their efforts to excuse jurors for cause," and 16% said that they "have become more willing to excuse jurors for cause." 74% of the respondents indicated that neither change had occurred.

Others Views Regarding Questioning by Counsel in Voir Dire

Question 8 asked the judges to indicate statements with which they agreed pertaining to questioning by counsel in voir dire. The statements and the percentage indicating agreement are shown in Table 4.

TABLE 4

Questioning of prospective jurors by counsel:

a. Takes too much time.	50%
b. Is less time-consuming than voir dire conducted entirely by the judge.	4%
c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).	67%
d. Is an appropriate opportunity for counsel to introduce themselves to jurors.	31%
e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.	14%
f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.	32%
g. Is more effective because counsel know better what questions to ask.	17%
h. Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.	33%
i. Other	23%

Judges who indicated agreement with statement a in Table 4 (counsel questioning takes too much time) were asked to indicate how much more time counsel questioning would take than voir dire conducted entirely by the judge. The median response was 1.5 hours for civil cases and 2 hours for criminal cases. Compared to the total voir dire time reported by the respondents in question 2 (see tables 2 and 3 and associated text, above), these responses reflect a view that counsel questioning of jurors will more than double the time required for voir dire. This is at odds with the information presented in Table 3, above, which indicates very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors. The disharmony between these two aspects of the responses may also be due to either or both of two other phenomena:

1. Those judges who allow counsel questioning may manage to do so without it taking excessive time, and many of those who prohibit counsel participation may do so in part because they believe it will take too much time—a belief sometimes but not always based on personal experience.
2. At least some judges apparently interpreted the inquiry as pertaining to "unlimited" attorney voir dire (e.g. as they experienced voir dire as a state court judge), and indicated that

[5] The percentages mentioned in this paragraph pertain only to those respondents who were appointed to the bench before the *Batson* decision (86% of all respondents).

attorney participation in voir dire takes vastly more time, even though the judge routinely allows at least some questioning by counsel (the "takes too much time" response was chosen by 28% of the judges who report that they routinely allow some counsel questioning in both civil and criminal cases).

The responses to question 8 (see Table 4) can be used to gauge general attitude about counsel questioning in voir dire. Responses a, c, and h may be taken as negative views of attorney participation in voir dire, and the others (except i - other) as positive. Of those who selected any of these answers, 19% expressed only positive views, 68% expressed only negative views, and 13% expressed both positive and negative views.

Finally, we asked those judges who do allow counsel questioning to indicate how they ensure that counsel "do not use voir dire for inappropriate purposes or simply take too much time." The responses are summarized in Table 5.

TABLE 5

Response	Percent:
a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.	41%
	Percent of those answering other than a
b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.	44%
c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. (By what means:)	79%
c1. oral reminder at the bench	41%
c2. standard part of pretrial order	8%
c3. other (mostly during pretrial conference)	41%
d. I generally limit the time allowed for voir dire.	50%
Average minutes per side allowed in routine case, Civil: 22, Criminal: 25	
e. Other (most referred simply to close monitoring of counsels' questions)	10%

A number of the respondents offered explanations of their approaches to conducting voir dire that are not amenable to tabulation but that may be useful in considering either questioning by counsel during voir dire or how voir dire practices might be modified in light of *Batson*. These are listed below.

Approaches to controlling attorney questioning of prospective jurors.

1. Some judges who indicated that they permit counsel to conduct all or most of the voir dire pointed out that the oral questioning was limited to follow-up questions. The initial "voir dire" is handled by a questionnaire tailored to the specific case that jurors are asked to complete before reporting to the courtroom. An example of such a questionnaire is attached as exhibit B.
2. While many judges impose time limits on counsel questioning, others constrain the questioning by limiting the scope of questioning, sometimes by an in-chambers conference where counsel explain the questions they want to ask and the judge in turn specifies what questions will be permitted.

3. Some judges will simply take over the questioning (and thus end counsel's questioning) if counsel does not comply with the judge's rules concerning proper inquiry. Other judges employ the approach of suggesting that counsel "rephrase" a question that the court finds problematic.
4. One respondent noted following the Scheherezade rule: "if they keep me interested, they can keep asking questions."
5. Another mentioned a list of restrictions, including: (a) A question may not be directed to an individual juror if it can be addressed to the panel as a whole; (b) Prohibit using voir dire to instruct jurors; and (c) A question may not seek a juror's commitment to support a given position based on hypothetical facts.

Responses to *Batson*:

1. Some judges require that peremptories be exercised first after an initial panel (e.g. 12 jurors) have passed challenges for cause, with challenged jurors then being replaced by random draw from the pool of prospective jurors, peremptories exercised only with respect to the replacements, and so on. This approach prevents counsel from knowing who might replace a challenged juror, and so makes it more difficult to pursue a strategy prohibited by *Batson* (or any other strategy).
2. Other judges, for the same purposes, allow all peremptories to be exercised after all challenges for cause, but with the parties making their choices "blind" to the choices made by opposing parties (in contrast to alternating "strikes" from a list of the names of panel members).[6]

Observations about questioning of prospective jurors by counsel:

1. A number of respondents indicated that judges <u>should</u> conduct voir dire, because—as every trial lawyer knows—the lawyer's objective is to obtain a biased jury. Only the judge is in a position to foster selection of unbiased jurors.
2. A number suggested that judges simply do a better job of voir dire questioning, for one or more of several reasons: (a) counsel aren't very good at it, (b) some questions are better asked by the judge (to shield counsel from adverse responses to the asking of such questions), and (c) jurors will be more candid in responding to the judge than to counsel.

[6] A more extreme approach to the same end (not mentioned by any of the respondents but practiced in some state courts) is a procedure where jurors are individually questioned and passed for both peremptory and cause challenges one at a time—juror #1 is seated before juror #2 is questioned (or perhaps even identified). This approach imposes maximum limits on counsel's ability to employ peremptories in a strategic manner.

ADMINISTRATIVE OFFICE OF THE
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February 28, 1995

MEMORANDUM TO JUDGES D. LOWELL JENSEN AND PATRICK E. HIGGINBOTHAM

SUBJECT: Research Materials on *Voir Dire*

I requested Robert Deyling, our Judicial Fellow, to research *voir dire* practices in the state courts. He identified three state court systems that may be helpful in the committees' study of this issue. The materials referred to two law journal articles on *voir dire* practices, which are also included. The articles purport to demonstrate that more honest, accurate information is elicited from prospective jurors by attorney, instead of judge, questioning.

STATE COURT PRACTICES

The Arizona *voir dire* practice in civil cases was changed in 1991 and is very similar to the practice suggested under the proposed rules amendments. A committee of the Arizona Supreme Court now recommends extending the right of attorneys to question prospective jurors in criminal cases. "The principal reason for the committee's position is that lawyer participation in *voir dire* is more likely to result in a fair and impartial jury than is *voir dire* conducted by the judge alone." The accompanying materials include letters of support and opposition to the 1991 change in Arizona's civil rules.

New York *voir dire* is undergoing review. A pilot program is underway in four judicial departments studying various *voir dire* practices. The study will conclude on May 19, 1995. New York *voir dire* in civil cases is now done entirely by attorneys outside the presence of a judge. Among other procedures, the pilot program will study the effects of some or full judge supervision. During the sixteen-week pilot program, however, only one week was singled out to review *voir dire* where the judge is present throughout the proceeding. The remaining weeks focus on *voir dire* in which judges merely monitor the proceedings periodically or are present initially and available throughout for questions.

The *voir dire* procedures in California are provided for comparison purposes.

LAW JOURNAL ARTICLES

The two articles include the results of some empirical testing of prospective jurors' responses to questions from attorneys versus judges. The authors conclude that the "higher authority status" of judges unduly influences jurors' responses.

The role differences between an attorney and a judge are highlighted in the *Indiana Law Journal* article. The authors note that a juror is more likely to open up and disclose meaningful information to an attorney rather than a judge for several cited reasons. In addition, the authors note that unintentional, nonverbal communication from a judge during *voir dire* may prejudice a juror's response. Even the physical distances and barriers between a judge and jury versus an attorney and a jury may influence the jurors' responses.

The *Law and Human Behavior* article is more technical. It discusses the results of an experiment conducted of over 100 participants regarding judge versus attorney questioning. The results appear to be consistent with the conclusions drawn in the *Indiana Journal* article.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Professor Edward H. Cooper

Juror Self-Disclosure in the Voir Dire: A Social Science Analysis†

DAVID SUGGS*
BRUCE D. SALES**

The term "voir dire" has been translated as "to speak the truth"[1] or "to see them talk."[2] It refers to the preliminary examination of a potential witness or juror when his competence is in issue. It has also taken on the colloquial meaning of referring to the entire stage of trial in which jurors are empaneled. To convey this latter meaning, many people use the term "jury selection" rather than voir dire, which incorrectly implies that the jury is actively selected. In fact, the jury is not "selected," but is composed of persons who were not rejected through a process of exclusion.[3] During voir dire, questions are put to prospective jurors by the attorneys or judge or both; after this time, the attorneys may exercise challenges to remove particular jurors from the panel. Those remaining after the exercise of these challenges comprise the jury.

There are two types of challenges which may be made to remove prospective jurors—challenges for cause and peremptory challenges. A challenge for cause is successful whenever it is shown that the juror does not satisfy statutory requirements for jury service[4] or that the

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† Preparation of this article was partially supported by a grant from the National Institute of Mental Health, Center for Studies for Crime and Delinquency.

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[1] BLACK'S LAW DICTIONARY 1746 (4th ed. 1968).

[2] Zeisel & Diamond, *The Effect of Peremptory Challenges on the Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491 n.1 (1978) (noting that this is an incorrect translation).

[3] "The right to challenge is the right to reject, not the right to select." 1 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 74 (encyc. ed. 1959).

[4] A person does not become eligible for jury duty until he has reached the minimum age prescribed by statute. *See, e.g.*, ALA. CODE § 12-16-60(a)(1) (Supp. 1980) (19 years); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1980) (18 years). Nonresidents are usually excluded from jury duty, *see, e.g.*, IND CODE § 33-4-5-7 (1976), and some states exempt various government officials, *see, e.g.*, CONN. GEN. STAT. ANN. § 51-219 (Supp. 1980), and attorneys, *see, e.g., id.*, from serving as jurors. In addition, grounds for challenges for cause commonly provided for by statute include: conviction of a felony, *see, e.g.*, ALA. CODE § 12-16-150(5) (1975); indictment for a similar offense within a fixed time, *see, e.g., id.* § 12-16-150(3); having scruples against capital punishment, *see, e.g.*, IND. CODE § 35-1-30-4(3) (Supp. 1980); relation by blood or affinity to a party in interest, *see, e.g., id.* § 35-1-30-4(4), or to any attorney in the case, *see, e.g.*, ALA. CODE § 12-16-150(4), (11) (1975); previous jury service within a year, *see, e.g.*,

juror is so biased or prejudiced that he cannot render a fair and impartial verdict based on the law and evidence as presented at trial.[5] Attorneys may make an unlimited number of challenges for cause during voir dire. When a challenge is made, it is up to the judge to determine its validity. In addition, the judge may remove a juror for cause *sua sponte*.

For several reasons, the use of challenges for cause is inadequate to remove those jurors who may have significant biases or prejudices. First, assuming that the juror is willing to admit to being biased or prejudiced, the judge may decide that the juror is not so biased or prejudiced as to be incompetent to serve on the jury as a matter of law. Second, if the juror admits that he has formed an opinion about the case, it is standard procedure to ask if he can set aside that opinion and decide the case on the basis of the evidence to be presented.[6] Since all of us like to think we can be fair, it is the rare juror indeed who will admit to being unable to set aside an already formed opinion. Nevertheless, challenges for cause are rarely sustained when the juror maintains that he can be impartial. Third, the problem of using challenges for cause to eliminate jurors is further complicated by the fact that "[j]urors often, either consciously or unconsciously, lie on *voir dire*."[7]

Since challenges for cause are so infrequently sustained, the exercise of peremptory challenges remains the chief means for securing an impartial jury. Unlike challenges for cause, the number of peremptory challenges allowed is limited by statute.[8] No explanation need be given for the use of a peremptory challenge, and attorneys may use their allotted challenges for whatever tactical reasons they desire.[9] Theoretically, after the attorneys have exercised their peremptory challenges, those jurors who were most biased will have been eliminated, and the resulting jury will be relatively impartial.

In order to exercise their peremptory challenges intelligently, at-

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IND. CODE § 35-1-30-4(15) (Supp. 1980); and solicitation of service as a juror, *see, e.g., id.* § 35-1-30-4(10).

[5] *See, e.g.*, CONN. GEN. STAT. ANN. § 51-240 (Supp. 1980).

[6] *See, e.g.*, IND. CODE § 35-1-3-4(2) (Supp. 1980).

[7] Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965).

[8] *See, e.g.*, IND. CODE § 34-1-20-7 (1976); *id.* §§ 35-1-30-2 to -3. Peremptory challenges are regarded as a privilege granted by legislative authority and a litigant may exercise them as a matter of right only to the extent authorized by the legislature. *See* Kunk v. Howell, 40 Tenn. App. 163, 189, 289 S.W.2d 847, 877 (1956).

[9] Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1715, 1718 (1977). A few recent cases, however, have held that some uses of peremptory challenges may be impermissible. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (systematic use of peremptory challenges by prosecutor to eliminate blacks from jury denied defendant the right to jury representing a fair cross-section of the community).

torneys must gain information through voir dire regarding jurors' attitudes toward the opposing litigants, counsel for both sides and the legal and factual issues which are relevant to the case. Yet attorneys do not receive adequate information through voir dire upon which to base their peremptory challenges. One study concludes that "[v]oir *dire* was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"[10] Another study summarizes:

> [O]n the whole, the voir dire, as conducted in these trials did not provide sufficient information for attorneys to identify prejudiced jurors. The average performance score of the prosecution was near the zero point . . . , indicating an inability to distinguish potential bias; defense counsel performed only slightly better . . . . Perhaps most significant is the inconsistent performance of attorneys. Occasionally, one side performed well in a case in which the other side performed poorly, thereby frustrating the law's expectation that the adversary allocation of challenges will benefit both sides equally."[11]

Given that the typical voir dire does not produce sufficient information to identify prejudiced jurors, the question becomes why this is so. This article will answer this question by first asserting that voir dire may be ideally characterized as a self-disclosure interview because it purports to obtain background and attitudinal information which might affect a juror's decision in the case. The balance of this article will then demonstrate that the procedures used during voir dire and the psychological atmosphere in which it takes place are virtually guaranteed to inhibit rather than facilitate such self-disclosure. To support this thesis, a number of variables will be examined: first, whether the voir dire is conducted by the attorneys or by the judge; second, whether the potential jurors are questioned as a group, as individuals within a group or individually; third, the interaction distance between the prospective jurors and the interviewer; and fourth, the environmental characteristics of the room in which the questioning takes place. For each of these variables, the current legal practice and its rationale will be examined. Research from social science literature tending to indicate that the current legal practice discourages self-disclosure during voir dire will then be presented. The research presented is not specifically addressed to the issue of juror self-disclosure. Rather, it is basic social science research which has been undertaken to explore the determinants of self-disclosure in clinical and experimental settings. Although application of the conclusions of this research to the setting of the courtroom involves extrapolation, the extent of the research and the consistency of its

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[10] Broeder, *supra* note 7, at 505.

[11] Zeisel & Diamond, *supra* note 2, at 528-29.

results are great enough to raise serious questions as to the validity of current voir dire practices. Finally, a number of recommendations will be made for modifying the current practices to enhance self-disclosure by jurors and, thus, facilitate the intelligent exercise of peremptory challenges by attorneys.

THE PURPOSES OF VOIR DIRE

There are three judicially sanctioned purposes for voir dire. The first two are related to causal challenges while the third is related to the exercise of peremptories. First, voir dire may always be used for the purpose of determining whether the juror satisfies statutory requirements for serving on a jury.[12] Second, jurors may also be questioned to determine if they can impartially participate in the deliberation on the issues of the case based solely on the law and evidence as presented at trial.[13] This second purpose is mandated by the sixth amendment guarantee of the right to trial by an impartial jury.[14] Nevertheless, the extent of questioning allowed for this purpose is restricted to determining if the juror is biased or prejudiced as a matter of law.[15] Often, when the judge conducts questioning of this type, it will simply take the form: "'Can you be fair?' Once the juror has answered 'Yes,' everything else is considered irrelevant and the judge passes on to the next juror, even though Adolph Hitler himself would have answered that question in the affirmative."[16]

The third, and final, judicially sanctioned purpose of voir dire is to provide the attorney with a procedure by which he may obtain information to exercise the peremptory challenges intelligently.[17] The scope of

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[12] 2 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 328 (1967).

[13] Hare, *Voir Dire and Jury Selection*, 29 ALA. LAW. 160, 173 (1968).

[14] *See* Witherspoon v. Illinois, 391 U.S. 510, 518, 521 (1968).

[15] A prejudiced juror is one who has actually decided how he will rule in the case before the trial. A biased juror, on the other hand, has an inclination to favor one side over the other. If the juror admits that he has already decided on what the outcome of the case should be, the juror may be excluded as a matter of law. In order to be successful in challenging a prospective juror for cause on the ground of bias, however, it is necessary to show that the bias is of such a magnitude as to lead to the natural inference that the juror will not act impartially. *See generally* Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. 1965).

[16] Garry, *Attacking Racism in Court Before Trial*, in MINIMIZING RACISM IN JURY TRIALS xv, xxii (A. Ginger 1969).

[17] *See* Evans v. Mason, 82 Ariz. 40, 46, 308 P.2d 245, 249 (1957); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 2.4 (1968). *See also* MacGutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972); Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure that Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65 (1976); Comment, *Court Control over the Voir Dire Examination of Prospective Jurors*, 15 DE PAUL L. REV. 107 (1965).

Some jurisdictions, however, do not sanction this purpose, and allow only questions

questioning for this purpose is much broader than that associated with challenges for cause. For example, under this rubric questioning is often allowed to probe the juror's occupation, marital status, number of children, past jury service, residence, exposure to news coverage of the case, attitudes toward the death penalty, degree of belief in the concept that the defendant is innocent until proven guilty and attitudes toward racial minorities.[18]

The broader scope of permissible questioning for this purpose results from the importance of peremptory challenges, and the courts have frequently recognized this importance. In *Swain v. Alabama*,[19] for example, the United States Supreme Court stated: "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[20] This use of voir dire to gain information for peremptory challenges is based on the recognition by the law that

> the rules of evidence can only partly limit the extent to which a juror's bias affects his deliberation. The tests which the law furnishes to the jury for weighing evidence are crude and imperfect and provide few internal checks on jury prejudice. There is a critical area in every case, where a juror must rely on his own experience to reach a decision. If bias permeates a juror's thinking, it may distort the importance of evidence consistent with it. . . . Bias may, therefore, be a fact of singular importance in the case.[21]

The notion that verdicts are frequently affected by the jurors' values and biases is supported by a report that "in about two-thirds of all cases the jurors are likely to differ over the significance of the evidence presented to them in the trial. In only about one-third of the trials is the jury unanimous on the first ballot; in two-thirds of the cases the jurors differ in their vote."[22]

In addition to the above three approved purposes, voir dire is often used for reasons which are not judicially sanctioned. Some attorneys

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which might uncover legal grounds for challenges for cause. 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, § 334. In these jurisdictions, "any enlightenment given by the answers which serves to inform counsel's judgment on the intelligent exercise of peremptory challenges is at best a by-product, and often one suspiciously regarded." *Id.* *See also* Van Dyke, *supra*, at 89-90.

[18] For general discussions of the proper scope of voir dire, see 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, §§ 334, 336; 1 F. BUSCH, *supra* note 3, § 94; Bodin, *Selecting a Jury*, in CIVIL LITIGATION AND TRIAL TECHNIQUES 211, 225-62 (H. Bodin ed. 1976).

[19] 380 U.S. 202 (1965).

[20] *Id.* at 219.

[21] *See* MacGutman, *supra* note 17, at 303-04. The concept of bias used here is the same as that referred to in the challenge for cause, *see* note 15 *supra*, with the exception that the attorney does not have to prove that the juror will not act impartially before exercising a peremptory challenge.

[22] Zeisel & Diamond, *The Jury in the Mitchell-Stans Conspiracy Trial*, [1976] AM. B. FOUNDATION RESEARCH J. 151, 173 (footnote omitted).

abuse the voir dire by using it as a means to ingratiate themselves with the jurors and to indoctrinate the jurors to their version of the case before the presentation of evidence.[23] Attempts at ingratiation may take a variety of forms. The "grandstand play" occurs when the attorney declines the opportunity to question the prospective jurors, announcing his faith in the jury system and in that particular panel.[24] This method is not often employed, however, and jurors tend to regard an attorney who uses this method as careless in his treatment of the case.[25] More commonly employed methods of ingratiation include such obvious strategies as exaggerated courtesy extended to members of the panel, concerned but polite questioning as to the health of the older members, joking with the panel and making it known that the jurors and the attorney have mutual acquaintences or associations. Attorneys also use voir dire to attempt to indoctrinate the prospective jurors. For example, one author recommends that attorneys use voir dire to teach jurors important facts, to expose damaging facts in the case in order to reduce their impact, to instruct jurors as to the law involved and to force jurors to face their own prejudices.[26]

A minimum level of rapport between the person conducting voir dire and the jurors is necessary for a productive dialogue. However, at the point at which the establishment of effective rapport becomes an attempt at ingratiation, it becomes unacceptable and should be guarded against. Likewise, while the jurors must be given some minimum level of introduction to the facts of the case during voir dire since the questioning cannot take place in a vacuum, this introduction should not be allowed to become indoctrination in the pejorative sense. The concern of the judiciary over these two unacceptable purposes of voir dire seems to be somewhat justified. A study of a number of cases in a midwestern federal district court concludes that attorneys use about eighty percent of voir dire time indoctrinating the jury panel.[27] The study adds, however, that such indoctrination attempts by the attorneys often do not appear to succeed.[28]

ATTORNEY-CONDUCTED AS OPPOSED TO JUDGE-CONDUCTED VOIR DIRE

Traditionally, the questioning of jurors during voir dire was left to at-

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[23] *See* Blunk & Sales, *Persuasion During the Voir Dire*, in PSYCHOLOGY IN THE LEGAL PROCESS 39 (B. Sales ed. 1977); Field, *Voir Dire Examinations—A Neglected Art*, 33 U. MO. KAN. CITY L. REV. 171 (1965).

[24] *See* M. BELLI, MODERN TRIALS § 121, at 803 (1954).

[25] *Id.* at 804.

[26] *See* A. GINGER, JURY SELECTION IN CRIMINAL TRIALS §§ 7.18-.21 (1975).

[27] Broeder, *supra* note 7, at 522.

[28] *Id.* at 522-23.

torneys.[29] In recent years, however, there has been a move away from attorney-conducted and toward judge-conducted voir dire. At present, only nineteen states allow attorneys to exercise primary control over the conduct of voir dire in both civil and criminal cases.[30] In fifteen states, the judge has unfettered control, although attorneys may submit questions for the judge to ask.[31] The judge, in his discretion, may or may not ask the questions or, alternatively, may allow the attorneys to directly question jurors after he has questioned them. The remaining jurisdictions divide the responsibility for conducting voir dire between the judge and the attorneys. Usually this means that the judge will begin by asking standard questions and then the attorneys will be allowed to ask their own questions concerning particular matters important to the case at hand.

In the federal system, judges may allow attorneys to conduct voir dire, but are not obligated to do so.[32] In the event the judge elects to conduct the voir dire himself, he is required to allow the attorneys to supplement the examination or to submit further questions to be asked by the judge. Nevertheless, the scope of supplemental questioning lies in the discretion of the judge. In fact, by 1977, "approximately three-fourths of federal judges conduct voir dire examinations without oral participation by counsel."[33] It would seem that the trend toward increasing judicial control over the conduct of voir dire is continuing; a 1970 report revealed that at that time only fifty-six per cent of the federal district judges reported that they conducted the voir dire without oral participation by counsel.[34]

One of the justifications given for this recent shift is that it prevents attorneys from abusing the voir dire process. Those who support judge-conducted voir dire argue:

> [It] saves time, promotes respect for the court, brings the judge into greater prominence at the very outset, reveals that an impartial court can obtain an impartial jury better than partisan counsel, that extended individual questioning by counsel may embarrass or even

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[29] *See* McGuirk & Tober, *Attorney-Conducted Voir Dire: Securing an Impartial Jury*, 15 N.H. B.J. 1, 4 (1973).

[30] *See* Van Dyke, *supra* note 17, at 95-97.

[31] *See id.*

[32] *See* FED. R. CIV. PROC. 47(a); FED. R. CRIM. PROC. 24(a).

[33] G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION 6 (Federal Judicial Center Pub. 1977).

[34] *See* COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON VOIR DIRE PROCEDURES (1970). There are regional differences in the degree of counsel participation allowed. G. BERMANT, *supra* note 33, at 5-20. Federal district courts sitting in states which allow attorney participation in the state courts are more likely to allow a greater degree of attorney involvement in the federal voir dire. *Id.* at 10-13.

> insult the juror, or that he may become brainwashed and committed by counsel before any evidence has been heard.[26]

There is no question but that abuse by attorneys of voir dire through ingratiation and indoctrination attempts will be completely eliminated by judge-conducted voir dire. In addition, the assertion that judge-conducted voir dire saves time is supported by data. In a direct comparison of voir dires conducted by attorneys and judges, one study found that judge-conducted voir dire results in a significant savings of time.[27] Yet, there is no objective data to support the assertion that a judge is more likely than partisan counsel to obtain an impartial jury. It is also doubtful that any attorney would intentionally embarass or insult a prospective juror, since such conduct would alienate not only that particular juror, but also the remaining jurors who witness the event.

Those who support the attorney-conducted voir dire argue that inquiry into the biases of jurors requires the interviewer to have a thorough knowledge of the legal issues involved in the case and of the evidence to be presented by both sides. Because the trial judge does not, and should not, have such knowledge at the time of voir dire, it has been argued that he is not as competent as the attorneys to question the jurors.[28] In addition, some commentators argue that judges do not ask pressing or probing questions about the jurors' attitudes and that, "[e]ither because of institutional pressures to keep their calendars moving or because of their lack of sympathy to one or both of the litigants, many judges question prospective jurors without much interest or enthusiasm, hoping that a panel can be quickly assembled and that the trial can begin."[29] Studies which report that judge-conducted voir dire saves time have been criticized because, if the studies are examined as a whole, no conclusive proof exists one way or the other. Even though some studies do show a statistically significant savings of time through the use of judge-conducted voir dire, the time differences are not dramatic when compared to the overall length of the trial.[30]

Finally, supporters of attorney-conducted voir dire argue that it is unnecessary to eliminate attorney participation simply because attorneys

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[26] Braswell, *Voir Dire—Use and Abuse*, 7 WAKE FOREST L. REV. 49, 54 (1970); *see* Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916 (1971); Note, *Judge Conducted* Voir Dire *as a Time-Saving Trial Technique*, 2 RUT.-CAM. L.J. 161 (1970).

[27] *See* Levit, Nelson, Ball & Chernick, *supra* note 35, at 946-49.

[28] *See* MacGutman, *supra* note 17, at 327-28; Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386, 391 (1974); Comment, *The Jury Voir Dire: Useless Delay or Valuable Technique*, 11 S.D. L. REV. 306, 317-18 (1966).

[29] Van Dyke, *supra* note 17, at 76.

[30] *See id.* at 88-89 (noting that what little court time was saved by judge-conducted voir dire was made up for by additional pretrial conferences).

have been known to abuse it. A number of commentators point out that the conduct of the voir dire has always been subject to the judicial discretion of the courts.[40] Thus, the judge has the power to curtail any attorney abuse of the voir dire.

Social Science Research Relevant to a Determination of Who Should Conduct Voir Dire

There is a considerable body of basic research investigating how status differentials and reinforcement techniques affect self-disclosure in interview situations. There is also a considerable body of research which illustrates how attitudes may be communicated to others through nonverbal communication. This research indicates that attorneys are probably better suited to conduct the voir dire.

Status Differentials Between the Judge and Attorneys

The judge obviously has the highest status of anyone in the courtroom. He is physically separated from and elevated above everyone else, and is addressed by jurors and attorneys alike as "your honor." One psychological study seems to indicate that the judge would be the more appropriate interviewer to elicit juror self-disclosure.[41] It finds that both males and females disclose more to a high-status male interviewer than to one of low status.[42] On the other hand, the status level of female interviewers does not appear to affect the amount of self-disclosure from either male or female subjects. Since there are currently more male judges and attorneys than there are female judges and attorneys, the judge, having a higher status than the attorney would appear to be the more appropriate interviewer in most cases.

Other studies, however, indicate that there is a curvilinear relationship between the status of the interviewer and interviewee and the amount of self-disclosure: too great a status differential between the interactants may lead to an interviewing bias effect.[43] One study on bias in information interviews states:

> [B]ias is likely to occur in the interview when there is social distance between interviewer and respondent. Status distance and threatening questions may create a situation in which the respondent feels pressure to answer in the direction he believes will conform to the opinions or expectations of the interviewer. . . .

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[40] *See, e.g.*, Comment, *supra* note 17, at 110; Comment, *supra* note 37, at 316.

[41] *See* Brooks, *Interactive Effects of Sex and Status on Self-Disclosure*, 21 J. COUNSELING PSYCH. 469, 473 (1974).

[42] *Id.*

[43] *See, e.g.*, Williams, *Interviewer Role Performance: A Further Note on Bias in the Information Interview*, 32 PUB. OPINION Q. 287 (1968).

> It would seem likely that the role performance of the interviewer could either enhance or mitigate the biasing effects of status characteristics and potentially threatening questions."

Furthermore, another study finds that liking for a person will vary as a function of perceived similarity.[45] A large status differential between the interactants will most likely reduce perceived similarity and, in turn, the degree of self-disclosure. Finally, it has been found that such interviewer biasing effects are greatest when the respondent perceives the social distance between himself and the interviewer to be either very large or very small.[46] When social distance is very large, the respondent may hedge opinions out of fear of retaliation from a more powerful interviewer. On the other hand, when the social distance is very small, he may hedge opinions so as not to alienate an equal.

While the lawyer is in a higher status position in the courtroom as compared to the prospective jurors, he is at an intermediate social distance from the jurors as compared to the judge. It is probable that attorneys will be seen by the jurors as more similar to themselves than is the judge. Given these circumstances, it appears that attorneys would be better suited than the judge to interview prospective jurors and elicit self-disclosure.

Role Differentials Between the Judge and Attorneys

The judge has an extremely difficult role to fulfill, both intellectually and emotionally. He must be the arbiter of fine points of law, coordinate the activities of all parties to facilitate a just result and remain above interparty rivalries, all of which require that he remain aloof and emotionally detached. In fact, the judge's physical placement in the courtroom and the use of somber black robes probably evolved to foster such detachment. The attorneys, on the other hand, are free to modulate openness and familiarity with prospective jurors without compromising role requirements. Indeed, the flamboyant and expansive lawyer is a part of American folklore. Thus, attorneys are capable of interacting with prospective jurors either in a warm and friendly manner, or in an aggressive manner, depending on what the situation requires.

Common sense dictates that people prefer to talk to and will reveal more of themselves to warm and friendly people, than they will to those who are aloof and emotionally detached. This view is supported by a

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[44] *Id.* at 257-88 (footnotes omitted).

[45] *See* Knecht, Lippman & Swap, *Similarity, Attraction, and Self-Disclosure*, 8 PROCEEDINGS OF THE 81ST ANNUAL CONVENTION OF THE APA 205 (1973).

[46] Dohrenwend, Colombotos & Dohrenwend, *Social Distance and Interview Effects*, 32 PUB OPINION Q. 410 (1968).

number of psychological studies.[47] Since an attorney can manipulate his behavior to appear warm and friendly to prospective jurors, whereas the judge runs the risk of compromising his role performance if he acts in that way, it would seem that attorneys are better suited for the role of the interviewer.

Furthermore, because of the greater flexibility in behavior allowed to the attorney in his role as the interviewer, he is in a better position to positively reinforce the prospective jurors' self-disclosure. For example, it has been shown that nonverbal stimuli, such as head-nodding and mm-hmming which indicate interest in what the interviewee is saying stimulate longer speech.[48] Increased eye contact, less physical distance, relaxed posture and a direct orientation of the interviewer's body toward the interviewee all serve to reinforce the interviewee and, thus, elicit more verbalization and presumably more self-disclosure from him.[49] A word of caution is in order, however, in regard to eye contact. Another study indicates that a direct linear relationship between eye contact and intimacy appears to hold only for women subjects: males view continuous eye contact, especially from other males, as threatening.[50] Other research reveals that increased body motion on the part of male therapeutic counselors generates more self-disclosure from subjects, while low levels of body motion on the part of female counselors enhances subject self-disclosure.[51]

The judge would not be at a disadvantage, as compared to the attorneys, in rendering the nonverbal types of positive reinforcement to prospective jurors. But his role requirements and physical placement within the courtroom preclude him from administering some of the other types of reinforcement. For example, the judge's placement behind the bench may prevent him from directly facing the jurors and the fact that he wears a robe may obscure expressive body motions and relaxed body posture. Attorneys, on the other hand, can get out from behind the table, approach the jury[52] and engage in all of the nonverbal

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[47] *See, e.g.*, Pope & Siegman, *Interviewer Warmth and Verbal Communication in the Initial Interview*, 2 PROCEEDINGS OF THE 75TH ANNUAL CONVENTION OF THE APA 245 (1967); Simonson, *The Impact of Therapist Disclosure on Patient Disclosure*, 23 J. COUNSELING PSYCH 3 (1976); Worthy, Gary & Kahn, *Self-Disclosure as an Exchange Process*, 13 J. PERSONALITY & SOC PSYCH 59 (1969).

[48] *See* Matarazo, *The Interview*, in HANDBOOK OF CLINICAL PSYCHOLOGY 403, 443-44 (B. Wolman ed. 1965).

[49] *See* Mehrabian, *A Semantic Space for Nonverbal Behavior*, 35 J. CONSULTING & CLINICAL PSYCH 248 (1970); Reece & Whitman, *Expressive Movements, Warmth and Verbal Reinforcement*, 64 J. ABNORMAL & SOC. PSYCH. 234 (1962).

[50] Ellsworth & Ross, *Intimacy in Response to Direct Gaze*, 11 J. EXPERIMENTAL SOC. PSYCH 592 (1975).

[51] *See* Gardner, The Effects of Body Motion, Sex of Counselor, and Sex of Subject on Counselor Attractiveness and Subject's Self-Disclosure (1973) (unpublished manuscript on file at Univ. of Wyo.).

[52] Some judges, however, may restrict the attorneys' movements by requiring, for example, that they remain behind a podium.

methods of reinforcement without appearing artificial or out of character.

As noted above, in addition to an ability to interact with the jurors in a warm and empathic manner, attorneys are better able to interrogate them in an aggressive style without compromising their role. If the interviewer suspects that a juror is lying and is unable to confirm this through friendly questioning, resort to aggressive tactics may be called for. This tactic is supported by the results of a study on the effects of induced anxiety which concludes that individuals tend to regress in stressful situations and respond to stimuli as they have done in the past.[53] Thus, a prospective juror with long-held prejudices might be more likely to admit them in a stressful situation engineered by the attorney's aggressive questioning. A further advantage of the occasional use of aggressive questioning is found in research on psychiatric interviews, which concludes that high anxiety questions produce a higher verbal output than do neutral questions.[54]

From a psychological viewpoint, it appears that more self-disclosure from prospective jurors would be produced by allowing attorneys, rather than the judge, to conduct voir dire. Attorneys are at a moderate social distance from the jurors thus minimizing interviewer biasing effects and they are able to modulate their interviewing behavior to positively reinforce or attack juror responses as necessary.

Ability to Prejudice Jurors Through Nonverbal Communication

In the preceding sections, it was concluded that attorneys are better suited to conduct voir dire because they are in a position to facilitate the jurors' self-disclosure. This section illustrates that exclusion of attorneys from the voir dire process may lead to bias on the part of jurors resulting from the judge's unintentional communication of whatever biases he may have. To explain this point, it is first necessary to refer to Kalven and Zeisel's classic empirical study[55] of the jury's decisionmaking process. The study, in comparing juries' actual decisions with judges' opinions of how the juries should have decided the cases, finds that juries and judges concur in their decisions about seventy-five percent of the time.[56] This level of concurrence persists even when the juries are confronted with difficult evidentiary and legal issues, which leads to the conclusion that juries are capable of understanding difficult cases.[57] There is, however, an alternative explanation for the high

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[53] *See* Beier, *The Effect of Induced Anxiety on Flexibility of Intellectual Functioning*, 65 PSYCH. MONOGRAPHS, Whole No. 326, at 17-18 (1951).

[54] Kanfer, *Verbal Rate, Eye Blink, and Content in Structured Psychiatric Interviews*, 61 J. ABNORMAL & SOC. PSYCH. 341, 347 (1960).

[55] *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

[56] *Id.* at 56, 63.

[57] *Id.*

degree of concurrence between jury and judge decisions: "[J]udge/jury concurrence may result, at least in part, because the judge subtly and unintentionally conveys to the jury his feelings about the parties and participants in the case and because the jury is influenced by his cues."[58]

The judge may communicate feelings and attitudes about the litigants to the jury through kinesic and paralinguistic behavior. Kinesic behavior, or body language, includes: facial expressions, body posture, body movements, body orientation and hand movements. Paralinguistic behavior includes aspects of speech such as: pitch and tone of voice, pauses and latencies, loudness, tempo and breathing patterns. Both types of behavior are normal components of communicative behavior. Indeed, these behaviors constitute well over half of an individual's total communicative behavior and operate to communicate interpersonal attitudes, express emotions, indicate mutual attentiveness, provide feedback and provide illustrations for speech.[59] Furthermore, these behaviors are for the most part beyond the individual's control. Thus, even if one actively attempts to hide feelings, research indicates that the attitudes and emotions will continue to escape through nonverbal behavior.[60] Not only are nonverbal cues sent by everyone, but nonverbal messages are received and interpreted by others; even untrained observers are able to accurately decode a sender's nonverbal cues.[61] The decoding process is, like the sending of cues, largely unconscious.

The significance of this communication research is enhanced when its findings are coupled with the findings of research concerning experimenter biasing effects. In the last fifteen years, there has been a considerable concern among psychologists that experimenters might be subtly influencing their subjects' responses. In fact, research shows that experimenters will often unintentionally influence the subject to make a "correct" response.[62] This phenomenon is explained by the fact that the experimenter's unintentional actions seem to be reciprocated by attempts on the part of subjects to search for and respond to the experimenter's influence. Research on evaluation apprehension demonstrates that this phenomenon is enhanced when a subject is confronted

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[58] Note, *Judge's Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1267 (1975).

[59] *See* M. ARGYLE, SOCIAL INTERACTION 110-14 (1969).

[60] *See, e.g.*, Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCH. 88 (1969).

[61] P. EKMAN, W. FRIESEN & P. ELLSWORTH, EMOTION IN THE HUMAN FACE: GUIDELINES FOR RESEARCH AND AN INTEGRATION OF FINDINGS 77-108 (1972).

[62] *See* Duncan, Rosenberg & Finkelstein, *The Paralanguage of Experimenter Bias*, 32 SOCIOMETRY 207 (1969); Masling, *Differential Indoctrination of Examiners and Rorschach Responses*, 29 J. CONSULTING PSYCH. 198 (1965); Rosenberg, *The Conditions and Consequences of Evaluation Apprehension*, in ARTIFACT AND BEHAVIORAL RESEARCH 279 (R. Rosenthal & R. Rosnow eds. 1969); Rosenthal, *Interpersonal Expectations: Effects of the Experimenter's Hypothesis*, in ARTIFACT AND BEHAVIORAL RESEARCH, *supra*, at 181.

with an ambiguous situation and is apprehensive about performing well.[43]

When these various research findings are combined, they militate against a wholly judge-conducted voir dire. When a prospective juror is brought to the voir dire, he has been removed from a daily routine and subjected to a novel and ambiguous situation. The prospective juror "wants to serve and do his duty for society .... To be selected to judge his fellow man is indeed serious business, and he knows that he will likely be called upon for decisions that are much deeper than daily expressions of opinion."[44] Individuals placed in novel situations will often look to individuals of higher status for guidance as to the appropriate behavior.[45] Since it is obvious that the judge has the highest status of anyone in the courtroom, the jurors may well look to him for such guidance. If the judge conducts the voir dire and has negative feelings toward the parties or their counsel, the communication research indicates he will almost surely convey these feelings to the jurors through nonverbal communication. Research also indicates that the jurors will be able to interpret these nonverbal cues. Furthermore, studies on experimenter bias indicate that jurors may well adopt the attitudes and emotions of the judge as appropriate. Thus, a voir dire conducted solely by the judge may lead to a subtle inculcation of bias in the jurors toward the parties or counsel.

To be sure, attorneys are even more likely than the judge to have biases and prejudices regarding the case. They also lack compunctions against revealing their beliefs and even attempt to do so on the verbal level rather than merely on the nonverbal level. But it is precisely because attorneys are open about their biases that they should be allowed to conduct the voir dire. Jurors are aware that the attorneys are acting as advocates, and, therefore, jurors are less liable to accept their biases as absolute truth. Furthermore, the persuasive attempts of one attorney will be counterbalanced by the other. The judge, on the other hand, is presumed to be impartial and the attitudes which he conveys are more likely to be readily accepted. Also, if a judge conveys negative attitudes toward one side during the voir dire, counsel has no effective way to counter the resulting impact of such conduct on the jury.

THE METHOD OF ADDRESSING QUESTIONS TO THE PROSPECTIVE JURORS

In most jurisdictions, at least some portion of the voir dire consists of

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[43] Rosenberg, *supra* note 62, at 324-29.

[44] Brown, *A Juryman's View*, in SELECTED READINGS—THE JURY 102, 102 (G. Winters ed. 1971).

[45] Rosenthal, *On Not So Replicated Experiments and Not So Null Results*, 33 J. CONSULTING & CLINICAL PSYCH. 7 (1969).

questions addressed to the group as a whole.[66] In some voir dires, this is the predominant mode with individual questioning taking place only when a juror has affirmatively responded to a question put to the group and follow up questions are required. Many voir dires, however, start with some brief group questioning on general topics, followed by an extended period of questioning addressed to specific individuals seated within the group as a whole. Occasionally, prospective jurors are questioned out of the presence of the other members of the panel—particularly when there has been massive publicity surrounding the trial and the judge concludes that this form of voir dire is required to determine the extent to which prospective jurors have been "tainted" by the media without further biasing the other prospective jurors.[67] Individual questioning outside the presence of the other jurors may not be allowed, however, if the judge feels that it will unduly lengthen the voir dire process.

In general, the conduct and scope of voir dire is within the discretion of the judge. Determining whether the questioning should be done individually or collectively is also within the discretion of the judge, and most cases hold that a judge does not abuse that discretion by refusing to allow individual examinations.[68] Inherent in the rationale of these cases is the justified belief that group questioning will render a considerable savings of time and the questionable belief that in most cases collective questioning is capable of revealing biases and prejudices.

Social Science Research Pertaining to the Mode of Questioning

Both the group and the individual-within-a-group styles of questioning are grossly inadequate for producing honest self-disclosure because they engender conformity of responses. It seems intuitively obvious that when people are called for jury duty by a judicial summons, they feel a certain degree of anxiety at being removed from the context of their ordinary lives and ordered to perform a role which will have a significant effect on the lives of others. A variety of investigators find that anxious individuals have an increased need for affiliation while they are awaiting a threatening event.[69] Many prospective jurors perceive interroga-

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[66] *See* 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, §§ 331-332.

[67] The American Bar Association has advocated this practice. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.4(a) (1968).

[68] *See, e.g.*, United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *cf.* United States v. Addonizio, 451 F.2d 49, 66 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (trial court's refusal to examine jurors individually was not an abuse of discretion; noting, however, in dicta, that if there has been extensive pretrial publicity, jurors should be examined individually).

[69] *See* Gerard & Rabbie, *Fear and Social Comparisons*, 62 J. ABNORMAL & SOC. PSYCH. 586, 588-89 (1961); Helmreich & Collings, *Situational Determinants of Affiliative Preference Under Stress*, 6 J. PERSONALITY & SOC. PSYCH. 79 (1967); Sarnoff & Zimbardo,

tion in a public forum to determine their suitability as jurors to be such an event. In addition, conformity increases as the need for affiliation increases.[70] Thus, even before the voir dire begins, there are socio-psychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure.

In the group questioning method of conducting voir dire, the entire group of prospective jurors is asked a question such as, "Would any of you be unable to be fair and impartial toward the defendant because of the media coverage which has surrounded this case?" If no one from the group responds to this question, the interviewer moves on to other areas. This technique is hardly fitted for a self-disclosure interview. Since no response is required of any particular individual and factors of group conformity are at work, it is highly unlikely that a prospective juror will respond to such a question, particularly when it would discredit him as a fair person. Even when relatively mundane questions are addressed to the prospective jurors as a group, researchers have observed that they squirm in their seats and look around to see if anyone else is going to volunteer information; if they discover that no other hands are raised, they settle back in their chairs and refuse to respond. In contrast, responses were forthcoming when attorneys later addressed the very same questions to particular individuals.

The technique of questioning an individual within a group is an improvement over group questioning but it still closely resembles the paradigm used by psychologists to study conformity. In one study on independence and conformity, it was found that when an individual was called upon to state his opinions in public after hearing the opinions stated by the majority of the group, over one-fourth of the minority individuals covertly changed their private opinions and stated their public opinions so that they matched those of the majority.[71] When the individual was not required to state an opinion in front of the group, the degree of conformity was markedly lower. Other research in this area, while differing in methodology and emphasis, supports the same conclusion.[72] This research also supports the conclusion that an individual in-

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Anxiety, Fear, and Social Affiliation, 64 J. ABNORMAL & SOC. PSYCH. 356 (1961); Zimbardo & Formica, *Emotional Comparison and Self-Esteem as Determinants of Affiliation*, 31 J. PERSONALITY 141, 161 (1963).

[70] *See* Hardy, *Determinants of Conformity and Attitude Change*, 54 J. ABNORMAL & SOC. PSYCH. 289 (1957); McGhee & Teevan, *Conformity Behavior and Need for Affiliation*, 72 J. SOC. PSYCH. 117 (1967).

[71] Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCH. MONOGRAPHS, Whole No. 416, at 11 (1956).

[72] *See, e.g.*, Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCH. 629, 635 (1955); Sherif, *Group Influences Upon the Formation of Norms and Attitudes*, in READINGS IN SOCIAL PSYCHOLOGY 219, 224-25 (E. Maccoby, T. Newcomb & E. Hartley eds., 3d ed. 1958); *cf.* A.

terview which takes place away from the group is the best way to determine a person's opinions on a given issue[73] because "in the interest of bolstering the opinions of others, [individuals within a group] may make statements that deviate from the truth as they see it."[74]

The conformity experiments demonstrate a sizeable conformity effect when individuals are required to state their opinions in front of members of a group, even under such nonthreatening conditions as requesting each individual to judge line length.[75] This effect is likely to be even more pronounced under the conditions of anxiety which arise when an attorney challenges a juror in the courtroom. For example, when an attorney challenges a juror for cause, he may publicly accuse the juror of being biased or prejudiced because of the opinion he stated.[76] Often the judge will initially reject such a challenge and require the attorney to further question the prospective juror. This questioning can be quite brutal to a novice in the courtroom. If the individual is being questioned within a group, the other prospective jurors witness what can happen to one who makes the "wrong" response. Thus, in an attempt to avoid such close scrutiny, they may alter their responses so as not to give "wrong" answers.

Both of the predominant questioning techniques create a group situation which tends to foster conformity in the expression of personal opinions. If the goal of voir dire is honest self-disclosure, the most effective way to facilitate the achievement of that goal is to interview prospective jurors out of the presence of their fellows, thus eliminating the conformity-generating aspects of group voir dire. Collective questioning is the method least likely to encourage self-disclosure and should be avoided whenever possible.

INTERACTION DISTANCE DURING VOIR DIRE

The interaction distance between the person conducting the voir dire and the prospective jurors is usually quite large. For example, it is not uncommon to observe a distance of twenty to thirty feet between the interviewer and the prospective jurors. This large interaction distance is most prevalent when questions are addressed to the jurors as a group, probably because such a distance fosters a loud speaking voice from all

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HARE, HANDBOOK OF SMALL GROUP RESEARCH 361-62 (1962) (discussing small group dynamics).

[73] See Chandler, *An Evaluation of the Group Interview*, 13 HUMAN ORGANIZATION 26 (Summer 1954).

[74] *Id.* at 28.

[75] *See* Asch, *supra* note 74.

[76] Most commentators, however, suggest that the attorney politely request the juror be "excused," without making it seem like an accusation. *See, e.g.*, M. BELLI, *supra* note 24, § 120.

parties, thus allowing everyone to hear the questions and answers. Although some assume a closer interaction distance when questioning prospective jurors in an attempt to establish closer rapport with them, such attempts generally are not satisfactory because, in order for everyone in the courtroom, including the court reporter, to hear what is being said, the interactants must still speak very loudly. The result is that the two interactants who are positioned fairly close together speak in stentorian voices for the benefit of others—a result which enhances the artificiality of the interaction and may even hinder the establishment of rapport. Only two voir dires where the interactants were able to maintain a social distance[77] and speak at a normal conversational level have been observed. In one of these, jurors were examined individually, out of the presence of the other jurors, and in a courtroom cleared of spectators. In the other, jurors were questioned individually in the privacy of the judge's chambers. The attorneys involved in both of these cases indicated that in their experience such procedures were extremely rare.

The issue of interaction distance between the interviewer and interviewee has not been addressed in either case law or legal literature. This is probably because whoever conducts voir dire theoretically has the option of assuming a close interaction distance with the prospective jurors. If the judge conducts the voir dire, he may ask prospective jurors to take the witness stand next to the bench while they are being questioned individually. Attorneys may approach the prospective juror whether the person is sitting in the jury box or in the witness stand. As already noted, however, the practicalities of current voir dire procedures require the interactants to speak very loudly, even if they are physically very close, and this is not conducive to self-disclosure. Thus, the issue of interaction distance during voir dire is closely tied to the issue of the appropriate environmental characteristics of the room in which voir dire is to take place. If voir dire is to take place in a large public room designed and decorated to reflect a formal atmosphere, the interaction distances which people adopt will also be formal.

Social Science Research Concerning the Effect of Interpersonal Distance on Self-Disclosure

Four main categories of interpersonal distance are used to define and maintain interpersonal relationships: intimate distance (contact to one and one-half feet); personal distance (one and one-half to four feet); social distance (four to twelve feet); and public distance (twelve or more feet).[78]

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[77] *See* E. HALL, THE HIDDEN DIMENSION 114-16 (1966); text accompanying note 78 *infra*.
[78] E. HALL, *supra* note 77, at 113-20.

Most voir dires take place with a public distance between the speakers. There is some evidence to suggest that this public distance is most conducive to persuasion, the primary function of the attorneys during the trial.[79] It is doubtful, however, that a public distance is conducive to eliciting self-disclosure during voir dire. At the close phase of public distance, around twelve feet, speakers adopt a formal style of speaking and at the more distant phases, speaking style becomes positively frozen. The frozen style of speech is for people who expect to remain strangers. Both the verbal and nonverbal aspects of the communicative process must be exaggerated at this distance with the result that communication tends to assume stereotypic forms.

It is argued that the extent to which the behavior of an interviewee is affected by the interviewer is inversely proportional to the distance, both physical and psychological, which separates one from the other.[80] This hypothesis is supported by a number of research studies on interpersonal attraction in general,[81] and self-disclosure interviews in particular.[82] These studies show that closer physical distance facilitates communication and the formation of a positive feeling. The self-disclosure studies find that when interviews are conducted at distances ranging from three to six feet, the interviewee feels more comfortable, speaks significantly more and reveals more of himself to the interviewer. In addition, one study on interaction distance indicates that interviewers are able to form much stronger impressions of the interviewee's personality at interview distances ranging from four to six feet than they are at closer and farther distances.[83] Thus, the relationship between distance and self-disclosure is not a linear function. If the interview distance is decreased to less than approximately three feet, the interviewee becomes anxious and self-disclosure decreases. A height differential between the interactants at close interpersonal distances would generate even more discomfort in the person at the lower level.

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[79] *See* Albert & Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCH. 265 (1970).

[80] Kleck, *Interaction Distance and Non-verbal Agreeing Responses*, 9 BRIT. J. SOC. & CLINICAL PSYCH. 180 (1970).

[81] *See* Cook, *Experiments on Orientation and Proxemics*, 23 HUMAN RELATIONSHIPS 61 (1970); Willis, *Initial Speaking Distance as a Function of the Speakers Relationship*, 5 PSYCHONOMIC SCI. 221 (1966).

[82] *See* Jourard & Friedman, *Experimenter-Subject "Distance" and Self-Disclosure*, 15 J. PERSONALITY & SOC. PSYCH. 278 (1970); C. Lassen, Interaction Distance and the Initial Psychiatric Interview: A Study on Proxemics (1969) (unpublished dissertation, Yale Univ.); J. Weber, The Effects of Physical Proximity and Body Boundary Size on the Self-Disclosure Interview (1972) (unpublished dissertation, Univ. S. Cal.); *cf.* Knight & Blair, *Degree of Client Comfort as a Function of Dyadic Interaction Distance*, 23 J. COUNSELING PSYCH. 13 (1976) (noting client comfort is highest at midrange distances).

[83] *See* Patterson & Sechrest, *Interpersonal Distance and Impression Formation*, 38 J. PERSONALITY 161 (1970).

Thus, if the interviewer approaches the interviewee in order to enhance self-disclosure, he should also adjust his height so as not to arouse anxiety in the interviewee. For example, if the interviewee is seated, the interviewer can adjust his height by also sitting. The evidence supporting the notion that there is an optimal interpersonal distance of three to six feet for self-disclosure interviews is substantial and consistent. The legal system should take advantage of this research and modify the voir dire procedure to allow the interviewer to question the prospective juror at this distance.

The issue of optimal interview distance also has ramifications for some of the other issues regarding voir dire procedures. Use of the optimal distance is not possible if the jurors are questioned in the traditional group or individual-within-a-group manners. Unless the individual being questioned is placed in the witness stand, it is physically impossible to approach the prospective jurors at the optimal distance in those interview contexts. The evidence concerning distance also has a bearing on the determination of whether the attorneys or the judge should conduct voir dire. When the judge does the questioning, he generally remains at the bench and is not able to approach the jurors; even if a prospective juror is brought closer to the judge and placed in the witness stand, the judge and juror will still not directly face one another. In addition, the judge looks down at the prospective jurors, further hindering juror self-disclosure. Thus, the findings on the subject of optimal interview distance add further weight to arguments in favor of individualized attorney-conducted voir dire.

ENVIRONMENTAL ASPECTS OF THE COURTROOM AND THEIR IMPACT ON JUROR SELF-DISCLOSURE

While the exact environmental characteristics of particular courtrooms will vary, in general, the courtroom may be described as a very large, public room charged with a ritualistic atmosphere and staged with props that clearly demarcate the roles assigned to the various participants. Courtrooms are devoid of any props which denote warmth and informality. When group questioning is employed, the prospective jurors are often seated in the spectator section. In such a situation, the "bar" literally acts as a physical barrier between the interviewer and prospective jurors. Frequently, a small subgroup of the prospective jurors is randomly selected to come before the bar and sit in the jury box. Although these jurors may be questioned as individuals, it is usually in the presence of the surrounding group, and, once again, there is a physical barrier created by the jury box between the interviewer and the prospective jurors. Even though the judge directs and controls the events taking place, he is physically removed from the proceedings. The

judge sits in an elevated, enclosed box which allows only his upper torso and head to be seen. Moreover, the upper torso is somewhat obscured by a voluminous, ceremonial black robe. Thus, a double set of physical barriers separates the judge and the prospective jurors—those which isolate the jurors and those which surround, elevate and obscure the judge.

Very little has been written about the environmental aspects of the courtroom from a legal perspective. Presumably, the ritualistic atmosphere is encouraged for the same reasons which support the practice of requiring witnesses to take the oath; ritual is presumed to impress upon the individual the gravity of the events which are about to transpire and, therefore, encourage candor.[84] The legal view regarding the appropriate atmosphere in which to conduct voir dire may be illustrated by considering an experiment involving an unusual voir dire practice conducted largely without a judge being present.[85] In this method of empanelment, voir dire takes place in an ordinary room which seats twenty-five prospective jurors, as well as the judge, attorneys, clerk and court reporter. When all of the parties have been assembled, the prospective jurors are sworn in. The judge explains the purpose of voir dire and the procedures to be followed and asks only a few very general questions. The judge then leaves the room and the rest of the voir dire is conducted by the attorneys. If one of the attorneys objects to the nature of the other attorney's questioning, the procedure is halted and the judge returns to resolve the dispute. Once the jury has been selected, it is then transferred to a courtroom for trial.

This procedure is highly unusual not only in the degree of latitude afforded to the attorneys, but also in that it takes place in a room which is much smaller than the courtroom and presumably does not have all of the trappings which normally furnish a courtroom. Attorneys who have participated in this type of voir dire generally approve of it.

> All say that the atmosphere allows them to become acquainted and develop a degree of rapport with the jurors that is normally not possible irrespective of whether the voir dire is conducted primarily by the judge or primarily by counsel. Every attorney stated that the system is a fair one. All agreed that it allows sufficient latitude in the examination of prospective jurors.[86]

Despite the fact that the attorneys praised the method in part because of its less formal atmosphere, the study concludes that voir dire should not be regularly conducted in an informal room.

> For a juror to respect the process it must be unmistakably "judicial" in order to convey an official and formal air. . . . Especially because

[84] *See* Levit, Nelson, Ball & Chernick, *supra* note 35, at 939, 950.
[85] *See id.* at 931-36.
[86] *Id.* at 938 (footnotes omitted).

> the voir dire comes at the very beginning of the trial, all care must be taken to assure that the tone is not one of excessive casualness."[87]

Thus, the legal community takes the position that excessive casualness is an evil which must be guarded against in order to insure the integrity of the trial. The legal community should also be aware, however, that excessive formality during the voir dire will inhibit juror self-disclosure and thus hinder the exposition of bias and prejudice.

Social Science Research Relevant to the Environmental Aspects of the Courtroom and Their Effect on Juror Self-Disclosure

The large size of the courtroom appears to have an effect on preferred interpersonal distance which may in turn affect the amount of self-disclosure generated in the voir dire. One study proposes that an inverse relationship exists between room size and preferred interaction distance between subjects.[88] Thus, in a large room, subjects assume a close interpersonal distance, whereas in a small room, subjects tend to assume larger interaction distances. Another study suggests that interaction distances decrease in large rooms because both auditory and visual sensations diminish with the increase in room size:[89] "Screaming across a void does not make for comfortable conversation; rather than increase the volume, most people choose to decrease the void."[90] The implication for voir dire taking place in a large courtroom is that people prefer to have a fairly close interaction distance. This preference is blocked, however, either because of the physical barriers in the courtroom or because of the necessity of everyone in the courtroom being able to hear the exchange of questions and answers. The blocking of these preferred distancing patterns probably generates discomfort and anxiety for the prospective juror, thus reducing self-disclosure. If this is indeed the case, two solutions come readily to mind: either remove the voir dire from the context of the large, open courtroom or remove the physical barriers between the participants to allow closer interaction distances, thereby eliminating the necessity of loud speaking voices by the participants during the exchange.

In addition, environmental aspects may affect the jurors independently of their relation to the attorneys. Specifically, although there is a considerable distance between the interviewer and the interviewee in the typical voir dire, the distance between the various interviewees is

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[87] *Id.* at 939.

[88] *See* Sommer, *The Distance for Comfortable Conversation: A Further Study*, 25 SOCIOMETRY 111, 115 (1976).

[89] *See* White, *Interpersonal Distance as Affected by Room Size, Status, and Sex*, 95 J. SOC. PSYCH. 241, 248 (1975).

[90] *Id.*

minimal. When prospective jurors are seated in the spectator section, as is the case in most group-style voir dires, they are usually in actual physical contact with those on either side of them. Even when prospective jurors are brought into the jury box for questioning, the distance between jurors does not exceed several feet. In studying the effects of room size and crowding on stress and self-disclosure, one researcher concludes that, under conditions of crowding as, for example, where subjects are shoulder to shoulder, the subjects are significantly less comfortable, exhibit more nonverbal indicators of stress such as manipulating objects and frequently changing positions and are less willing to discuss intimate topics.[91] Thus, the seating of prospective jurors in a compact grouping probably leads to reduced self-disclosure.

It has long been the common sense view that reduced privacy leads to reduced self-disclosure. A study finding that self-disclosure in a dyad increases under conditions of isolation[92] supports this view. Other research, also supporting the common sense view, concludes that reduced privacy decreases client self-disclosure in a counseling setting and this occurs even when partial barriers such as desks or bookcases are employed to encourage the client's perception of privacy.[93] From this research, it would seem that one way to encourage self-disclosure among prospective jurors is to conduct voir dire in the most isolated setting possible, for example, in the judge's chambers. To be sure, the complete isolation of a client-counselor setting cannot be achieved since the voir dire must include, at a minimum, the juror, judge, both litigants in a civil case or the defendant in a criminal case, counsel for both sides and the court reporter. Yet, a small group setting is much more conducive to self-disclosure than a voir dire which takes place in front of fifty or more spectators.

The final aspect of the environment considered here is the degree of warmth or coldness of the room in which voir dire takes place. "Hard architecture" is described as that which is unyielding, impervious and impersonal, and it is argued that such architecture tends to foster isolation and estrangement among people.[94] The courtrooms in which voir dire is conducted can typically be characterized as "hard" rooms. Empirical data from a counseling analogue demonstrates that subjects disclose significantly more in a "soft" rather than a "hard" room.[95] This result

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[91] *See* Sundstrom, *An Experimental Study of Crowding: Effects of Room Size, Intrusion, and Goal Blocking on Nonverbal Behavior, Self-Disclosure and Reported Stress*, 32 J. PERSONALITY & SOC. PSYCH. 645 (1975).

[92] *See* Altman & Haythorn, *Interpersonal Exchange in Isolation*, 28 SOCIOMETRY 41 (1975).

[93] Holahan & Slaikeu, *Effects of Contrasting Degrees of Privacy on Client Self-Disclosure in a Counseling Setting*, 24 J. COUNSELING PSYCH. 55 (1977).

[94] R. SOMMER, TIGHT SPACES *passim* (1974).

[95] Chaikin, Derlega & Miller, *Effects of Room Environment on Self-Disclosure in a Counseling Analogue*, 23 J. COUNSELING PSYCH. 479 (1976).

might occur because hard architecture makes status differences tween client and counselor more salient, because a soft environm similar to that in which friends interact or because a soft environm more conducive to a feeling of relaxation and ease.[*] Whatev reason, both common sense and empirical data clearly demonstrate more self-disclosure is forthcoming in a warm and intimate room t a cold and impersonal one. Therefore, voir dire could be improv removing it from the courtroom and into the judge's chambers o some other room especially designed for the voir dire of prosp jurors.

RECOMMENDATIONS FOR THE LEGAL SYSTEM

The courtroom functions as a public forum in which society d mines the civil and criminal liabilities of its members through the u an adversarial system. The structure of the courtroom and the p cedures which are used in the courtroom setting have evolved to ther that function. Although voir dire is nominally a part of the ad sary system, it should be conceptualized as a separate part of the process. Since the purpose of voir dire is to obtain information from spective jurors regarding their qualifications and attitudes to issues in the case at hand, it can best be conceptualized as a self closure type of interview. The research which has been reviewed demonstrates that self-disclosure is markedly affected by situational tors. Thus, the voir dire situation needs to be tailored to facilitate disclosure. Present voir dire practices are not designed to encourage self-disclosure and indeed seem almost intended to discourage open, honest self-revelation.

There are several specific recommendations for revising the procedures used in conducting voir dire which could encourage self-disclosure among prospective jurors. First, emphasis should be placed on individual rather than group or individual-within-a-group questioning. Second, questioning should be conducted by attorneys rather than by the judge. Third, the interviewer should conduct the interview from a distance of three to six feet from the jurors. Fourth, the questioning should take place in a smaller room than is traditionally employed, but should not result in crowding. And finally, the room where voir dire takes place should have a warmer and more intimate atmosphere than that of the cold, hard, ritualistic settings where it is presently conducted. Essentially, these recommendations urge the legal system to de-emphasize the adversarial approach to voir dire and to transform it into a more relaxed proceeding where free and open self-disclosure can take place.

[*] *Id.*

Once voir dire is moved to a more open setting, there are four other recommendations derived from the psychological literature which could be employed to facilitate disclosure. First, positive reinforcement should be given to the juror when he makes self-disclosing statements. Second, the interviewer should make self-disclosing statements about himself to the prospective juror. Third, a model of self-disclosure should be offered to the juror prior to the voir dire. And finally, jurors should be instructed to disclose information about themselves.

The first of these recommendations, the giving of positive reinforcements to increase self-disclosing statements by the juror, was mentioned previously in dealing with the issue of who should conduct voir dire. These reinforcements could take the form of verbal praise or nonverbal indicators of interest, such as increased eye contact, direct body orientation, relaxed posture, head-nodding and mm-hmming.

The second recommendation, that the interviewer disclose himself to the prospective juror during the voir dire, is based upon a considerable body of research indicating that interviewer disclosure appears to facilitate self-disclosure in interviewees.[97] There are three theoretical explanations for this phenomenon. One explanation is that the interviewer's example of self-disclosure tends to lessen the interviewee's inhibitions concerning self-disclosure.[98] In addition, there is evidence indicating that the phenomenon might be the result of the modeling aspect of the situation.[99] In other words, the interviewees use the interviewer's behavior as a discriminative cue to guide their own behavior. Finally, the phenomenon may be viewed as a social exchange process in which the disclosures follow a norm of reciprocity.[100] Whatever the cor-

[97] Davis & Skinner, *Reciprocity of Self Disclosure in Interviews: Modeling or Social Exchange?*, 29 J. PERSONALITY & SOC. PSYCH. 779, 779 (1974). There is, however, other research indicating that when subjects view interviewer self-disclosure as inappropriate to the interviewer's role, they may actually withdraw and disclose less of themselves when confronted by the interviewer's disclosures. *See* Derlega, Lovell & Chaikin, *Effects of Therapist Disclosure and Its Perceived Appropriateness on Client Self-Disclosure*, 44 J. CONSULTING & CLINICAL PSYCH. 866 (1976). Further research needs to be done to determine which interviewee personality variables are associated with this phenomenon. Empirical research is also needed to determine whether most prospective jurors would view voir dire as an inappropriate social situation for interviewer self-disclosures thereby rendering this strategy of generating juror self-disclosure untenable.

[98] *See* A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION 192-96 (1969). There is, however, some data indicating that interviewees maintain elevated levels of self-disclosure only if the interviewer also continues to disclose, *see* Davis & Sloan, *The Basis of Interviewee Matching of Interviewer Self-Disclosure*, 13 BRIT. J. SOC. & CLINICAL PSYCH. 359 (1974), thus militating against this disinhibitory theory.

[99] *See* Marlatt, *Exposure to a Model and Task Ambiguity as Determinants of Verbal Behavior in an Interview*, 36 J. CONSULTING & CLINICAL PSYCH. 268 (1971). However, there is also evidence indicating that interviewees do not model the content of interviewers' disclosures. *See* Davis & Sloan, *supra* note 98. This tends to negate the modeling theory.

[100] *See* Worthy, Gary & Kahn, *supra* note 47, at 59-60.

rect explanation,[101] the principle of interviewer disclosure can get out of hand. For example, one study finds that an intermediate level of interviewer self-disclosure, such as four disclosures during a thirty minute interview as opposed to none or twelve, leads to greater self-disclosure by the interviewees.[102] Thus, if the interviewer makes too many self-disclosures, the results may be counter-productive. This finding has an implication for the decision whether to question prospective jurors individually or within the group context. If individuals are questioned with the entire group present, the attorney may not be able to safely employ the self-disclosure technique since he may have overexposed himself. Thus, interviewer self-disclosure should only be employed in conjunction with a truly individual voir dire. The type of disclosure made by the interviewer also needs to be considered. Interviewees respond more to a warm therapist making demographic disclosures than to a warm therapist making personal disclosures.[103] Thus, the voir dire interviewers should not disclose information which is too personal. It is doubtful that the parties involved in voir dire would consider personal disclosures appropriate on the part of the judge or attorney anyway.

It is also recommended that a model of self-disclosure be provided to prospective jurors prior to the voir dire. In a study in which the subjects witnessed an interview of a self-disclosing stooge and were then asked how much they would be willing to disclose in the interview, it was discovered that subjects exposed to high disclosing stooges are significantly more willing to disclose information about themselves than are those exposed to low disclosing stooges.[104] There was no interaction between the interviewer and the subject or between the stooge and the subject, so that willingness to disclose in this instance must be a function of modeling rather than of a social exchange process. In addition, another study demonstrates that a model for self-disclosure on videotape can increase subject self-disclosure in subsequent interactions.[105] In some jurisdictions, prospective jurors are exposed to movies which attempt to explain the functions of the trial and the role of the juror in a trial. These movies could be adapted to include a segment showing a voir dire in which prospective jurors are highly disclosing. Based on the

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[101] It seems that self-disclosure follows a norm of reciprocity; *see* notes 97-98 *supra*, and that, therefore, self-disclosure on the part of the interviewer on a fairly continuous basis throughout voir dire would facilitate self-disclosure on the part of the prospective jurors.

[102] *See* Mann & Murphy, *Timing of Self-Disclosure, Reciprocity of Self-Disclosure, and Reactions to an Initial Interview*, 22 J. COUNSELING PSYCH. 304 (1975).

[103] Simonson, *The Impact of Therapist Disclosure on Patient Disclosure*, 23 J. COUNSELING PSYCH. 3 (1976).

[104] *See* Thase & Page, *Modeling of Self-Disclosure in Laboratory and Nonlaboratory Interview Settings*, 24 J. COUNSELING PSYCH. 35 (1977).

[105] *See* Annis & Perry, *Self-Disclosure Modeling in Same-Sex and Mixed-Sex Unsupervised Groups*, 24 J. COUNSELING PSYCH 370 (1977).

research findings described above, this should lead to increased self-disclosure in the real voir dire.

The final recommendation for altering voir dire procedures is that the jurors be instructed to disclose information about themselves. Two studies demonstrate that descriptive instructions by themselves will significantly increase subject self-disclosure in interviews.[106] Although such instructions are sometimes given, they are frequently mentioned almost as an afterthought or in an offhand manner. The research indicates that self-disclosing instructions should always be given and emphasized prior to voir dire.

CONCLUSION

The voir dire is an important part of the trial process in which the constitutional right to an impartial jury is at stake. In order to protect that right, it is essential that attorneys obtain as much information about prospective jurors as possible so that they may challenge for cause those who are biased or prejudiced as a matter of law. Juror self-disclosure will also allow the attorney to protect his client's legal interests by permitting him to exercise his peremptory challenges on the basis of solid information rather than on speculation and guesswork. Unfortunately, current voir dire practices are not conducive to promoting juror self-disclosure. Thus, in order to further the goals of voir dire, research from the social sciences on the subject of self-disclosure interviews, should be implemented to change current voir dire practices and increase self-disclosure.

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[106] *See* McGuire, Thelen & Amolsch, *Interview Self-Disclosure as a Function of Length of Modeling and Descriptive Instructions*, 43 J. CONSULTING & CLINICAL PSYCH. 356 (1975); Stone & Gotlib, *Effect of Instructions and Modeling on Self-Disclosure*, 22 J. COUNSELING PSYCH. 288 (1975).

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Judge- Versus Attorney-Conducted Voir Dire

An Empirical Investigation of Juror Candor*

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Broeder (1965) found that potential jurors frequently distort their replies to questions posed during the voir dire. Considerable controversy has arisen over whether more honest, accurate information is elicited by a judge or by an attorney. The experiment manipulated two target (judge- versus attorney-conducted voir dire) and two interpersonal style variables (personal versus formal). The dependent measure was the consistency of subjects' attitude reports given at pretest and again verbally in court. One-hundred-and-sixteen jury-eligible community residents participated. The results provide support for the hypothesis that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors. Subjects changed their answers almost twice as much when questioned by a judge as when interviewed by an attorney. It was suggested that the judge's presence evokes considerable pressure toward conformity to a set of perceived judicial standards among jurors, which is minimized during an attorney voir dire.

INTRODUCTION

The right to a fair and impartial jury of one's peers is a right guaranteed to each criminal defendent by the sixth and fourteenth amendments to the U.S. Constitution. One of the vehicles through which the court seeks to meet this obligation is a process called the voir dire.

Voir dire, literally translated as "to speak the truth" (Gifis, 1975: p. 222), is the preliminary stage of jury selection during which prospective jurors are examined to determine their suitability to hear the case before the court. The goal of

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this procedure is to excuse jurors failing to meet the criteria for jury service or holding biases or prejudices viewed as likely to interfere with their impartiality (Bush, 1976). Attorneys for either side may have a member of the jury panel (venire) removed by exercising a challenge for cause or a peremptory challenge.

Attorneys exercise causal challenges when they can demonstrate that a juror (a) fails to meet the statutory requirements for jury service, or (b) exhibits sufficient prejudice against one of the parties that the juror is unlikely to be capable of rendering a fair and impartial verdict. Peremptory challenges are made at the attorney's discretion and are generally reserved for when the attorney believes that a juror remains biased but this cannot be sufficiently demonstrated to have the juror removed for cause.

Clearly, prudent use of either type of challenge is contingent upon obtaining *honest, accurate* information from potential jurors regarding their background, attitudes, and beliefs (Bush, 1976).

According to federal and most state statutes, the questioning of potential jurors during the voir dire may be done by the judge, by the attorneys, or by some combination of the three.

The current practice in most federal courts, and in an increasing number of state courts, is one in which the judge conducts the questioning of potential jurors (Bermant & Shapard, 1978). Although counsel for both sides may submit questions, judges use their discretion regarding which, if any, of the submitted questions are posed to the jury.

This departure from attorney-conducted voir dire has created considerable controversy in the legal system. Those arguing for judge-conducted voir dire assert that a considerable amount of time and money is saved under such a system (Stanley, 1977). It is assumed that jurors are as candid, or even more so, when questions are posed by a judge rather than by an attorney. Levit, Nelson, Ball, and Chernick (1971) go so far as to suggest that the formality and gravity of the situation created by the judge's presence are likely to *increase* juror candor. They assert, without empirical support, that the respect elicited by the robed judge serves to enhance judges' effectiveness in obtaining truthful responses from jurors.

Several respected legal scholars (e.g., Babcock, 1975; Bonora & Krauss, 1979; Bush, 1976; Glass, 1977; Padawer-Singer, Singer, & Singer, 1974) dispute the assumption that the judge's active role leads to greater juror candor. Citing anecdotal and case data, they argue that the judge will be seen as an important authority figure, and as such, jurors will tend to be concerned about displeasing him or her. Such a concern is likely to cause jurors to be less than honest in their replies.

This has been an issue of considerable debate; however, no empirical studies available have systematically varied each condition (judge- versus attorney-conducted voir dire) and measured the quality and quantity of information elicited from prospective jurors.

Suggs and Sales (1981) aptly characterize the voir dire as a self-disclosure interview in which information is sought from potential jurors concerning their history, attitudes, and beliefs. Empirical investigations on self-disclosure have

repeatedly found that individuals disclose more to (a) those from whom they receive moderate self-disclosure (reciprocity effect), (b) those whom they like more, and (c) those whom they perceive as sharing equal status with themselves (status similarity) (Chelune, 1979).

Research has shown that a significant correlate of subject self-disclosure is the amount of self-disclosure he or she initially receives from a target (see, e.g., Ehrlich and Graeven, 1971; Jourard, 1959, 1969). Subjects exposed to a high self-disclosing confederate disclose at higher levels themselves within certain parameters. For example, Simonson (1976) paired subjects with interviewers who behaved in either a cold, aloof fashion or in a warm, friendly manner, and who disclosed at one of three levels: personal disclosure, disclosure of demographic information, or no disclosure. This study found that subjects exposed to a warm interviewer who disclosed demographic information (moderate disclosure) were the most effective in eliciting self-disclosure from subjects. Not surprisingly, the cold, aloof interviewers elicited little or no self-disclosure, regardless of the intimacy level of their disclosure. These and other studies prompted Archer (1979) to conclude that the reciprocity effect is one of the most robust and reliable effects in social psychology.

Liking for the target of self-disclosure also influences the degree of subjects' return self-disclosure. Subjects disclose most to the targets who are most liked and disclose least to targets who are least liked (Critelli, Rappoport, & Golding, 1976; Jourard, 1959; Worthy, Gary, & Kahn, 1969).

Finally, similarity in status and authority are important to interviewees in selecting targets of self-disclosure. Slobin, Miller, and Porter (1968) found that employees were more willing to disclose to other employees within their own hierarchical level rather than to more powerful superiors. Apparently, disclosure to a more powerful target is perceived to entail considerable risk, and subjects prefer not to reveal themselves to targets who hold substantial power. As Goodstein and Reinecker (1974) note, "we self-disclose to those who have already demonstrated that they will not punish our self-disclosure and to those who have no capacity for punishing such behavior" (p. 52).

In examining the courtroom behavior of attorneys and judges in light of the research on self-disclosure, a number of things become apparent. At the beginning of the voir dire, attorneys typically engage in moderate self-disclosure to the panel, disclosing some personal information about themselves, their background, and their faith in the judicial system (Van Dyke, 1977). Manuals on courtroom tactics encourage such behavior (e.g., Bonora & Krauss, 1979; Jordan, 1981). Judges, however, purposely attempt to maintain a formal demeanor in their courtroom interactions to avoid compromising their role as arbitrator and typically do not offer personal disclosure to the panel.

Moreover, attorneys generally attempt to appear warm and friendly to jurors in order to win favorable consideration for their clients (Bonora & Krauss, 1979; Suggs & Sales, 1981). They expend considerable effort to gain jurors' positive regard and are in a much better position than judges to succeed. As Suggs and Sales (1981) assert, "attorneys . . . have and use the flexibility to interact with jurors in a more open and personal manner, thereby influencing perceived famil-

iarity, liking and warmth" (p. 253). On the other hand, many of the requirements of the judge's role are unlikely to promote liking. The judge, cloaked in a long black robe, sits elevated and apart from the rest of the courtroom, literally looking down upon the jurors. He or she is addressed as "Your Honor," rather than with a more personal address.

Finally, judges and attorneys hold different levels of ascribed status in the courtroom. Although attorneys' social status may be higher than that of most jurors, there is less of a discrepancy between jurors and attorneys than between jurors and judges (Suggs & Sales, 1981).

As a function of their relative adherance to these respective roles, coupled with their typical courtroom behaviors, it seemed likely that jurors would perceive attorneys as more similar to themselves and report greater liking for them than for judges. These two factors, in conjunction with attorney self-disclosure (reciprocity), were predicted to interact such that attorneys would be more effective than judges in eliciting juror self-disclosure.

Finally, the present study sought a parsimonious explanation for the predicted efficacy of these three factors in facilitating self-disclosure. Fenigstein, Scheier, and Buss (1975) proposed that the degree of attention to the public aspect of the self is a mediator in the relationship between individuals' privately held attitudes and beliefs and their public expression of them. Essentially they suggest that the consistency (honesty) of individuals' self-disclosure is mediated by the degree to which they are focused on the public aspects of themselves.

Applying these hypotheses to the courtroom, it was expected that jurors who were interviewed by a judge would remain in states of relative heightened public self-awareness. Such a state would cause their self-reports of attitudes and beliefs to differ considerably from their privately held attitudes and beliefs. It was expected that individuals interacting with an attorney would show a reduction in their levels of public self-awareness. It seemed likely that the presence of the factors shown to facilitate self-disclosure (reciprocity, liking, and similarity) would function to lower jurors' relative levels of public awareness by lessening their attention to the evaluative aspects of an interaction. Buss (1980) observed that attention to the public self decreases as liking and familiarity with a target increases. Lower levels of public self-awareness have been shown to be associated with greater consistency of attitude reports across situations (Froming, Walker, & Loypan, 1982; Scheier, 1980).

Consequently, this study empirically tested the efficacy of a judge-conducted versus an attorney-conducted voir dire in eliciting honest, accurate self-reports of attitudes and beliefs from potential jurors (venirepersons). The study operationalized "honesty" as the degree of consistency between jurors' pretest attitude scores, obtained under conditions outlined by Petty and Cacioppo (1981), and their public attitude reports obtained while subjects were participating in the voir dire. Further, the interpersonal behavior of the judge and the attorney was varied to assess whether alterations in the characteristic interpersonal behavior of judges would enhance their effectiveness in eliciting information from venirepersons, if in fact, they were less successful than attorneys. Finally, the study was designed to be functionally similar to a real courtroom experience and used

jury-eligible community residents in order to overcome the most salient criticisms of court-related research (see Kerr & Bray, 1982).

In sum, the current experiment assessed the effects of two target conditions (judge- versus attorney-conducted voir dire) and two interpersonal style conditions (personal versus formal) on attitude change scores, calculated based on the difference between subjects' attitude reports given at pretest and those given verbally in court. In addition, change scores on public self-awareness were similarly calculated based on scores obtained at two intervals in the voir dire.

Hypotheses

1. Change scores for subjects in the attorney, personal voir dire condition were predicted to be significantly smaller than change scores for subjects in the judge, formal condition.

2. Change scores for subjects in the judge, personal voir dire condition were predicted to be smaller than change scores for subjects in the judge, formal voir dire condition.

3. Subjects in the attorney-conducted voir dire conditions were predicted to show greater consistency in their attitude reports from pretest to incourt than subjects in the judge conditions.

4. It was predicted that subjects who interacted with a target whose behavior included self-disclosure and other behaviors intended to influence liking (personal condition), would show greater consistency in their self-reports than would subjects who interacted with a target whose behavior was cool and aloof (formal condition).

5. It was predicted that subjects in the attorney, personal voir dire would show a greater decrease in self-awareness than subjects in the judge, formal condition.

METHOD

Subjects and Experimenters

Subjects were 116 jury-eligible community residents randomly selected from the county voter registration list. They were paid twenty dollars for their time and effort. When subjects' schedules permitted. they were randomly assigned to conditions. allowing for an equal proportion of male and female subjects and an equal proportion of minorities on each jury panel. Nine subjects could not make the designated night and they were allowed to select an alternate night. No systematic bias in assignment was detected with these few cases. Panels ranged in size from 13 to 16 jurors. There were 42 males and 69 females in the study. The author and four confederates staged the trials.

The author played the role of court clerk, administered pre- and postexperimental questionnaires, recorded subjects' responses to questions posed during the voir dire, and debriefed the subjects at the conclusion of the study. The roles

of the judge and the principal attorney were filled by two actors. Two actors were used for each condition so as to expand the generalizability of the findings and to ensure that the results obtained would be a function of the manipulations and not of some unique characteristics of the individuals. Because of the possible interactions of target and subject sex on self-disclosure, the sex of the target was held constant and male actors were used to assume the roles of judge and attorney. The first actor (Actor A), a white male in his mid-50's, was a professor of law at a major southern law school. Actor B, a white male in his late 30's, was completing his last year in law school. Both actors had considerable courtroom experience and were repeatedly rehearsed until their performances were consistent and accurate. Eight trials were held so that each principal actor could assume all four of the primary roles described below (judge/personal, judge/formal, attorney/personal, attorney/formal). The part of the bailiff was played by a white male in his mid-40's who wore an authentic sheriff's uniform rented from a local costume rental agency. Finally, the opposing attorney, who had no speaking part, was played by a law student in his early 30's.

Design

The experiment was a 2 × 2 × 2 factorial design with a repeated measure (pretest versus incourt attitude reports). The design contained a target manipulation (judge versus attorney), an interpersonal style manipulation (personal versus formal), and a nonmanipulated subject variable (male versus female).

Dependent Measures

There were two primary dependent measures. At pretest, subjects completed the Attitudes Toward Legal Issues Questionnaire (ATLIQ), an attitude scale developed specifically for the present study. The survey contained 29 statements regarding attitudes toward issues previously acknowledged by the courts as proper areas of inquiry during the voir dire (Bush, 1976; Suggs & Sales, 1981). The scale contained four subscales measuring (a) attitudes toward the treatment of minorities by the courts, (b) attitudes toward controversial sociolegal issues, e.g., abortion, legalization of marijuana, (c) attitudes toward the courts, e.g., judges, attorneys, and (d) attitudes toward deterrence. Subjects were asked to indicate their agreement or disagreement with each statement along a 10-point Likert-type scale. Total score on the ATLIQ ranged from 0 to 290. Earlier studies indicated that a high score reflected relative conservatism on the legal issues being investigated and lower scores reflected greater liberalism. Half of the items were negatively keyed and half were positively keyed. These items were embedded in 96 distractor items to minimize the possibility that subjects would become aware of the salient attitudes being measured. The 29 questions were asked again verbally in court, either by the judge or by the attorney, depending upon the appropriate experimental condition. Change scores were calculated based on absolute differences between subjects' total pretest score on the 29 relevant items on the ATLIQ and the total score obtained from their verbal replies recorded during the voir dire.

The Public Self-Awareness Questionnaire is a seven-item adaptation of the Fenigstein, Scheier, and Buss (1975) original scale and was designed to measure subjects' relative state of public self-awareness. Subjects completed the questionnaire during two planned interruptions in the voir dires, which were staged so as to appear to be typical procedural delays in the courtroom.

At posttest subjects completed a questionnaire which contained three scales that served as manipulation checks on the reciprocity effect, perceived liking and perceived similarity, and a scale measuring subjects' perceptions of the realism of the courtroom proceedings.

Independent Variables

Judge Versus Attorney Manipulation

The judge- versus attorney-conducted voir dire (target) independent variable was carefully controlled through the use of prepared scripts for each condition. After initial remarks to the panel by the judge, he or the attorney, depending upon the experimental condition, solely conducted the actual voir dire. The wording of the instructions and the statements used by the judge or the attorney remained virtually the same; the salient manipulation was who conducted the voir dire.

Interpersonal Style Manipulation

The interpersonal style variable was manipulated by variations in the scripts for the judge and the attorney, and by nonverbal, rehearsed interpersonal behaviors. In the personal condition, the judge or the attorney offered a brief personal statement to the jury panel which included three demographic disclosures; his name, residence, and number of years in practice, and a single moderate personal disclosure, the fact that he was a little uncomfortable about having to ask the panel some personal questions. In addition, the judge or attorney made eye contact with jurors as he called on them, and smiled and nodded after they replied to each statement. In the formal condition, neither the judge nor the attorney offered personal disclosure to the panel. They maintained a formal, detached demeanor, and were more concerned with recording jurors' replies than with maintaining eye contact. They responded with minimal smiling or nodding as jurors spoke.

PROCEDURE

Eight voir dires were conducted (two under each of the four conditions) on Monday through Thursday nights of two consecutive weeks in the moot courtroom of a major southern university law school. The voir dires were ordered so as to alternate judge- and attorney-conducted voir dires each night. Actor A and Actor B alternately assumed the principal role for one trial under each condition.

Upon arrival subjects were told that there would be a delay in starting the proceedings as the judge had been briefly detained. Although they were told that

they would be participating in a mock trial, they were led to believe (by the clerk and the bailiff) that the judge and the attorneys were authentic. Participants were asked if they would mind completing a survey on attitudes toward various legal issues that was being conducted as part of a study by the law school and were given the ATLIQ to complete.

When everyone was finished, the bailiff brought the jurors to the courtroom. The judge proceeded to welcome jurors. When he was almost finished addressing the panel, the attorneys would interrupt and request a hearing on a pretrial motion in the judge's chambers. During the hearing, the clerk would administer the Public Self-Awareness Questionnaire. When all parties returned to the courtroom, the proceedings resumed. At this point in the proceedings the scripts diverged, depending upon which of the four experimental conditions was being implemented.

Judge-Conducted Voir Dires

In the formal condition, the judge would return and explain to the panel that he would read a series of statements to them. They were to think about each statement, and when he called on them, they were to report whether they agreed or disagreed with each statement along a 10-point continuum ranging from disagree very strongly to agree very strongly. A copy of the alternatives was posted in view of all jurors. For each statement jurors were called on in a different order, the order randomly determined prior to the start of the experiment in order to control for any order effects of juror replies. Prior to question 24, the bailiff would inform the judge that he had an urgent phone call and the judge would announce a short break. The clerk would administer the Public Self-Awareness Questionnaire for the second time. After a short break, the judge would return and read the remaining five statements. When he had concluded, the court clerk administered the postexperimental questionnaire and debriefed the panel.

In the personal condition, the proceedings were identical to those described for the formal condition, with one important exception. After his return from the pretrial motion hearing, the judge would offer the personal disclosures and respond to jurors with the interpersonal behaviors described above.

Attorney-Conducted Voir Dires

The procedure for the four attorney-conducted voir dires was very similar. After the first break (pretrial motion), the judge would turn the examination of the panel over to the attorney. The attorney would initiate either the behaviors rehearsed for the formal condition or those for the personal condition. The attorney, speaking from the podium in front of the jury box, would similarly explain the voir dire procedures and then would read the same statements, in the same order, as were read during the judge-conducted voir dires. A similar interruption was made for the judge to take a phone call, during which the Public Self-Awareness Questionnaire was administered.

RESULTS

Analyses of Nonmanipulated Variables

Data obtained from five subjects were excluded from the data analyses because they reported knowing one of the principal actors ($n = 3$) or they had heard about the study and were able to describe the hypotheses under examination ($n = 2$). The mean age of participants in the study was 42.74 years ($SD = 16.25$) with ages ranging between 18 and 79 years. Subjects reported completing 13.30 years of formal education ($SD = 2.23$), with educational backgrounds ranging from an eighth grade education to a Ph.D. The modal income reported by participants ($n = 36$) in the study was between $20,000 and $40,000 per year. Individuals were represented from the service occupations, engineering profession, education, health care fields, the ministry, and sales. Most subjects (68%) reported that they had never served as jurors before ($n = 75$).

Manipulation Checks

No significant main effects or interactions of actor or subject sex were found on multivariate analyses of variance (MANOVA) on the three manipulation check dependent measures (perceived liking, perceived similarity, and reciprocity), thus the data were combined. A 2 × 2 (target × style) multivariate analysis of variance revealed a significant main effect of target, $F(3,105) = 2.88$, $p < .04$, and a significant main effect of interpersonal style, $F(3,105) = 27.76$, $p < .0001$, on the three manipulation check items.

Reciprocity. A 2 × 2 univariate analysis of variance on the reciprocity measure revealed a significant main effect of style, $F(1,107) = 29.72$, $p < .001$. Subjects rated target disclosure on an 11-point Likert scale, with a 6.0 indicating moderate target disclosure. Subjects perceived targets in the personal conditions ($M = 4.95$) as offering greater self-disclosure than targets in the formal conditions ($M = 2.78$).

Liking. A 2 × 2 univariate analysis of variance on the liking manipulation revealed a significant main effect of target on perceived liking, $F(1,107) = 6.09$, $p < .01$, with subjects reporting greater liking for attorneys ($M = 23.86$) than for judges ($M = 21.77$) based on a composite score of three 11-point Likert items. Additionally, a significant main effect of interpersonal style was revealed, $F(1,107) = 64.23$, $p < .001$, with subjects reporting greater liking for attorneys and judges when they behaved in a warm, personal manner ($M = 26.21$) than when they acted in a cool, aloof fashion ($M = 19.42$).

Similarity. A 2 × 2 univariate analysis of variance on the similarity measure revealed no significant main effects or interactions of the independent variables on this manipulation check. This result indicates that, contrary to predictions, jurors did not perceive attorneys as more similar to themselves than judges. Upon closer scrutiny of the manipulation check items, it seems that the items selected may have failed to measure the relevant dimensions of perceived similarity. The items asked subjects to rate how much they had in common with the targets

rather than asking how similar they perceived themselves to be to the targets in terms of social status, power, and authority.

Realism. Subjects gave the proceedings a mean rating of 7.95 (SD = 2.79) on an 11-point Likert item measuring perceived realism, suggesting that, overall, they viewed the proceedings as highly realistic.

Perceived Authenticity of the Targets. Informal analysis of subjects' comments during postexperimental discussions revealed that subjects were convinced that the judge and the attorney were, in fact, actually who they said they were and were not merely actors. Although subjects were told that they would be hearing a mock trial, it was important that they believed that they were addressing a real judge and a real judge.

Desire to be Selected. Subjects reported that they genuinely wanted to be selected for the jury. Many subjects went to great lengths in order to be able to participate and did not want to be excused from the jury. One subject drove back from a neighboring state where he was on military duty in order to participate, a 12-hour drive. Other subjects reported exchanging work shifts with co-workers, canceling social engagements, hiring babysitters, or otherwise rearranging their schedules so they would be able to attend.

Analyses of Dependent Variables

Global Scores. A 2 × 2 × 2 (target × style × actor) univariate analysis of variance revealed no significant main effects or interactions due to a particular actor on the change scores; thus the data for both actors were combined for each of the four conditions. A 2 × 2 × 2 (target × style × sex) univariate analysis of variance revealed a significant main effect of sex, $F(1,103) = 11.80$, $p < .001$. Inspection of the means revealed that females' scores changed to a much greater degree than males' (Ms = 26.39 and 15.43, respectively). Women were considerably less consistent in their attitude reports than men. Since there were no main effects or interactions of sex with the other independent variables, the data were collapsed for further analyses.

A 2 × 2 (target × style) univariate analysis of variance (Table 1) revealed a significant main effect of target ($p < .001$). The average change score for subjects in the judge condition (M = 29.00) was almost twice the size of the change score for subjects in the attorney condition (M = 15.75).

In addition, there was a marginally significant trend ($p < .06$) toward the predicted interaction of target and style. Mean scores and standard deviations for the interaction are presented in Table 2. A pairwise comparison of the group

Table 1. Summary of 2 × 2 Univariate Analysis of Variance on Change Scores of Attitudes Toward Legal Issues Questionnaire

Source of variation	Mean square	df	F	p	η^2
Target (A)	4845.76	1	17.09	.000	.133
Style (B)	131.55	1	.46	.504	.004
A × B	1003.47	1	3.54	.059	.028
Error	283.48	107			

Table 2. Mean Scores and Standard Deviations on Change Scores on Attitudes Toward Legal Issues Questionnaire

	Personal			Formal		
Target	*n*	*M*	*SD*	*n*	*M*	*SD*
Attorney	31	11.65[a]	15.66	28	19.86[b*]	18.99
Judge	26	30.92[c*]	17.82	26	27.08[c]	14.56

Means that do not share a common superscript are significantly different at the .05 level. Higher scores indicate *greater change* from pretest to incourt attitude reports.
* Means differ significantly at .05 level by the Newman–Keuls procedure.

means comprising the interaction revealed that subjects' scores changed significantly more in the judge, formal condition than in the attorney, personal condition, as predicted, $t(55) = -3.85$, $p < .001$, one-tailed. Surprisingly, subjects' change scores did not differ significantly in the judge, personal condition and the judge, formal condition, $t(50) = .852$, n.s. Attorneys were able to positively influence juror consistency when they engaged in the planned interpersonal behaviors $t(57) = -1.80$, $p < .05$, one-tailed. Overall, subjects in the attorney, personal condition showed the greatest consistency from pretest to in-court in their attitude reports.

Subscales of ATLIQ. A multivariate analysis of variance was performed on the change scores of the four subscales of the ATLIQ in order to explore the differences found on the global scores. A 2 × 2 (target × style) MANOVA revealed a significant main effect of target, $F(4,104) = 6.84$, $p < .001$, and a significant interaction of target and style, $F(4,104) = 2.59$, $p < .04$. Univariate analyses of variance (Table 3) revealed that on three of the four subscales (measuring attitudes regarding the treatment of minorities by the police and the courts; attitudes toward sociolegal issues; and attitudes toward criminal justice personnel) subjects changed their answers to a significantly greater degree when they were asked to report their attitudes to the judge than when they were asked to report their answers to an attorney. Inspection of the means (Table 4) indicates that subjects were more consistent in their attitude reports when they were interviewed by an attorney.

A 2 × 2 (target × style) univariate analysis of variance (Table 5) revealed a significant interaction on the subscale measuring attitudes toward criminal justice

Table 3. Summary of Univariate Analysis of Variance of Target Main Effect on Four Subscales of ATLIQ

Subscale	MS	*df*	*F*	*p*
Treatment of minorities	8.96	1	4.13	.0421
Socio-legal issues	5.08	1	6.62	.0111
Criminal justice personnel	90.01	1	23.84	.0001
Deterrence through punishment	1.44	1	1.42	.2350

Table 4. Mean Change Scores on Four Subscales of Attitudes Toward Legal Issues Questionnaire[a]

	Range	Attorney *M*	Judge *M*
Treatment of minorities	0–77	6.28	9.27
Sociolegal Issues	0–44	1.29	3.54
Criminal justice personnel	0–143	6.15	15.64
Deterrence through punishment	0–55	2.06	.89

[a] Higher scores indicate *greater* change from pretest to incourt attitude reports.

personnel. Results of paired comparisons of the means comprising the interaction (Table 6) revealed a pattern similar to that found in the global scores. As predicted, subjects in the attorney, personal condition were significantly more consistent than subjects in the judge, formal condition, $t(55) = -.436$, $p < .001$, one-tailed. Attorneys were able to positively influence juror consistency by engaging in the interpersonal behaviors; the change scores for subjects in the attorney, personal condition were significantly smaller than the change scores in the attorney, formal condition, $t(57) = -2.65$, $p < .01$, one-tailed. There were no significant differences on change scores in the judge, personal and the judge, formal conditions, $t(50) = 1.27$, n.s., indicating that regardless of his interpersonal style, the judge was unable to improve on the consistency of jurors replies on this variable.

Public Self-Awareness. A 2 × 2 (target × style) analysis of variance of change scores on the PSA questionnaire revealed a significant interaction of target and style on change scores $F(1,107) = 4.625$, $p < .03$, as predicted; however, results of a planned comparison between the changes scores in the attorney, personal ($M = -2.32$) and judge, formal conditions ($M = -1.31$), revealed no significant differences, $t(55) = -1.02$, $p > .90$.

DISCUSSION

Results of the manipulation checks indicate that the study was quite successful in establishing both psychological and mundane realism. Subjects rated

Table 5. Summary of 2 × 2 (Target × Style) Univariate Analysis of Variance of Four Subscales of ATLIQ

Subscale	MS	*df*	*F*	*p*
Treatment of minorities	5.76	1	2.65	.1024
Sociolegal Issues	.52	1	.68	.5846
Criminal justice personnel	28.68	1	7.60	.0069
Deterrence through punishment	.91	1	.90	.6521

Table 6. Mean Change Scores for Target × Style Interaction on Attitudes Toward Criminal Justice Personnel Subscale of ATLIQ

Target	Personal *M*	Formal *M*
Attorney	2.58[a]	9.71[b*]
Judge	17.42[c*]	13.85[c]

Means that do not share a common superscript are significantly different at the .05 level. Higher scores indicate *greater* change from pretest to incourt attitude reports.

* Means differ significantly at .05 level by the Newman-Keuls procedure.

the trials as highly realistic; they were convinced of the authenticity of the judges and the attorneys; and the manipulations successfully elicited the attitudinal set found among most potential jurors, i.e., the desire to be selected (Broeder, 1965). Jury-eligible community residents, randomly selected from the voter registration list, were enlisted, and analysis of subjects demographic data reveals that participants represented an extremely diverse group of jurors in terms of race, sex, age, occupation, income, and education level.

The hypothesis that jurors would be more consistent in their attitude reports when interviewed by an attorney rather than a judge was supported by the presence of significant main effects of target on the global scores and on three of the four subscales of the ATLIQ. Subjects changed their answers almost twice as much when questioned by a judge as they did when interviewed by an attorney. Essentially subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during an attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys, a finding that contradicts previous assertions that a judge-conducted voir dire will elicit greater juror candor than an attorney-conducted voir dire (Levit et al., 1971).

In reviewing the changes in subjects' answers, it appears that there may be implicit pressures in the courtroom toward conformity to a "perceived standard" that differs depending upon who conducts the voir dire. A pilot study (Jones, 1984) examined subjects' perceptions of how judges and attorneys would stand on the issues being investigated during the voir dire. Essentially, subjects were asked how they thought a judge and an attorney would answer the 29 relevant questions on the ATLIQ. Subjects perceived judges as holding extremely conservative positions on the issues, whereas attorneys were viewed as holding rather liberal opinions. Subjects' own views fell midpoint between these extremes. Applying these results to the present study, it seems from the direction and magnitude of the change scores that during a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear. Essentially, in the judge voir dire conditions, subjects with moderate opinions about the issues gave very conserva-

tive replies to a very conservative target, revealing a "conservative shift." Apparently, by virtue of his status and authority, the judge was established as the standard of comparison, and jurors sought to conform their attitude reports to this standard. Interestingly this shifting was not as strong during the attorney-conducted voir dires. If subjects were attempting to conform their replies to the attorney standard, their attitude scores would have been in the opposite direction, approaching the perceived attorney norm of liberalism. This was not the case. In the attorney condition, moderate subjects gave slightly conservative replies to a liberal target. This slight conservative shift apparently stems from subjects' awareness of the presence of the judge during an attorney voir dire. Although some pressure to conform to the more powerful target remains, interactions with the attorney either put subjects more at ease, and subsequently more comfortable with giving their true opinions, or simply distracted their attention from the judge. While the judge's presence continues to exert some pressure toward conformity during an attorney-conducted voir dire, as evidenced by the slightly conservative positions taken by subjects, the pressure appears to be considerably less so than in the judge-conducted voir dire conditions.

Hypothesis 1 was concerned with the relative effectiveness of judges and attorneys in eliciting candid juror self-disclosure given their respective characteristic courtroom behaviors. Analyses of the global scores of the ATLIQ revealed a strong trend toward the predicted interaction; however, it failed to reach significance. Analyses of the subscales comprising the ATLIQ revealed a significant interaction of target and style on the subscale measuring attitudes toward criminal justice personnel.

Comparison of the means comprising the interaction on this subscale suggest that subjects in the attorney, personal condition were more honest in their replies than subjects in the attorney, formal condition, although subjects in the latter condition were still more consistent than subjects in either judge condition. Essentially, attorneys, even when they did not utilize the interpersonal behaviors found to facilitate self-disclosure, were still able to elicit greater candor than judges. Apparently, the role status of the target alone is a compelling influence on juror candor in the courtroom.

Hypothesis 2 predicted that judges could improve their effectiveness by incorporating the interpersonal behaviors found to facilitate self-disclosure. Inspection of the means comprising the interaction suggest that judges were unable to improve their effectiveness, regardless of how they related to jurors. At present it appears that interpersonal style does not make a difference for judges in facilitating self-disclosure, although it does positively influence liking. Apparently, the judge's role as an authority figure outweighs any influence that interpersonal style might have. A warm, friendly judge is just as much a judge as a cool, aloof judge, and apparently role-identity remains salient in the minds of jurors.

The predicted main effect of style on change scores (hypothesis 4) was not demonstrated on either the global score or the subscales of the ATLIQ. Although the manipulation checks revealed that subjects perceived the targets in the personal condition as offering self-disclosure to them, a single, moderate self-disclosure may not be potent enough to elicit the expected reciprocity effect.

The predicted interaction of target and style on levels of public self-awareness (hypothesis 5) was not demonstrated. Instead, subjects' levels of public self-awareness decreased significantly over the course of the voir dire under all four conditions. Habituation may have competed with target and style influences, eliminating their effectiveness.

One surprising finding in the present study was the large difference between males and females in the consistency of their attitude reports during voir dire. There was a significant main effect of sex on change scores. Females changed their attitude reports during the voir dire by an average of 26.39 points, whereas males changed their answers an average of 15.43 points. Interestingly, sex did not interact with target or style; females distorted their replies to a greater degree than males regardless of who conducted the voir dire or how they behaved. Since both targets were male, it is possible that females find disclosing their true attitudes and beliefs to a male target very difficult. Sex role socialization in Western society encourages females to be cooperative whereas males are encouraged to be independent and assertive. Thus, females may be more powerfully influenced by the implicit pressures to conform to the perceived standards than males. They may have feared appearing deviant, especially to a male target.

In sum, empirical support was found for Broeder's (1965) observation that jurors often distort their replies to questions posed during the voir dire. In the present study, inconsistency in attitude reports cut across all age, income, and occupational groups. Even three ministers in the present study significantly altered their attitude reports. Essentially, the presumption was not supported that potential jurors who have taken an oath to tell the truth, the whole truth, necessarily do so. Of course, jurors may not be deliberately distorting their answers, but instead, responding unconsciously to pressures toward social conformity. Whatever the underlying mechanisms, it is apparent that jurors are not as candid as we presumed.

REFERENCES

Archer, R. L. (1979). Role of personality and the social situation. In G. J. Chelune (Ed.), *Self-disclosure* (pp. 28–58). San Francisco: Jossey-Bass.

Babcock, B. A. (1975). Voir dire: Preserving its wonderful power. *Standard Law Review, 27*, 545–565.

Bermant, G., & Shapard, J. (1978). Voir Dire examination, juror challenges and adversary advocacy. Report No. FJC-4-78-6. Washington: Federal Judical Center.

Bonora, B., & Krauss, E. (1979). *Jurywork: Systematic techniques*. Atlanta: National Jury Project.

Broeder, D. W. (1965). Voir dire examinations: An empirical study. *Southern California Law Review, 38*, 503–528.

Bush, N. (1976). The case for expansive voir dire. *Law and Psychology Review, 2*, 9–26.

Buss, A. H. (1980). *Self-consciousness and social anxiety*. San Francisco: Freeman.

Chelune, G. J. (1979). *Self-disclosure*. San Francisco: Josey-Bass.

Critelli, J. W., Rappaport, J., & Golding, S. L. (1976). Role played self-disclosure as a function of liking and knowing. *Journal of Research in Personality, 10*, 89–97.

Erhlich, H. J., & Graeven, D. B. (1971). Reciprocal self-disclosure in a dyad. *Journal of Experimental Social Psychology, 7*, 389–400.

Fenigstein, A., Scheier, M. F., & Buss, A. H. (1975). Public and private self-consciousness: Assessment and theory. *Journal of Consulting and Clinical Psychology, 43,* 522–527.

Froming, W. J., Walker, G. R., & Loypan, K. J. (1982). Public and private self-awareness: When personal attitudes conflict with societal expectations. *Journal of Experimental Social Psychology, 18,* 476–487.

Gifis, S. H. (1975). *Law Dictionary.* New York: Barron's.

Glass, J. F. (1977). Voir dire in the federal courts: Diminishing the effectiveness of legal representation. *Insurance Counsel Journal, 44,* 628–633.

Goodstein, L. D., & Reinecker, V. M. (1974). Factors affecting self-disclosure: A literature review. In B. A. Maher (Ed.), *Progress in experimental personality research* (pp. 49–77). New York: Academic.

Jones, S. E. (1984). Pilot study 2. Unpublished raw data.

Jordon, W. E. (1981). A trial judge's observation about voir dire examinations. *Defense Law Journal, 30,* 222–247.

Jourard, S. M. (1959). Self-disclosure and other cathexis. *Journal of Abnormal and Social Psychology, 59,* 428–431.

Jourard, S. M. (1969). The effects of experimenters' self-disclosure on subjects' behavior. In C. Speilberger (Ed.), *Current topics in community and clinical psychology.* New York: Academic.

Kerr, N. L., & Bray, R. M. (1982). *Psychology of the courtroom.* New York: Academic.

Levit, W. H., Nelson, D. W., Ball, V. C., & Chernick, R. (1971). Expediting the voir dire: An empirical study. *Southern California Law Review, 44,* 916–994.

Padawer-Singer, A. M., Singer, A., & Singer, R. (1974). Voir dire by two attorneys: An essential safeguard. *Judicature, 57,* 386–391.

Petty, R. E., & Cacioppo, J. T. (1981). *Attitudes and persuasion: Classic and contemporary approaches.* Dubuque, Iowa: William C. Brown.

Scheier, M. F. (1980). Effects of public and private self-consciousness on the public expression of personal beliefs. *Journal of Personality and Social Psychology, 39,* 514–521.

Simonson, N. R. (1976). The impact of therapist disclosure on patient disclosure. *Journal of Counseling Psychology, 23,* 3–6.

Slobin, D. I., Miller, S. H., & Porter, L. W. (1968). Forms of address and social relations in a business organization. *Journal of Personality and Social Psychology, 8,* 289–293.

Stanley, A. J. (1977). Who should conduct the voir dire: The judge. *Judicature, 61,* 70–75.

Suggs, D., & Sales, B. D. (1981). Juror self-disclosure in the voir dire: A social science analysis. *Indiana Law Journal, 56,* 245–271.

Van Dyke, J. (1977). *Jury selection procedures: Our uncertain commitment to representative panels.* Cambridge, Massachusetts: Ballinger.

Worthy, M., Gary, A. L., & Kahn, G. M. (1969). Self-disclosure as an exchange process. *Journal of Personality and Social Psychology, 13,* 59–63.

Memorandum Prepared by Judge Walter R. Mansfield

RULE 47(a): ATTORNEY ROLE IN THE VOIR DIRE

Federal Rule of Civil Procedure 47(a) gives the court broad discretion as to who conducts the voir dire examination. Specifically, Rule 47(a) provides that the judge may conduct the examination or allow the attorneys to conduct the examination. If the judge so desires, he may deny the attorneys the opportunity to ask any questions directly to the potential jurors:

> (a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

Fed. R. Civ. P. 47(a).

The American Bar Association has maintained that counsel should have the right to participate orally in the voir dire examination. The ABA has proposed a new Rule 47(a) which would provide as follows:

> (a) Examination of Jurors. The court shall permit the parties or their attorneys to conduct oral examination of prospective jurors. The court may inquire of prospective jurors as a supplement to the examination by the parties.

Quoted at 97 F.R.D. 559 (1983). A bill to amend Rule 47(a) in a similar fashion was introduced into the Senate on March 3, 1983, by Senator Heflin. That bill, S. 677, provides:

> (a) Examination of Jurors. The court shall permit the parties or their attorneys to conduct the oral examination of prospective jurors, and may, in addition to such

> examination, conduct its own examination. The court may impose such reasonable limitations as it deems proper with respect to the examination of prospective jurors by the parties or their attorneys, except that the defendant or his attorney and the attorney for the Government may each request, and shall be granted not less than thirty minutes for such examination. In cases where there is more than one defendant, the court shall allow the attorneys for such defendants an additional ten minutes for each additional defendant.

This paper analyzes the current practice of voir dire in the federal courts, the rationale supporting that practice, and the arguments favoring the ABA proposal and S. 677.

PRESENT PRACTICE

Over the past quarter century, there has been a gradual erosion of the oral participation of attorneys in the voir dire examination. Today, most federal district courts exercise their discretion under Rule 47(a) to deny attorney participation in the questioning of potential jurors. A 1977 Federal Judicial Center survey of all federal district judges found that 69% of the judges do not allow attorneys to ask questions during the voir dire. The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges 8 (1977). In 1969, that figure was 56%, thus suggesting that attorney involvement in the voir dire examination in federal courts is decreasing. Committee on the Operation of the Jury System, Judicial Conference of the United States, Report on Voir Dire Procedures (1970).

State courts vary significantly in their practices with respect to attorney participation in the voir dire. Seven states require voir dire questioning exclusively by the judge,

twelve states contemplate questioning by both the attorneys and the judge; sixteen states contemplate questioning by the attorneys alone; and fifteen states and the District of Columbia have a rule substantially similar to Fed. R. Civ. P. 47(a). Federal Judicial Center, The Conduct of Voir Dire Examination: Practices and Opinion of Federal District Judges 17-19 (1977).

There appears to be a significant correlation between federal practice with respect to the voir dire examination and the practice of the state within which the federal court sits. An analysis of federal practice indicates that the highest level of oral participation by attorneys in the federal voir dire occurs in states with rules of procedure that favor attorney participation.

These restrictions on attorney participation in the voir dire have consistently withstood judicial scrutiny as the courts have uniformly upheld the right of federal district judges to deny attorneys the opportunity to question potential jurors directly. See, e.g., Perry v. Allegheny Airlines, Inc., 459 F.2d 1349 (3d Cir. 1974), Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), James v. Continental Insurance Co., 424 F.2d 1064 (3d Cir. 1970). Although a few commentators have argued that attorneys and their clients have a constitutional right under the Sixth Amendment to attorney-conducted voir dire, at least in criminal trials, no court appears to have

adopted that view. See Gutman, "The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right," 39 Brooklyn L. Rev. 290 (1972). However, the courts have on occasion been willing to find that the judge-conducted voir dire was inadequate and remanded for a new trial. See, e.g., Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981); Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980); Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965).

RATIONALE SUPPORTING RULE 47(a)

The primary purpose of the voir dire is to determine if the potential juror can impartially participate in the deliberation on the issues of the case based solely on the law and evidence as presented at trial, or whether that juror has certain biases which would hinder fair deliberation. Subsidiary to that purpose is the goal of providing the attorney with a procedure by which he may obtain information to exercise peremptory challenges intelligently. Indeed, those appeals courts which have ordered new trials on the ground of inadequate judge-conducted voir dire have done so on the ground that the voir dire examination did not adequately probe potential juror bias. See, e.g., United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965).

In accord with that purpose, there are two rationales supporting judge-conducted voir dire. First, proponents of the current rule argue that the judge can adequately probe

for juror bias, and can do so in a much shorter time than can the attorneys, thereby contributing to judicial economy without sacrificing important procedural protections.

Various studies have attempted to identify the difference in length of time consumed by the voir dire examination in which attorneys directly participate and those in which the attorneys do not directly participate. One study, based on civil trials and twelve-person juries, reported a mean duration for judge-conducted examinations of 64 minutes and a mean duration for combined judge-attorney examination of 111 minutes. Levit, Nelson, Ball & Chernick, "Expediting Voir Dire: An Empirical Study," 44 S.Cal.L. Rev. 916 (1971). A reanalysis of the data collected in that study, however, suggests a mean duration of 52.6 minutes for judge-conducted examinations and 68 minutes for combined examinations, a smaller difference between the two types of examinations than reported in the earlier study. National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice, A Guide to Jury System Management (1975). Although the actual difference in time between the two forms of examination is difficult to measure, most commentators would agree that the attorney-conducted voir dire takes longer than the judge-conducted voir dire. Proponents of the current rule thus argue that judges can do just as well as attorneys in rooting out juror bias and can do it in a shorter period of time.

Second, proponents of the current rule argue that attorneys have an additional, illegitimate purpose in wanting to participate in the voir dire examination: influencing the jury in favor of the attorney's client. There is no question that attorneys who are allowed to directly question the venire attempt to use that questioning session to foster jury sympathy. There are a number of means by which to gain this sympathy and they are clearly laid out in any trial practice textbook: establishing friendly rapport with jurors, providing the jurors with the attorney's view of the facts and law in the case, introducing damaging facts to the jury as a means of lessening the impact of those facts when they are introduced at trial, and pre-committing jurors to a particular opinion about the case. See, e.g., Ginger, Jury Selection in Criminal Trials 275-85 (1975) (discussing means by which to use the voir dire to favorably influence the jury). Indeed, reports from the Chicago Jury Project indicate that attorneys devote about half of their voir dire time to selling their case to the venire panel. H. Zeisel, H. Kalven & B. Buchholz, Delay in Court 103 n.9 (1959). Proponents of the current rule argue that these tactics are unrelated to the legitimate purpose of the voir dire -- rooting out juror bias -- and can only serve to subvert the effort to secure a fair trial for both parties. The 1977 Federal Judicial Center study indicates that those judges who do not allow attorneys to

participate directly in the voir dire examination believe that jury selection should precede the adversarial aspect of the trial, whereas those judges that do allow attorney participation in the voir dire believe that jury selection is a legitimate part of the adversarial part of the trial. The Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges 36 (1977).

OPPOSITION TO RULE 47(a)

Opposition to the denial of attorney participation in the voir dire examination centers on criticism of the judge's performance in conducting the examination. In particular, opponents of the current rule argue that the court's voir dire is generally superficial and perfunctory and inadequate in terms of probing juror bias. They argue that juror bias is difficult to detect and a careful, extensive voir dire is necessary to uncover potential bias. Without such an extensive voir dire, the attorney cannot exercis his peremptory challenges intelligently, thereby reducingthe chance that his client will receive an unbiased hearing before the jury. Another argument is that jurors are too overawed and intimidated by the judge's presence to answer his questions fully or to volunteer material information bearing on their ability to be objective, whereas they feel more comfortable and involved when questioned individually by counsel and not as inhibited by the presence of other panelists as they otherwise would be. Thus, whatever additional time is required by allowing the attorneys to participate in

the voir dire examination, the argument goes, is certainly worth it in terms of achieving a substantively better jury. The issue is therefore whether counsel, through oral participation in the voir dire, can detect bias more easily than can the judge through his examination. Indeed, if it can be said that attorney-conducted voir dire leads to a substantively better jury, small delays in the trial can surely be forgiven.

The commentators are split over the question of whether attorneys are any better than judges at detecting juror bias. Some argue that bias is inherently a nebulous concept that can never be definitively uncovered through a series of questions; others argue that questions about attitudes and life habits can place the potential juror within a cultural stereotype and allow the attorney to make a better guess with his peremptory challenges as to which jurors are more apt to be biased against his client. At best, the evidence is inconclusive. See generally Suggs and Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Ind. L.J. 245 (1981) (concluding that attorneys can better probe for bias than can judges); Babcock, "Voir Dire: Preserving 'Its Wonderful Power,'" 27 Stan. L. Rev. 545 (1975) (concluding that limitations on the voir dire limit the ability of the litigant to exercise his peremptory challenges); Okun, "Investigation of Jurors by Counsel - Its Impact on the Decisional Process," 56 Geo. L.J. 839, 848 (1968) (questioning value of attorney participation in the voir dire examination).

Opponents of Rule 47(a) further argue that even if attorney-conducted voir dire does further the adversarial purposes of the attorneys, that effect does not harm the fairness of the trial and indeed simply makes the voir dire part of the adversarial process. They argue that the net effect when opposing attorneys attempt to gain an advantage for their clients by conducting the examination in an adversarial spirit is to secure a jury with a more steadfast determination to engage in impartial fact finding than would have been developed under questioning by the judge alone. In effect, they argue that even if voir dire does serve this adversarial purpose, which it surely does, there is no harm to fairness on account of these adversarial efforts.

On the other hand, when the voir dire is considered in light of its original purpose -- the elimination of juror bias -- one questions whether adversarial positioning has any place in the voir dire. The Federal Rules of Evidence have been carefully crafted to insure the legitimacy of evidence that is placed before the jury during trial; to the extent that the attorneys attempt to characterize or construe the facts in a manner favorable to their clients during the voir dire, the protections of the Rules of Evidence are arguably undermined. The response to this, of course, is that the attorneys do just that anyway in their opening and closing statements and thus no harm is done if additional characterizations are made during the voir

dire. Again, the commentators are split on the question of whether these adversarial techniques exercised by the attorneys during the voir dire are "purposes" or "abuses" of the voir dire. See generally Babcock, "Voir Dire: Preserving 'Its Wonderful Power,'" 27 Stan. L. Rev. 545 (1975); Begam, "Voir Dire: The Attorney's Job," 13 Trial 3 (March, 1977); Broeder, "Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965); Comment, "Voir Dire Examination--Court or Counsel," 11 St. Louis L.J. 234 (1967); Comment, "Judge Conducted Voir Dire as a Time-Saving Technique," 2 Rut.-Cam. L.J. 161 (1970); Comment, Voir Dire in California Criminal Trials: Where is it Going: Where Should it Go?, 10 San Diego L. Rev. 395 (1972-73); Craig, Erickson, Friesen & Maxwell, "Voir Dire: Criticism and Comment," 47 Den. L.J. 465 (1970); Federal Judicial Center, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges (1977); Gutman, "The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right," 39 Brooklyn L. Rev. 290 (1972); Lay, "In a Fair System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 13 Judges J. 63 (July 1974); Levit, Nelson, Ball & Chernick, "Expediting Voir Dire: An Empirical Study," 44 S. Cal. L. Rev. 916 (1971); Okun, "Investigation of Jurors by Counsel: Its Impact on the Decisional Process," Geo. L.J. 839 (1968); Suggs & Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Ind. L.J. 245 (1981).

In short, the debate over whether to amend Rule 47(a) boils down to three issues: (1) can attorneys do a better job at

probing juror bias than can judges; (2) if so, can they do it without significantly lengthening the voir dire process; and (3) do the adversarial techniques which the attorneys invariably employ when they conduct a voir dire examination in any way harm the integrity of the judicial process. Reasonable people have differed as to the answer to those questions. Whether Rule 47(a) should be amended depends upon which set of answers are more persuasive.

If the Committee should decide that Rule 47(a) should be amended to give parties or their attorneys the right to question prospective jurors on the voir dire, the recommendations of the ABA and of S. 677 offer two alternatives. Another would be to have the rule provide that the parties or their attorneys shall have the right, after the judge examines the prospective jurors, to exmaine them with respect to any matter not explored by the judge, i.e., to engage in non-duplicative examination.

WRM
12/15/83