A Manual on Jury Trial Procedures

2004 Edition

Prepared by the
Jury Instructions Committee
of the Ninth Circuit

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The Jury Instructions Committee
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FOREWORD

This is the third edition of *A Manual on Jury Trial Procedures*. It updates and replaces the 1998 manual, as supplemented in 2000. Like previous editions, this manual provides a reliable reference to issues that recur in the conduct of federal civil and criminal jury trials in the Ninth Circuit. While not exhaustive in its treatment, it does provide a starting point to help guide more detailed research.

As with previous editions, this manual focuses on the law, procedures and practices in the Ninth Circuit governing jury trials. Accordingly, it continues the previous practice of citing primarily Supreme Court and Ninth Circuit case law, when available. Consistent with the current practices in the Circuit, the manual provides practical suggestions to aid the conduct of such trials. In order to promote as wide availability as possible, an electronic version of this manual is available on the web at <http://www.ce9.uscourts.gov>.

The committee expresses its appreciation to the Office of the Circuit Executive for its support and for publishing this new edition of the manual.

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This chapter includes pretrial matters.

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1.1 Right to a Jury Trial

A. Civil Actions

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

In order to determine whether a civil action gives rise to a jury trial right, the court must examine the issues involved and the remedy sought. This determination requires the court (1) to compare the statutory action to the 18th century actions brought in the courts of England prior to the merger of law and equity courts, and (2) to examine the remedy sought and determine if it is legal or equitable in nature. This second inquiry is the more important one. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346-55 (1998); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996); *Wooddell v. Int'l Bhd. of Elec. Workers*, 502 U.S. 93, 97 (1991).

The following topics are illustrative only.

1. *No Right to Jury Trial*

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

b. Title VII Injunctive Relief. There is no right to a jury trial as to the issuance of injunctive relief in a Title VII action. *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230 (7th Cir. 1994).

c. Civil Enforcement Action for Disgorgement of Profits. A civil enforcement action by a federal agency seeking disgorgement of illicit profits does not give rise to a jury trial right. Disgorgement of profits is equitable in nature even though it involves a claim for money. Because the court is not awarding damages to which the plaintiff is legally entitled, but is simply exercising discretion to prevent unjust enrichment, no jury trial right exists. *S.E.C. v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir.), *cert. denied*, 510 U.S. 963 (1993).

d. Federal Tort Claims Act. A plaintiff has no right to a jury trial in an action against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346. *See* 28 U.S.C. § 2402; *Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir. 2000). However, a party is entitled to a jury trial if the claim is one against the United States for "recovery of any internal-revenue tax . . . ." under 28 U.S.C. § 1346(a)(1). 28 U.S.C. § 2402.

e. Jones Act. In a case brought solely under the Jones Act, the defendant does not have the right to a jury trial. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 476 (9th Cir.) (interpreting 46 U.S.C. App. § 688 as allowing only plaintiff to demand a trial by jury), *cert. denied*, 513 U.S. 875 (1994).

2. *Right to Jury Trial*

a. Generally. The Seventh Amendment of the United States Constitution entitles a plaintiff to a jury trial where money damages are sought. *Smith v. Barton*, 914 F.2d 1330 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991).

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

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

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

e. 42 U.S.C. § 1983 Civil Rights Actions. A plaintiff seeking damages in a civil rights action brought pursuant to 42 U.S.C. § 1983 has the right to a jury trial. *See, e.g.*, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1426-27 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999).

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

g. Copyright Act. A party is entitled to a jury trial on statutory damages sought pursuant to the Copyright Act, 17

U.S.C. § 504(c). *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998); in light of *Feltner*, the court may wish to consider whether a party is entitled to a jury trial on the amount of statutory damages in cases brought under other statutes.

B. Criminal Actions

1. *Right to Jury Trial*

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

b. Misdemeanor. Generally, a defendant is entitled to a jury trial if the misdemeanor is punishable by imprisonment for more than six months. *Frank*, 395 U.S. at 148-150.

c. Petty Offense. Petty criminal offenses may be tried without a jury. *District of Columbia v. Clawans*, 300 U.S. 617 (1937). A petty offense is a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than that set forth in 18 U.S.C. § 3571(b)(6) or (7) or (c)(6) or (7). 18 U.S.C. § 19; *see also* 18 U.S.C. § 3581(b) (maximum term of imprisonment for Class B misdemeanor is six months). "Where the maximum term of imprisonment is six months or less, there is a very strong presumption that the offense is petty and defendant is not entitled to a jury trial." *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir.), *cert. denied*, 528 U.S. 853 (1999). "Any offense punishable by a prison term of six months or less is presumed to be petty. This presumption may be overcome if there are objective indications that the legislature regards the offense as serious." *United States v. Clavette*, 135 F.3d 1308,

1309-10 (9th Cir.) (crime of killing a grizzly bear in violation of the Endangered Species Act, punishable by imprisonment for six months and/or a $25,000 fine, held to be a petty offense), *cert. denied,* 525 U.S. 863 (1998). Where "a very large fine, or a very long period of probation, or the forfeiture of substantial property" is imposed, a petty offense may be converted into a more serious offense. *United States v. Ballek*, 170 F.3d at 876 (restitution did not turn a petty offense into a serious offense).

C. Waiver of Jury Trial

1. *Criminal*

a. Waiver in general. Rule 23(a), Fed. R. Crim. P., provides that if the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.

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

b. Waiver by Defendant. A defendant may waive the right to a jury trial, but the judge may be required to engage in a colloquy with the defendant regarding the waiver. *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (in-depth colloquy required for waiver where court has reason to suspect a defendant may suffer from mental or emotional instability); *Brown v. Burns*, 996 F.2d 219 (9th Cir. 1993) (extended colloquy regarding right to a jury trial and differences between bench and jury trials, and record of defendant's express waiver of his right to a jury trial, was sufficient to satisfy constitutional requirement of a

knowing, intelligent and voluntary waiver of the right to jury trial, notwithstanding failure to comply with Nevada law requiring defendant to execute signed written waiver of the right to jury trial); *United States v. Yee Soon Shin*, 953 F.2d 559, 561 (9th Cir. 1992) (knowledge of the right to participate in the selection of jurors is not constitutionally required for a knowing, voluntary and intelligent jury waiver), *cert. denied*, 508 U.S. 961 (1993).

c. Waiver by Government. There is no Sixth Amendment right to waiver of jury trial. Rule 23(a), Fed. R. Crim. P., provides for waiver with the consent of the government. The government is not required, however, to state reasons for refusing such consent. *United States v. Reyes,* 8 F.3d 1379, 1390 (9th Cir. 1993) (citing *Singer v. United States*, 380 U.S. 24, 37 (1965)) ("We need not determine in this case whether there might be circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.")

2. *Civil*

Once a timely demand for a jury has been made, all parties must agree to waiver of the right to a jury trial. Fed. R. Civ. P. 38(d); Fed. R. Civ. P. 39(a)(1). *See DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 832 (9th Cir. 1963) (failure to demand a trial by jury does not constitute a waiver if such a demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to), *cert. denied*, 376 U.S. 950 (1964). *But see White v. McGinnis*, 903 F.2d 699, 700 (9th Cir.) (knowing participation in a bench trial without objection constitutes waiver of a timely jury demand), *cert. denied*, 498 U.S. 903 (1990); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1304 (9th Cir.) (the consistent efforts of a party to defeat another party's jury request demonstrated the first party's failure to rely on this request and constituted a waiver by the first party of its rights under Rules 38(d) and 39(a)), *cert. denied*, 464 U.S. 916 (1983).

D. Stipulations re Elements (Criminal)

1. *Stipulations re elements*

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

"A stipulation is valid and binding if the defendant understands the contents of the stipulation, the nature of the stipulated-facts trial, and the likelihood of a guilty finding." *Adams*, 968 F.2d at 844.

"[A] defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Old Chief v. United States*, 519 U.S. 172, 200 (1997) (O'Connor, J, dissenting) (acceptance of a stipulation regarding prior conviction may be appropriate even where government objects under Fed. R. Evid. 403).

2. *De facto guilty plea*

A stipulation of facts constituting a de facto guilty plea may trigger procedural protections guaranteed by *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (at change of plea proceeding defendant is entitled to be advised of constitutional rights being given up, including (1) "privilege against compulsory self-incrimination;" (2) "right to trial by jury;" and (3) "right to confront one's accusers"). *Adams*, 968 F.2d at 846.

1.2 Double Jeopardy (Criminal)

A. Jury Trial

Jeopardy attaches in a criminal jury trial when the jury is impaneled and sworn. *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir.), *cert. denied*, 519 U.S. 817 (1996); *Willhauck v. Flanagan*, 448 U.S. 1323 (1980). "Jeopardy terminates when the jury reaches a verdict, or when the trial judge enters a final judgment of acquittal." *United States v. Byrne*, 203 F.3d 671, 673 (9th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001) (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

B. Court Trial

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

1.3 Speedy Trial Act Issues—18 U.S.C. § 3161 et seq. (Criminal)

A. Tolling of Speedy Trial Act

The Speedy Trial Act provides time limits within which criminal proceedings, including trial, must take place, as well as exclusions from those time limits.

1. *The thirty-day rule for charging.*

Under 18 U.S.C. § 3161(b) any information or indictment charging an individual with an offense must be filed within thirty days from arrest or service of summons. *United States v. Ramirez-Cortez,* 213 F.3d 1149, 1153 (9th Cir. 2000) (summarizing the requirements of the Speedy Trial Act as it relates to the thirty-day rule and holding that the granting of a continuance requested by a defendant for the purpose of plea negotiations does not toll the Act in the absence of specific findings by the court supporting an "ends of justice" exclusion). The issuance of a violation notice does not trigger the thirty-day rule of § 3161(b). *United States v. Boyd*, 214 F.3d 1052, 1056 (9th Cir.), *cert. denied,* 531 U.S. 910 (2000).

2. *The seventy-day rule for trial*

18 U.S.C. § 3161(c)(1) provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

3. *Excludable time*

18 U.S.C. § 3161(h) provides several grounds for excluding time from the seventy-day period within which trial must commence. The most common grounds for delay and exclusion are:

a. Motions and other proceedings concerning defendant. § 3161(h)(1). Typically, this exclusion would encompass mental competency proceedings or pendency of a pretrial motion from filing of the motion through disposition of the motion, not to exceed thirty days for having the motion under advisement. § 3161(h)(1)(J). *United States v. Aviles*, 170 F.3d 863, 869 (9th Cir.) (illustrating the detailed accounting of time that may be required to compute excludable time attributable to pending motions), *cert. denied*, 528 U.S. 848 (1999), *amended by* 216 F.3d 881 (9th Cir. 2000). To toll the Speedy Trial Act, a continuance of a pending discovery motion must be to a date certain or to a happening of a date certain and the parties must have a real dispute or the possibility of a real dispute. *Unites States v. Sutter*, 340 F.3d 1022, 1028, 1031-32 (9th Cir.), *opinion amended on denial of reh'g*, 348 F.3d 789 (9th Cir. 2003), *cert denied*, 124 S. Ct. 1687 (2004). An interlocutory appeal tolls the Speedy Trial Act, but does not restart the clock. *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002).

b. Deferred prosecution pursuant to a written agreement. § 3161(h)(2).

c. Absence or unavailability of the defendant or an essential witness. §3161(h)(3)(A).

d. Joinder of defendant with an unsevered co-defendant as to whom the Speedy Trial Act has not run. § 3161(h)(7). There may exist circumstances, however, where delay attributable to joinder of a co-defendant as to whom the Speedy Trial Act has not run is deemed unreasonable. *United States v. Messer*, 197 F.3d 330, 338-41 (9th Cir.

1999) (prejudice shown by subsequent unavailability of a witness due to delay from joinder).

e. Ends of justice. § 3161(h)(8)(A). Upon motion of the judge or a party for continuance, any period of delay is excludable from the Speedy Trial Act provided the continuance is based upon findings "that the ends of justice served by [the action taken] outweigh the best interests of the public and the defendant in a speedy trial." Importantly, the court must set forth, on the record, the reasons for the finding(s), and the continuance must be specifically limited in time. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (quoting *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) in turn quoting *United States v. Jordan*, 915 F.2d 563, 565-566 (9th Cir. 1990)).

Section 3161(h)(8)(B) lists four factors the judge shall consider, among others, in granting a continuance in the ends of justice:

- whether failure to grant a continuance would result in a miscarriage of justice;

- whether the case is so unusual or complex that it is unreasonable to expect adequate preparation within the time limits of the Speedy Trial Act;

- whether certain circumstances concerning the indictment justify the continuance;

- whether failure to grant a continuance would otherwise "deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

Where the judge grants a continuance based upon a finding of case complexity, specific findings must be made. *United States v. Clymer,* 25 F.3d 824, 828-29 (9th Cir. 1994) (criticizing the trial court for an open-ended declaration of complexity as well as for a retroactive invocation of the "ends of justice" basis for delay).

A bare stipulation by the parties to waive time under the Speedy Trial Act is an inadequate basis for a continuance as "the right to a speedy trial belongs not only to the defendant, but to society as well." *United States v. Ramirez-Cortez,* 213 F.3d 1149, 1156 (9th Cir. 2000) (quoting from *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997)).

Upon remand following appeal where dismissal is ordered for violation of the Speedy Trial Act, the trial court is to exercise its discretion in determining whether the dismissal is to be with or without prejudice, considering the seriousness of the offense, the circumstances leading to the dismissal, and the impact re-prosecution would have on the Speedy Trial Act and the administration of justice. *United States v. Pollock*, 726 F.2d 1456, 1463 (9th Cir. 1984).

B. Voir Dire

The Ninth Circuit has yet to decide whether and under what circumstances a court may begin voir dire in order to stay the Act's time limits. Some circuits have held that long delays between the jury selection and the swearing in can violate the Speedy Trial Act, even though the voir dire was begun within the time limits set by the act. *United States v. Crane*, 776 F.2d 600, 603 (6th Cir. 1985); *United States v. Gonzalez*, 671 F.2d 441, 444 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982).

1.4 Other Delays

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

1.5 Assessment of Costs

A. Civil

1. *Local Rules Authorization of Assessment*

Many district courts have local rules authorizing the imposition of jury costs upon litigants and/or their attorneys in civil cases for failure to provide the court with timely notice of settlement. *See, e.g.,* U.S. Dist. Ct. Rules N.D. Cal., Civil L.R. 40-1; U.S. Dist. Ct. Rules Ariz. 2.13(c); U.S. Dist. Ct. Rules S.D. Cal. Civil L.R. 16.4.

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

2. *Assessments Against the Government*

Monetary awards can be assessed against the United States only if there has been an express waiver of sovereign immunity. *United States v. Woodley*, 9 F.3d 774, 781 (9th Cir. 1993) (citing *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Provisions in the Federal Rules of Civil Procedure pertaining to monetary sanctions against litigants, such as in Rule 11 and 37(b), can be viewed as an explicit Congressional waiver of the government's sovereign immunity. *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989). However, the government may not be sanctioned under a local rule because local rules do not constitute explicit waivers of immunity. *Woodley*, 9 F.3d at 782. Unlike the civil rules, Fed. R. Crim. P. 16(d)(2) which provides that a court may "prescribe such terms and conditions as are just" to remedy discovery order violations is not an express waiver of sovereign immunity. Therefore, no monetary sanctions can be levied against the government in a criminal case under that rule. *Id.* at 782.

B. Criminal

Federal Rule of Criminal Procedure 57

Following revisions in 1995 and 2002, Fed. R. Crim. P. 57(b) now provides in part that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance." Accordingly, actual advance notice of the court's assessment of jury costs on parties failing to timely notify the court of settlement may be a predicate for imposition of costs.

1.6 Presence of Defendant (Criminal)

A. Defendant's Presence Generally

A defendant has the right to be present at every stage of the trial. The right is both constitutional and statutory. The constitutional right is based on the Fifth Amendment due process clause and the Sixth Amendment right to confrontation. Under the Constitution, the defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934)). Thus, the Constitution does not guarantee that a criminal defendant be present at all stages of the trial but rather only at "critical stage[s]." *La Crosse v. Kernan*, 244 F.3d 702, 707-08 (9th Cir. 2001).

In *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975), the Supreme Court stated that a defendant has the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *See also Fisher v. Roe*, 263 F.3d 906, 914-15 (9th Cir. 2001) (citing *Snyder*, 291 U.S. at 105-06) (defendant has a right to be present if his presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

Rule 43(a), Fed. R. Crim. P., provides in part that a defendant must be present at every trial stage, including the jury impanelment and the return of the verdict and sentencing, unless otherwise provided by the rules.

Rule 43(b)(3), Fed. R. Crim. P., provides in part that a defendant need not be present where the "proceeding involves only a conference or hearing on a question of law."

Rule 43(c), Fed. R. Crim. P. governs circumstances under which a defendant has waived the right to be present at trial or sentencing:

Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who has pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Case law does not offer precise answers as to all circumstances under which a defendant is entitled to be present. The safer and better practice is to have the defendant present at all times unless the defendant waives the right to be present. *See, e.g., United States v. Gagnon*, 470 U.S. at 528 (although district judge's *in camera* contact with juror constituted critical stage, waiver inferred from defendant's failure to request to be present after having been advised that judge intervened to talk to juror); *Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir.) (under circumstances presented, any error resulting from defendant's absence at sidebar conferences was harmless), *cert. denied*, 423 U.S. 842 (1975); *Stein v. United States*, 313 F.2d 518, 522 (9th Cir. 1962) (defendant's absence from conference between court and counsel regarding admissibility of recordings not reversible error on facts presented), *cert. denied*, 373 U.S. 918 (1963).

B. Pretrial Conference

A defendant is not required to be present at a pretrial conference concerning legal issues. *United States v. Veatch*, 674 F.2d 1217, 1225-26 (9th Cir. 1981), *cert denied*, 456 U.S. 946 (1982); Rule 43(b)(3), Fed. R. Crim. P.

C. Voir Dire—Sidebar Conferences with Prospective Juror

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

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

1. *Sidebar Conferences During Voir Dire.* One option available to the trial judge is to speak with the prospective juror at a sidebar conference attended by respective counsel. Because of the close proximity of the defendant, this procedure has been upheld by other circuits. *See, e.g., United States v. Dioguardi*, 428 F.2d 1033 (2d Cir.) (sidebar conference at which prospective juror was questioned and from which defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer with defendants), *cert. denied*, 400 U.S. 825 (1970). *Cf. United States v. Alessandrello,* 637 F.2d 131 (3d Cir. 1980) (questioning of prospective jurors concerning pretrial publicity in judge's anteroom from which defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer), *cert. denied*, 451 U.S. 949 (1981). Some courts have found that any error in conducting a portion of voir dire at sidebar is harmless under certain circumstances. *See*, *e.g.*, *United States v. Feliciano*, 223 F.3d

102, 112 (2d Cir. 2000) (error in conducting limited voir dire at sidebar was harmless where the defendants were present in the courtroom and could consult with counsel about what was revealed at sidebar), *cert. denied*, 532 U.S. 943 (2001); *United States v. Cuchet*, 197 F.3d 1318, 1321 (11th Cir. 1999) (error for conducting voir dire at sidebar was harmless where the defendant was present during general voir dire, sidebar voir dire concerned only limited topics, and defense counsel could question each prospective juror and confer with the defendant afterwards). The Ninth Circuit has stated that "[a]lthough a defendant charged with a felony has a fundamental right to be present during voir dire, this right may be waived." *See United States v. Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996). Waiver may be effected by the defendant's "failing to indicate to the district court that he wished to be present at sidebar." *Id. See also, United States v. McClendon*, 782 F.2d 785, 788 (9th Cir. 1986) (defendant waived his right to be present where he knew of in-chambers voir dire but failed to object).

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

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

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

D. Sidebar Conferences During Trial

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

A sidebar conference may also be used to resolve relatively short issues which should not be discussed in front of the jury. More complex issues requiring lengthy discussion should be taken up during recesses, out of the presence of the jury.

Practical Suggestion

Waiver of Defendant's Presence at Sidebar Conference

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

E. *In Camera* Contact with Juror(s)

In *United States v. Gagnon,* 470 U.S. 522 (1985), the district judge informed the parties during trial that she intended to speak with a juror, *in camera*, in chambers after the juror expressed concern because the defendant was observed sketching the jurors. The Supreme Court held that "failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right." 470 U.S. at 529.

In *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109-10 (9th Cir.), *cert. denied*, 537 U.S. 1061 (2002), the Ninth Circuit found that the District Court's giving of a supplementary instruction to the jury, without knowledge of the parties, constituted a "critical stage" of a trial during which the presence of a defendant or his counsel was required under the Constitution and

Fed. R. Crim. P. 43. However, the court found that the error was harmless beyond a reasonable doubt because "there is no reasonable possibility that prejudice resulted from the [defendant's] absence."

F. Jury Instruction Conferences

The court may conduct the jury instruction conference in the defendant's absence. *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987). *See also United States v. Rivera*, 22 F.3d 430, 438-39 (2d Cir. 1994) (defendant was not entitled to attend charging conference because of its purely legal nature) (citing Fed. R. Crim. P. 43). The court may wish to determine if the defendant wishes to be present during jury instructions conference.

G. Readbacks During Deliberations

See § 5.2.D

The defendant has the right to be present during the replaying or reading back of testimony. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (harmless error on facts presented), *cert. denied*, 522 U.S. 1153 (1998).

1.7 Delegation of District Court's Responsibilities to Magistrate Judges

A. Criminal Proceedings

1. *Caution Regarding Delegation to Magistrate Judge*. Any delegation to a magistrate judge of trial-related tasks in a criminal felony trial should be made only in those cases where there is clear authority to do so. For an analytical approach to identifying additional duties a magistrate judge may perform under 28 U.S.C. § 636(b)(3) (Magistrate Judges Act) which are not inconsistent with the Constitution or laws of the United States, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1120-21 (en banc), *cert. denied,* 540 U.S. 900 (2003).

2. *Guilty Pleas*. A magistrate judge may preside over a Rule 11 felony change of plea with the consent of the defendant because "plea colloquies 'bear some relation to the specified duties' that are specifically authorized" by 28 U.S.C. § 636(b)(3) (Magistrate Judges Act). *Reyna-Tapia*, 328 F.3d at 1120-21. De novo review of the findings and recommendations of the magistrate judge following a plea colloquy is required only where a party files objections to the findings and recommendations. *Id* at 1121.

3. *Felony Jury Trials*

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

b. Presiding over closing argument. A magistrate judge may not preside over closing arguments in a felony criminal trial. *United States v. Boswell*, 565 F.2d 1338, 1341 (5th Cir. 1978) (harmless error on facts presented where trial judge was ill; court did not decide whether personal, intelligent waiver was required; Rule 25(a), Federal Rules of Criminal Procedure, which states that when a trial judge is unable to proceed with trial, any judge

regularly sitting in or assigned to the court may complete a jury trial after the judge certifies familiarity with the trial record, does not authorize magistrate judges to preside over closing arguments).

c. Instructing jury on law. Absent consent, a magistrate judge may not rule upon objections to and requests for instructions. *United States v. De La Torre*, 605 F.2d 154, 155-56 (5th Cir. 1979) (absent waiver by counsel, defendant entitled to have Article III judge rule on counsel's objections and requests for instructions to the jury). The Sixth Circuit has stated that a magistrate judge's mere reading of instructions to the jury is permissible. *Allen v. United States*, 921 F.2d 78, 79-80 (6th Cir. 1990) (reading instructions to jury is a mere ministerial function).

d. Presiding over jury deliberations.

Magistrate judges have been allowed to do the following:

(1) Readbacks. Once a district judge has determined that there should be a readback and the scope of the readback, a magistrate judge may preside over the readback of trial testimony because a readback is a subsidiary matter. *United States v. Gomez-Lepe*, 207 F.3d 623, 629 (9th Cir. 2000). *See also United States v. Demarrias*, 876 F.2d 674, 677 (8th Cir. 1989).

(2) Directive to continue deliberations. Under the supervision of a trial judge, a magistrate judge's directive to a jury to continue deliberations has been held to be permissible. *United States v. Saunders,* 641 F.2d 659, 662-64 (9th Cir. 1980), *cert denied*, 452 U.S. 918 (1981).

(3) Answering jury's question. The Ninth Circuit has not ruled upon whether a magistrate judge may answer a jury's question. *United States v. Foster*, 57 F.3d 727, 732 (9th Cir. 1995), *vacated in part on other grounds*, 133 F.3d 704 (9th Cir. 1998) (en banc). However, the

Ninth Circuit has cited with approval an Eighth Circuit holding that a magistrate judge "may accept the jury's questions, communicate them to the absent district judge, and communicate the district judge's responses to the jury." *United States v. Carr*, 18 F.3d 738, 740 (9th Cir.) (citing *Demarrias*, 876 F.2d at 677), *cert. denied,* 513 U.S. 821 (1994).

e. Accepting jury's verdict. Accepting and filing a jury verdict without more is a ministerial subsidiary matter that does not require the consent of the parties. *United States v. Foster*, 59 F.3d 72, 732 (9th Cir. 1995), *vacated in part on other grounds*, 133 F.3d 704 (9th Cir. 1998) (en banc). However, "a jury poll that calls into question the jury's unanimity is . . . a critical stage of a criminal proceeding" and therefore requires the defendant's consent. *United States v. Gomez-Lepe*, 207 F.3d 623, 629-30 (9th Cir. 2000).

The trial judge should attempt to take the verdict in every case. However, if a magistrate judge takes the verdict, the judge should obtain the consent of the parties.

4. *Misdemeanor Trials*. A magistrate judge may preside over a class A misdemeanor trial only upon a defendant's express consent. 18 U.S.C. § 3401(b); *Peretz v. United States*, 501 U.S. 923 (1991) (consent required); *N.L.R.B. v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994). Section 203 of the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, 114 Stat. 2410 (2000), amended 28 U.S.C. § 636(a) and 18 U.S.C. § 3401(b) and (g) to eliminate the requirement that a defendant consent to the authority of a magistrate judge in class B misdemeanor cases that do not involve a motor vehicle offense. Previously, the consent of the defendant was not required in class B misdemeanor cases charging a motor vehicle offense, class C misdemeanor cases, and infractions. The consent of the defendant was required in all other class B misdemeanor cases. Under the new law, consent is not required in petty offense cases, i.e., class B misdemeanors, class C misdemeanors, and infractions) although consent is still

required, either in writing or orally on the record, in class A misdemeanors.

5. *Evidentiary Hearing in Revocation of Probation Proceedings and Revocation of Supervised Release Proceedings*. A magistrate judge may only conduct revocation of probation proceedings in a misdemeanor case if the following three conditions are met: "(1) defendant's probation was imposed for a misdemeanor; (2) the defendant consented to trial, judgment, and sentencing by a magistrate judge; and (3) the defendant initially was sentenced by a magistrate judge." *United States v. Colacurcio*, 84 F.3d 326, 329 (9th Cir. 1996). However, a magistrate judge may conduct revocation of supervised release proceedings only with consent and by report and recommendation to the district judge to be reviewed de novo by the district judge. 18 U.S.C. § 3401(i); *Id.* at 330 (9th Cir. 1996).

B. Civil Proceedings

1. *Voir Dire*. A magistrate judge may preside over voir dire in a civil case only with the consent of the parties. *Thomas v. Whitworth*, 136 F.3d 756, 759 (11th Cir. 1998); *Stockler v. Garratt*, 974 F.2d 730, 732 (6th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990).

2. *Trial*. A magistrate judge may conduct a civil trial only with the consent of the parties. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

See generally Inventory of United States Magistrate Judge Duties, Administrative Office of the United States Courts.

1.8 Pretrial Order Governing Procedure at Trial (Criminal)

The use of a comprehensive order governing the proceedings at trial issued well in advance may be of great assistance in expediting the trial and alerting counsel as to deadlines for submission of jury instructions and witness and exhibit lists, as well as other expectations of the court.

1.9 Pretrial Order Governing Procedure at Trial (Civil)

The use of a comprehensive order governing the proceedings at trial issued well in advance may be of great assistance in expediting the trial and alerting counsel as to deadlines for submission of jury instructions and witness and exhibit lists, as well as other expectations of the court.

1.10 Pre-Voir Dire Jury Panel Questionnaires

A. Prescreening Questionnaires Prior to Reporting for Jury Duty

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

1. *Avoids Necessity of Appearance*

Prescreening does not exclude a discernible class of prospective jurors. The only difference between the use of a prescreening device and excusal based on in-court voir dire is that the prospective juror is spared the inconvenience of coming to court. Prejudice to a defendant may be avoided through counsel's ability to object to the excusal of any particular juror whose showing of hardship is thought to be insufficient. *United States v. Layton*, 632 F. Supp. 176, 177 (N.D. Cal. 1986).

2. *Length of Trial*

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

court's discretion in jury selection is broad enough to encompass consideration of hardship excusal requests. *United States v. Barnette*, 800 F.2d 1558, 1568 (11th Cir. 1986) (prescreening questionnaire permissible where each request for a hardship excusal was personally considered by the district court and ruled upon based on its individual merits), *cert. denied*, 480 U.S. 935 (1987).

B. Questionnaires Immediately Prior to Voir Dire

Immediately prior to voir dire potential jurors may be required to complete a questionnaire containing the usual inquiries bearing upon a juror's potential bias generally and specifically to describe their knowledge of the case and the source of that knowledge. *United States v. Greer*, 968 F.2d 433, 436 (5th Cir. 1992), *cert. denied*, 507 U.S. 962 (1993); *United States v. Ebens*, 800 F.2d 1422, 1426 (6th Cir. 1986). *See also United States v. Rahman*, 189 F.3d 88, 121 (9th Cir. 1999) (thorough voir dire resulted from comprehensive questionnaires regarding familiarity with parties and individualized voir dire), *cert. denied*, 528 U.S. 1094 (2000).

C. Confidentiality of Questionnaires

Confidentiality of the answers to questionnaires may not be guaranteed. *See, e.g., Copley Press, Inc. v. San Diego County Superior Court*, 228 Cal. App. 3d 77, 84, 278 Cal. Rptr. 443 (the press is constitutionally entitled to have access to at least some of the information contained in such questionnaires, although access is not absolute), *cert. denied*, 502 U.S. 909 (1991). *See also United States v. King*, 140 F. 3d 76, 81 (2d Cir. 1998) (stating that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest").

NOTES

Chapter Two: Jury Selection

Description:

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

Topics:

2.1 Qualifications of Federal Jurors

A. Qualifications

The provisions of 28 U.S.C. § 1865(b) establish the qualifications to serve as a member of a grand jury or trial jury. A person is qualified to serve as a juror if he or she (1) is a citizen of the United States who has resided for one year or more within the judicial district; (2) is at least 18 years of age; (3) is able "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form"; (4) is able to speak the English language; (5) is mentally and physically capable of rendering satisfactory jury service; (6) does not have "a charge pending against him for the commission of a crime punishable by imprisonment for more than one year;" and (7) has not been convicted in State or Federal court of a crime punishable by more than one year in prison unless the prospective juror's civil rights have been restored.

B. Erroneous Inclusion of Disqualified Juror

The participation of a felon-juror is not an automatic basis for a new trial. The participation of a felon-juror requires a new trial if the juror's participation in the case results in actual bias or prejudice to a party. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1059 (9th Cir. 1997). Actual bias must be shown by the party seeking a new trial. That party must demonstrate that a juror failed to reveal a disqualification because he or she was biased. Failure to disclose a conviction due to a mistake or embarrassment does not suggest bias. Even if nondisclosure is dishonest rather than mistaken, a new trial is not warranted unless there is evidence the nondisclosure was a result of bias or prejudice. *United States v. Bishop*, 264 F.3d 535, 555 (5th Cir. 2001), *cert. denied*, 535 U.S. 1016 (2002).

2.2 Voir Dire Regarding Pretrial Publicity

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

1. The scope and detail of the court's voir dire on pretrial publicity is dictated by the level of such publicity. In cases involving little pretrial publicity, general questions addressed to the entire panel followed by individual questioning of those who respond affirmatively is sufficient when few prospective jurors have knowledge about the case. *United States v. Baker,* 10 F.3d 1374, 1403 (9th Cir. 1993), *cert. denied,* 513 U.S. 934 (1994), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Giese*, 597 F.2d 1170, 1183 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979).

2. In circumstances where pretrial publicity has been great, the trial judge must conduct a careful individual voir dire of each prospective juror, preferably out of the presence of the other members of the panel. A general question addressed to the panel as a whole is inadequate. The jurors' subjective assessment of their impartiality is insufficient. *Giese*, 597 F.2d at 1183; *Silverthorne v. United States*, 400 F.2d 627, 635-640 (9th Cir. 1968). Questions concerning the content of the pretrial publicity to which the prospective juror has been exposed might be helpful to trial judges in assessing impartiality, but the failure to make this specific inquiry does not deny a defendant his right to an impartial jury or to due process. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

3. Inquire of the entire panel if any venireperson has heard anything about the case. Indicate that the venirepersons are to respond only by stating "yes" or raising their hands so the response can be recorded. After the response is recorded, ask the venirepersons if any of them have heard anything about the case through a medium other than radio, television, or newspapers. After that response is recorded, ask those who responded affirmatively if they have already formed an opinion

about the case. If they respond in the affirmative, ask them if they feel they can set that opinion aside and judge the case solely on the basis of the evidence presented during the trial. At that point, the judge will have narrowed the issues to be discussed with the respective jurors during individual voir dire.

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

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

2.3 Closed Voir Dire

Generally, a court may not close criminal voir dire to the public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). Courts may consider the right of the defendant to a fair trial and the right to privacy of prospective jurors in determining whether or not to close voir dire proceedings. In order to close the proceedings, a court must make specific findings that an open proceeding would threaten those interests and less restrictive alternatives to closure are inadequate. *Id.* at 510-11 (stating that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). Where there are legitimate privacy concerns judges should generally inform the potential jurors of the general nature of sensitive questions to be asked and allow individual jurors to make affirmative requests to proceed at sidebar or in chambers. *Id.* at 512. As to criminal cases, *see also* 1.6.C. Before a closure order is entered, members of the press and the public must be afforded notice and an opportunity to object to the closure. *Unabom Trial Media Coalition v. United States Dist. Court*, 183 F.3d 949, 951 (9th Cir. 1999); *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982).

2.4 Closed Proceedings Generally

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

2.5 Anonymous Juries

The provisions of 28 U.S.C. § 1863(b)(7) authorize the district court's plan for random jury selection to "permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names (of prospective jurors) confidential in any case where the interests of justice so require." The decision to use an anonymous jury is committed to the sound discretion of the judge. *United States v. Thai*, 29 F.3d 785, 800-01 (2d Cir.), *cert. denied,* 513 U.S. 977 and 513 U.S. 993 (1994). Although the judge must find that there is a strong reason to believe that the jury needs protection to perform its factfinding function, *United States v. Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996), or to safeguard the integrity of the justice system, *United States v. Shyrock*, 342 F.3d 948, 971-72 (9th Cir. 2003), *cert. denied,* 124 S. Ct. 1729 (2004), and *cert. denied* 124 S. Ct. 1736 (2004), the judge need not conduct an evidentiary hearing on the subject. *United States v. Edmond*, 52 F.3d 1080, 1092 (D.C. Cir.), *cert. denied,* 516 U.S. 998 (1995).

There are five non-exclusive factors to be considered to determine if the jury needs protection: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. *Shyrock*, 342 F.3d at 971, *Edmond*, 52 F.3d at 1091. *See also United States v. Saya*, 980 F. Supp. 1152, 1154 (D. Haw. 1997).

The court *must* take reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected. To minimize prejudicial effects, the court should provide the jurors with an explanation for the use of the anonymous jury. Examples of approved explanations include: protection from curiosity seekers, to avoid harassment from the media, and insulation of the jury from communication from either side. Any explanation given should emphasize that it is

not a reflection upon the defendant. *Shyrock*, 342 F.3d at 972-91. In addition, the court should instruct the jurors that the reasons for having jurors remain anonymous have nothing to do with the guilt or innocence of the defendant. *See Shyrock*, 342 F.3d at 972-73.

To ensure that the defendant's fundamental rights are protected, the court should provide defendant with adequate voir dire, sufficient to fully ascertain any possible bias without requesting information that would identify the jurors. *See, e.g.*, *United States v. Childress*, 58 F.3d 693, 704 (D.C. Cir. 1995), *cert. denied,* 516 U.S. 1098 (1996) (upholding anonymous jury where "court conducted a searching *voir dire* and gave jurors an extensive questionnaire").

Juror anonymity may continue after the trial ends. "Ensuring that jurors are entitled to privacy and protection against harassment, even after their jury duty has ended, qualifies as [a strong governmental] interest in this circuit." *United States v. Brown*, 250 F.3d 907, 918 (5th Cir. 2001).

2.6 Attorney Participation in Voir Dire

Under both the criminal and civil rules (Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a)), direct attorney participation in the voir dire examination is discretionary with the court. Many courts permit attorney voir dire. The extent of attorney participation varies greatly from court to court. Some courts permit attorneys to participate orally in voir dire, some permit attorney participation via written questions, and others use a combination of the practices.

2.7 Recurring Voir Dire Problems

A. Civil Voir Dire

1. *Juror Veracity*

A new civil trial is justified where a party demonstrates that (1) a juror failed to answer honestly a material question on voir dire, and (2) a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (in a product liability trial, a juror's failure to reveal that his son had been injured when a truck tire exploded did not justify a new trial).

A juror's lack of candor regarding nonmaterial, collateral matters resulting in no bias or prejudice to the complaining party does not require the granting of a new trial. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1059-62 (9th Cir. 1997). *See also Pope v. Man-Data, Inc.,* 209 F.3d 1161 (9th Cir. 2000) (error for district court to grant new trial where neither dishonesty nor bias of juror was demonstrated, notwithstanding juror's failure to disclose requested information regarding litigation and collection action history).

2. *Law Governing Challenges for Cause*

Federal law governs challenges for cause. Even in diversity cases, federal law and not state law applies to challenges for cause. *Nathan v. Boeing Co.*, 116 F.3d 422, 424 (9th Cir. 1997).

3. *Prospective Juror's Employment*

When a prospective juror is an employee of a party, the district court should examine the juror closely in order to determine whether any bias exists. *Nathan*, 116 F.3d at 425.

4. *Court's Failure to Ask Questions*

By inquiring about prejudices or biases concerning relevant areas, the district court need not explore general attitudes on these

topics. *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1507-08 (9th Cir. 1992) (court's overview of case concerning alleged police use of excessive force in attempting to subdue armed person overdosing on drugs and inquiry concerning any prejudices or biases of prospective jurors eliminated necessity of asking voir dire questions concerning attitudes about suicide, drug use, and firearms), *cert. denied*, 508 U.S. 940 (1993).

B. Criminal Voir Dire

1. *Juror Veracity*

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) (en banc), *cert. denied*, 525 U.S.1033 (1998). A juror's lying during voir dire may warrant an inference of implied bias. *Dyer*, 151 F.3d at 979. Simple forgetfulness does not fall within the scope of dishonesty. *United States v. Edmond*, 43 F.3d 472, 474 (9th Cir. 1994). "Whether a juror intentionally conceals or gives a misleading response to a question on voir dire about relevant facts in his or a relative's background may shed light on the ultimate question of that juror's ability to serve impartially." *Fields v. Woodford*, 309 F.3d 1095, 1105-06 (9th Cir. 2002) (A juror's omission of key facts during voir dire required a hearing to determine whether the juror had been intentionally misleading).

2. *Areas to be Covered*

"[A] defendant is entitled to a voir dire that fairly and adequately probes a juror's qualifications . . . ." *United States v. Toomey*, 764 F.2d 678, 683 (9th Cir. 1985) *cert denied,* 474 U.S. 1069 (1986). *But see United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991) (in a child molestation prosecution, the court's questioning as to whether there was anything about the nature of the charges that would prevent a juror from being fair and impartial may be sufficient voir dire without exploring whether prospective jurors had been victims of child sexual abuse, accused of child molestation, or were associated with groups supporting child sex abuse victims), *cert. denied*, 503 U.S. 975 (1992).

a. Law enforcement officers. When important testimony is anticipated from a law enforcement officer, the court should inquire whether any of the prospective jurors would be inclined to give "greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position." *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979). *See also United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987). "[W]hether a question need be asked about police credibility depends on various case-specific circumstances . . . ." *Paine v. City of Lompoc*, 160 F.3d 562, 565 (9th Cir. 1998) (referring to *Baldwin* factors; no error on facts presented).

b. Government witnesses. The court should ask, or permit counsel to ask, the prospective jurors whether they know of any of the government's witnesses. *United States v. Washington*, 819 F.2d 221, 224 (9th Cir. 1987). *See also United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993) ("Although a trial court abuses its discretion in failing to ask prospective jurors any questions concerning acquaintance with any government witnesses, (citations omitted), [the case law] [n]either . . . requires disclosure of all witnesses [n]or directs the trial court to question veniremen about every possible government witness" (citation omitted)), *cert. denied,* 513 U.S. 934 (1994), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

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

d. Case participants. It is appropriate to inquire as to whether any prospective juror is acquainted with the judge, court staff, lawyers, parties, or any other prospective juror.

e. Bias or prejudice against defendant based upon crime charged. A prospective juror's bias concerning a crime is not grounds for that individual to be excused, so long as the

bias is such that "those feelings do not lead to a predisposition toward the prosecution or accused." *Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (quoting *United States v. Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983)).

f. Bias or prejudice based upon race. "[A]bsent some indication prejudice is likely to arise, or that the trial will have racial overtones," the district court is not required to inquire about racial prejudice. *United States v. Rosales-Lopez*, 617 F.2d 1349, 1354 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981). *See also United States v. Sarkisian,* 197 F.3d 966, 979 (9th Cir. 1999) ("[e]ven assuming there was a reasonable possibility that racial or ethnic prejudice might have influenced the jury, the district court's questions regarding the defendants' ethnicity, the use of interpreters, and the jurors' abilities to serve impartially, were all reasonably sufficient to test the jury for bias and partiality" (citation omitted)), *cert. denied*, 530 U.S. 1220 (2000).

g. Willingness to follow law. Where it appears that a prospective juror disagrees with the applicable law, the court should inquire as to whether the juror is nevertheless willing to follow the law. *See United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998), *cert. denied*, 525 U.S. 1166 (1999).

h. Supplemental questions. "It is wholly within the judge's discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality." *Paine*, 160 F.3d at 564-65 (quoting *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir.)), *cert. denied*, 502 U.S. 891 (1991).

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

Caution should be exercised to ensure that the responses of a prospective juror do not infect the panel.

A jury panel's exposure to inflammatory statements made by a prospective juror requires, at a minimum, that the trial judge voir

dire the entire panel "to determine whether the panel ha[s] in fact been infected." *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998).

Practical Suggestion

General Inquiry

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

2.8 Challenges for Cause

A. In General

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

B. Erroneous Overruling of Challenge for Cause Cured by Exercise of Peremptory Challenge

If a defendant, by exercising a peremptory challenge, cures the erroneous denial of a challenge for cause, the defendant has been deprived of no rule-based or constitutional right. *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Moreover, a defendant's exercise of peremptory challenges pursuant to Rule 24(b), Fed. R. Crim. P. is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause. *Id.* at 317.

2.9 Peremptory Challenges

A. Civil

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

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

B. Criminal

1. *Number of Peremptory Challenges*

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

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

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

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

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

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

The additional peremptory challenges may be used against alternate jurors only. Fed. R. Crim. P. 24(c)(4).

3. *Additional Peremptory Challenges–Multiple Defendants*

There is no right to additional peremptory challenges in multiple defendant cases. Rule 24(b), Fed. R. Crim. P., makes award of additional challenges permissive. Furthermore, disagreement between codefendants on the exercise of joint peremptory challenges does not mandate a grant of additional challenges, unless the defendants demonstrate that the jury ultimately selected is not impartial or representative of the community. *United States v. McClendon*, 782 F.2d 785, 788 (9th Cir. 1986).

2.10 *Batson* Challenges

A. In General

1. *Prosecution Peremptory Challenges*

In *Batson v. Kentucky*, 476 U.S. 79, 87-98 (1986), the Supreme Court held that the racially discriminatory exercise of peremptory challenges by a prosecutor violated the equal protection rights of both the criminal defendant and the challenged juror. The *Batson* Court found that a defendant could demonstrate an equal protection violation based on the prosecutor's discriminatory exercise of peremptory challenges in that defendant's case alone; the court found that there was no need for a defendant to prove that the prosecutor had a pattern or practice in all of his/her cases of using peremptory challenges in a discriminatory manner. *Batson*, 476 U.S. at 95.

2. *Criminal Defense Challenges*

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

3. *Civil Litigation*

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

4. *Standing*

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

5. *Gender, Religion, Age and Other Classifications*

The exercise of peremptory challenges based on gender violates the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994); *DeGross*, 960 F.2d at 1437-43. *Batson* challenges based on age, religion, and membership in other definable classes have generally not been upheld. *Weber v. Strippit, Inc.,* 186 F.3d 907, 911 (8th Cir. 1999) (declining to extend *Batson* to peremptory challenges based on age*)*, *cert denied,* 528 U.S. 1078 (2000); *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999) (no precedent exists dictating extension of *Batson* to religion); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (no *Batson* challenge based on obesity)*, cert denied,* 516 U.S. 1044 (1996); *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) (young adults are not a cognizable group for purposes of a *Batson* challenge); *but see United States v. Berger*, 224 F.3d 107, 119-20 (2d Cir. 2000) (not reaching whether *Batson* applies to religion, but even assuming it did, peremptory strike of juror who was a rabbi did not violate *Batson*); *United States v. Greer*, 968 F.2d 433, 437-38 (5th Cir. 1992) (en banc) (defendants were not denied the opportunity to use their peremptory challenges effectively where trial court refused to make prospective Jewish jurors identify themselves), *cert denied,* 507 U.S. 962 (1993).

6. *Erroneous Rulings on Batson Challenges*

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

b. Allowance of peremptory challenge. "Clearly, the proper remedy for the improper use of a peremptory challenge is automatic reversal." *See, e.g., Annigoni*, 96 F.3d at 1147.

B. *Batson* Procedure

1. *Three-Step Process*

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

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

(b) once the moving party establishes a prima facie case, the burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and

(c) the court then determines whether the moving party has carried his/her ultimate burden of proving purposeful discrimination.

See Hernandez v. New York, 500 U.S. 352, 358-59(1991). *See also Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Stubbs v. Gomez*, 189 F.3d 1099, 1104 (9th Cir. 1999), *cert. denied*, 531 U.S. 832 (2000).

2. *Prima Facie Case*

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

(a) the prospective juror is a member of a protected group;

(b) the opposing party exercised a peremptory challenge to remove the juror; and

(c) the facts and circumstances surrounding the exercise of the peremptory challenge raise an inference of discrimination.

Cooperwood v. Cambra, 245 F.3d 1042, 1045-46 (9th Cir.), *cert. denied*, 534 U.S. 900 (2001). If the moving party fails to establish a prima facie case, the opposing party is not required to offer an explanation for the exercise of the peremptory challenge. *Id*.

3. *Opposing Party's Burden*

Once a prima facie case is established, the challenged party need only offer facially nondiscriminatory reasons; the reasons need not be "persuasive or even plausible." The persuasiveness of the challenged party's reasons is not relevant until the third part of the inquiry when the trial court determines whether the moving party has carried its burden of proving purposeful discrimination. *Purkett*, 514 U.S. at 767-68 (1995); *United States v. Bauer*, 84 F.3d 1549, 1554 (9th Cir. 1996), *cert. denied,* 519 U.S. 1131 (1997).

4. *The Court's Duty*

The trial court has the duty to determine whether the party objecting to the peremptory challenge has established purposeful discrimination. This finding turns largely on the court's evaluation of the credibility of the justification offered for the peremptory challenge. A court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 94. S*ee also Collins v. Rice*, 365 F.3d 667, 678 (9th Cir. 2004).

5. *Timeliness of Batson Challenges*

"The case law is clear that a *Batson* objection must be made as soon as possible, and preferably before the jury is sworn." *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir.), *cert. denied,* 519 U.S. 903 (1996).

6. *No Specific Findings Required*

"Neither *Batson* nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir.), *cert. denied*, 528 U.S. 900 (1999).

2.11 Number of Jurors and Alternate Jurors

A. Civil Trials

1. *Number of Jurors*

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

2. *Alternates*

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

3. *Unanimous Verdict*

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

B. Criminal Trials

1. *Number of Jurors*

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

2. *Alternates*

In criminal actions, the court may direct that no more than six jurors, in addition to the regular jurors, be called and impaneled to sit as alternate jurors. Fed. R. Crim. P. 24(c).

3. *Unanimous Verdict*

The verdict must be unanimous. Fed. R. Crim. P. 31(a).

2.12 Dual Juries

The Ninth Circuit upheld a district court's use of dual juries in *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973). While holding that the use of two juries did not violate any constitutional, statutory, or procedural right, the court cautioned against their use absent guidelines established by district court rule. *Id.* at 1170.

On habeas review of a state court conviction, the court again held that the use of a dual jury did not violate defendant's rights under the Fifth, Sixth, and Fourteenth Amendments in the absence of a showing of actual prejudice in *Beam v. Paskett*, 3 F.3d 1301, 1303-04 (9th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994). The court, however, expressed concern about their use in capital cases. *Id.* at 1304. In *Lambright v. Stewart*, 191 F.3d 1181, 1186-87 (9th Cir. 1999) (en banc) the court held that there was no per se constitutional error in the use of dual juries in state court capital cases, overruling any suggestion to the contrary in *Beam*.

NOTES

Chapter Three: The Trial Phase

Description:

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

Topics:

3.1 Setting the Trial Schedule—Options

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

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

3.2 Jury Admonitions

When the jury is first impaneled and sworn, it is recommended that the court instruct the jury concerning their conduct during trial. *See* 9TH CIR. CRIM. JURY INSTR. 1.9 (2003); 9TH CIR. CIV. JURY INSTR. 1.9 (2001).

At appropriate times during the trial the court should remind the jurors not to talk to one another, to others, or allow others to talk to them or read or listen to any media reports of the trial. In addition, they should be advised not to conduct their own investigation or visit the scene of events involved or undertake any research, such as use of the Internet. *See* 9TH CIR. CRIM. JURY INSTR. 2.1 (2003); 9TH CIR. CIV. JURY INSTR. 2.1 (2001).

3.3 Preliminary Instructions and Orientation of the Jury

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

Preliminary instructions and orientation are effective ways for the court to answer many common juror questions and to make jury service a more effective and positive experience.

See 9TH CIR. CRIM. JURY INSTR. Preliminary Instructions 1.1-1.13 (2003); 9TH CIR. CIV. JURY INSTR. Preliminary Instructions 1.1-1.16 (2001).

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

3.4 Notetaking by Jurors

The decision of whether to allow jurors to take notes is in the discretion of the trial judge. *United States v. Vaccaro*, 816 F.2d 443, 451 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987), and 484 U.S. 928 (1987), *abrogated on other grounds, Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993)*, cert. denied*, 513 U.S. 934 (1994), *overruled on other grounds, United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). If notetaking is permitted, the jurors should be given the preliminary instruction on taking notes. 9TH CIR. CRIM. JURY INSTR. 1.11 (2003); 9TH CIR. CIV. JURY INSTR. 1.11 (2001).

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

3.5 Juror Questions During Trial

There may be occasions where a juror desires to ask a question of a witness. The court has discretion in permitting or refusing to permit jurors to ask questions. *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994), *cert. denied*, 516 U.S. 816 (1995); *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970) (no error by trial judge in allowing juror to submit question to court).

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

Practical Suggestions

Juror Questions

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

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

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

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

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

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

3.6 Judges Examining Witnesses

A. Civil Jury Cases

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

B. Criminal Jury Cases

The trial judge should exercise great caution in examining witnesses during a criminal trial. The court may participate in the examination of witnesses for the purpose of clarifying the evidence, controlling the orderly presentation of evidence, confining counsel to evidentiary rulings and preventing undue repetition of testimony. *United States v. Allsup*, 566 F.2d 68, 72 (9th Cir. 1977). However, "the court must . . . be mindful that in the eyes of a jury, the court occupies a position of 'preeminence and special persuasiveness,'" and thus must avoid the appearance of giving aid to one side or the other. *Id*. (quoting *United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975)). *See also United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001) ("The judge may therefore 'participate in the examination of witnesses to clarify issues . . . .'") *(quoting United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994)).

"A trial judge's participation oversteps the bounds of propriety and deprives the parties of a fair trial only when 'the record discloses actual bias . . . or leaves the reviewing court with an

abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.'" *Parker,* 241 F.3d at 1119 (quoting *United States v. Mostella*, 802 F. 2d 358, 361 (9th Cir. 1986) (citation and further internal quotation marks omitted)). When questioning occurs, prejudice may be deflected by the trial court instructing the jury "not to infer any opinion from its questioning" and reminding the jury that they are the judges of the facts. *Parker,* 241 F.3d at 1119 (citation omitted). *See also Swinton v. Potomac Corp*., 270 F.3d 794, 808 (9th Cir. 2001), *cert. denied*, 535 U.S.1018 (2002).

In several cases, prejudicial judicial questioning has resulted in the reversal of convictions. *See, e.g., Allsup*, 566 F.2d at 72-73 (the court's rehabilitation of a prosecution witness whose credibility had been seriously undermined by the defense constituted error which, when considered together with other errors, required a new trial); *United States v. Pena-Garcia*, 505 F.2d 964, 967 (9th Cir. 1974) (judge threatened and intimidated witnesses and gave jury the impression he thought defense witness was lying under oath); *United States v. Stephens*, 486 F.2d 915, 916 (9th Cir. 1973) (judge implied to jury that he thought defendant was guilty). *See also United States v. Saenz*, 134 F.3d 697, 704, 714 (5th Cir. 1998) (judge's excessive questioning of witnesses required reversal); *United States v. Tilghman*, 134 F.3d 414, 418-19 (D.C. Cir. 1998) (judge's questioning of defendant that may have given jury impression that judge doubted defendant's credibility required reversal).

C. Non-Jury Cases

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

Practical Suggestion

Judge's Examination of Witnesses

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

3.7 Interpreters

A. Use and Competency

1. *Appointment of Interpreter*

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

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

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

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

3. *Competence of Interpreter*

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

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

on other grounds as recognized in Morris v. Woodford, 229 F.3d 775 (9th Cir. 2000).

B. Translations: Disputed Documents

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

C. Interpreter for Jurors

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

D. Necessity of Oath

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

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

E. Cautionary Instruction to Bilingual Jurors

Instruction 1.16 of the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL (2001) is a model instruction regarding the obligation of bilingual jurors to accept the translation given by

the federally certified court interpreter. *See also* 9TH CIR. CRIM. JURY INSTR. 1.13 (2003).

Practical Suggestions

Interpreters at Trial

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

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

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

3.8 Successive Cross-Examination

A. In General

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

Limits can be placed on repetitive cross-examination in multi-defendant trials. The court should caution counsel at the onset that although there may be some repetition, exhaustion of subject matter by each counsel will not be permitted. The court may require defense counsel to designate lead counsel for a particular witness. *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997) (where defense counsel was allowed to cross-examine as to issues particular to their clients, court did not err in asking counsel to designate one attorney to conduct "main" cross-examination into basic issues), *cert. denied* 522 U.S.1097 (1998), *abrogated on other grounds, United States v. Jimenez Recio*, 537 U.S. 270 (2003) In the absence of agreement, the court may designate the appropriate order. As a rule, repetitive cross-examination on the same subject matter should not be allowed.

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

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

Allowing re-cross (or re re-cross) is within the sound discretion of the trial court except where new matters are elicited on redirect, in which case denial of re-cross violates the confrontation clause. *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993)*, cert. denied,* 513 U.S. 934 (1994)*, overruled on other grounds, United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). What constitutes new matters should be liberally construed in criminal cases. It is reversible error to impose a blanket ban on re-cross examination when new and damaging testimony has been presented on re-direct examination. *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992).

3.9 Managing Exhibits

Sections 12.13 and 12.32 of the Manual for Complex Litigation (Fed. Jud. Center, 4th ed. 2004) contain an excellent discussion of the techniques that may be used in the orderly and illuminating presentation of exhibits to the court and jury.

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

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

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

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

3.10 Summaries

A. Summary Exhibits and Charts

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

1. *Charts and Summaries as Evidence*

Charts and summaries as evidence are governed by Fed. R. Evid. 1006, which allows the introduction of charts, summaries, or calculations "of voluminous writings, recordings, or photographs which cannot conveniently be examined in court." The party seeking to admit a summary as evidence under Fed. R. Evid. 1006 must establish a foundation that (1) the underlying materials upon which the summary is based are admissible in evidence, and (2) the underlying documents were made available to the opposing party for inspection. *United States v. Johnson*, 594 F.2d 1253, 1254-57 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979). *See also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). Rule 1006 does not encompass summaries of previously admitted oral testimony. *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993)*, cert. denied*, 513 U.S. 934 (1994), *overruled on other grounds, United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

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

Charts or summaries of testimony or documents already admitted into evidence merely help illustrate, and are not evidence themselves. Illustrative materials used only as a testimonial aid should not be admitted into evidence or otherwise used by the jury during deliberations. *Wood*, 943 F.2d at 1053-54 (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984)); *United*

States v. Abbas, 504 F.2d 123, 125 (9th Cir. 1974), *cert. denied*, 421 U.S. 988 (1975)). The court may consider telling the jury that illustrative or demonstrative exhibits will not be available during deliberations. In addition, cautionary instructions should be given to the jury when summary charts are used for pedagogical purposes. *Soulard*, 730 F.2d at 1300.

The court may wish to include in the pretrial order a requirement that summary charts be produced in advance of trial. The court may also give a cautionary instruction both at the time the evidence is introduced and again during final instructions. *See* 9TH CIR. CIV. JURY INSTR. 3.9 & 3.10 (2001); 9TH CIR. CRIM. JURY INSTR. 4.18 & 4.19 (2003).

B. Summary of Testimony

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

In *Baker*, the Ninth Circuit criticized the admission of testimony, noting that "[p]ermitting an 'expert' witness to summarize testimonial evidence lends the witness' credibility to

that evidence and may obscure the jury's original evaluation of the original witnesses' reliability." *Baker*, 10 F.3d at 1412. The court found no undue prejudice, however, because of the precautions taken by the district court. The court had required the government to lay a foundation for the summary evidence outside the presence of the jury, continued the trial for over one week to give the defense time to examine the materials, gave limiting instructions three times during the agent's testimony, and invited defense counsel to present its own summary witnesses. In addition, the defense thoroughly cross-examined the witness about her methods of preparing the summaries, and her alleged selectivity and partiality. *Id. See also Olano*, 62 F.3d at 1204 (district court did not abuse its discretion in permitting a certified public accountant who was the case agent for the bank fraud investigation to give summary testimony of evidence presented by the government's preceding witnesses).

C. Summary Witnesses Using Charts and Exhibits

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

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

D. Summaries of Evidence by Counsel

"[A] summary of oral testimony is generally the purpose and province of closing argument." *Baker*, 10 F.3d at 1412. Thus, counsel may orally summarize and argue the evidence, and use charts and summaries as a visual aid. *Abbas*, 504 F.2d at 125. The court may also allow counsel to present mini-arguments during the trial. *See* § 3.17.

E. Judicial Comment on the Evidence

It is strongly recommended that the court not comment on the evidence. If the court comments upon the evidence, caution should be exercised in doing so. *Quercia v. United States*, 289 U.S. 466, 469-70 (1933). *See also Rodriguez v. Marshall*, 125 F.3d 739, 749 (9th Cir. 1997), *cert. denied*, 524 U.S. 919 (1998).

If the court comments on the evidence, judges must avoid the appearance of advocacy or partiality. *United States v. Sanchez-Lopez*, 879 F.2d 541, 552 (9th Cir. 1989) (defamation case). Nor may a judge comment on a witness's credibility if such credibility is a crucial factor in the case. *Id*. Reversal is also required if a judge expresses his opinion on an ultimate issue of fact in front of the jury or argues for one of the parties. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991). Judges should avoid making prejudicial remarks, especially in criminal cases. For instance, a judge may not comment on a criminal defendant's guilt. *United States v. Wills*, 88 F.3d 704, 718 (9th Cir.), *cert. denied*, 519 U.S. 1000 (1996). In sum, "[j]udicial comments must be aimed at aiding the jury's fact finding duties, rather than usurping them." *United States v. Stephens*, 486 F.2d 915, 917 (9th Cir. 1973).

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

A. Generally

"A recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy." *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir.) (citations omitted), *cert. denied*, 528 U.S. 912 (1999).

B. Preferred Procedure Regarding Accuracy of Transcripts

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

C. Foreign Language Tapes

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

D. Videotaped Depositions—Immigration Case

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

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

3.12 Jury Examination of Demonstrative Evidence

A. Jury View of the Scene

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

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

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

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

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

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

B. Jury Examination of Other Demonstrative Evidence

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

3.13 Incompetent Jurors; Late or Missing Jurors

A. Civil

The court has discretion to excuse jurors for cause during the trial. *United States v. Gay*, 967 F.2d 322, 324 (9th Cir.), *cert. denied*, 506 U.S. 929 (1992). A trial court's "need to manage juries, witnesses, parties, and attorneys, and to set schedules" are factors that can outweigh a party's right to a particular jury. *Id.* (citing *United States v. Jorn*, 400 U.S. 470, 479-80 (1971)). The removal of a juror must meet the "good cause" standard. *See* Fed. R. Civ. P. 47(c). Although "[s]ickness, family emergency or juror misconduct that might occasion a mistrial are examples of 'appropriate grounds' for excusing a juror" (Fed. R. Civ. P. 47(c) Advisory Committee Note 1991 Amendment), the judge's discretion is not limited to those scenarios. Before excusing a juror, the court should determine the basis for the actions and discuss the matter with the lawyers on the record.

B. Criminal

In a criminal case, the trial judge makes the determination whether to substitute alternates for sitting jurors who "are unable to perform or who are disqualified from performing their duties." Fed. R. Crim. P. 24(c).

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

In criminal cases, the court has discretion to excuse a juror for cause. Although no finding is required if a juror becomes manifestly unable to perform his or her duties, it is better to make an adequate record. *United States v. Lustig*, 555 F.2d 737, 745 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977), and *cert. denied*, 434

U.S. 1045 (1978). "Just cause" as used in Fed. R. Crim. P. 23(b) (providing for the removal of a juror for "just cause" after jury deliberations have begun) " . . . embraces all kinds of problems - temporary as well as those of long duration - that may befall a juror during jury deliberations." *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092 (1995) (In 2002, Rule 23 was amended to substitute "good" for "just" cause.)

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

3.14 Juror Exposure to Extrinsic Influences

A. In General

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

B. Evidentiary Hearing

Upon a motion for mistrial or new trial based on the jury's consideration of extrinsic evidence, "[a]n evidentiary hearing must be granted unless the alleged misconduct could not have affected the verdict or the district court can determine from the record before it that the allegations are without credibility." *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). *See also United States v. Wilson*, 7 F.3d 828 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994). In addition, the court "must" hold a fair evidentiary hearing when a reasonable possibility of prejudice to the jury's verdict arises from ex parte contacts with a juror. A "reasonable possibility" of prejudice does not arise when a court or its staff shows a "courtesy" to a juror by providing the juror a ride to a bus stop and such service was offered by the judge in open court and the defendant, who claimed his due process rights were violated, failed to object to this service. *United States v. Velasquez-Carbona*, 991 F.2d 574, 576 (9th Cir.), *cert. denied*, 508 U. S. 979 (1993). "[N]ot every incident of a juror's ex parte contact . . . constitute[s] actual prejudice . . . ." *United States v. Maree*, 934 F.2d 196, 20 (9th Cir. 1991). Rather, a new trial is warranted only "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *United States*

v. Plunk, 153 F.3d 1011, 1024 (9th Cir. 1998) (quoting from *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979)).

C. Types of Extraneous Influences

There are two different standards for judging extraneous influences on jurors. If the juror has been exposed to extraneous material, then the trial court should grant a new trial if there is a reasonable possibility that the material could have affected the verdict. *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998); *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). However, if the juror has been exposed to improper ex parte contact, the trial court should grant a new trial only if the court finds actual prejudice to the defendant. *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir.), *cert. denied*, 488 U.S. 912 (1988). *See also United States v. Harber*, 53 F.3d 236, 242 (9th Cir. 1995) (Where the intrusion into the jury's deliberations is by a law enforcement officer who was a prosecution witness or who made comments regarding the defendant's guilt, prejudice to the defendant's right to due process is inherent or presumptive.). *See* §§ 5.1.C and 6.3.

3.15 Removal of Counts or Defendants (Criminal)

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

Many times codefendants in a joint trial either enter a plea or are severed or dismissed. It is recommended that Instruction 2.13 from the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–Criminal (2003) dealing with the problem of the severed or dismissed defendant (or one of similar import) be utilized. This is a neutral, short explanation which, in effect, instructs the jury that the matter is no longer before them and should not be considered by them in any way in reaching the result as to the remaining defendants whose cases remain before them for resolution.

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

The court should attempt to obtain the agreement of counsel concerning the giving of and form of any explanatory instruction(s). The record should reflect the agreement or any objections to the giving or form of any explanatory instruction.

3.16 Cautionary and Curative Instructions

A. In General

An admonition is of particular importance when a serious matter has occurred in the jurors' presence and an admonition to disregard is needed by the court. Many times, a very strict and emphatic admonition may save a case that in other circumstances would have to be retried. *Williams v. Woodford*, 384 F.3d 567, 627-28 (9th Cir. 2004).

In addition to a cautionary admonition during trial, the court should use a jury instruction at the end of the case on "What is Not Evidence." *See* 9TH CIR. CRIM. JURY INSTR. 3.7 (2003); 9TH CIR. CIV. JURY INSTR. 3.3 (2001).

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

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

1. *Decision to Sever*

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

Rule 8(b), Fed. R. Crim. P., allows for the joinder of two or more defenses or defendants in the same indictment or information. Rule 14(a), Fed. R. Crim. P., in turn, permits a court to grant a severance if the joinder of offenses or defendants or a consolidation for trial "appears to prejudice a defendant or the government."

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

2. *Cautionary Instructions as Alternative*

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

Double jeopardy does not attach if the court grants a defendant's motion for severance during trial. *Jeffers v. United States*, 432 U.S. 137 (1977); *People v. Gill*, 59 F.3d 1010, 1012-14 (9th Cir. 1995).

See also § 3.15.

3.17 Mini-Arguments During Trial

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

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

3.18 Defendant's Testimony

A. Defendant's Right to Testify (Criminal)

Although a defendant's right to testify is well established, *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), a defendant must assert the right to testify before the jury has reached a verdict. *See United States v. Pino-Noriega*, 189 F.3d 1089, 1095-96 (9th Cir.), *cert. denied*, 528 U.S. 989 (1999). If the defendant does not testify, use Instruction 3.3 of the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL (2003). If the defendant testifies, use Instruction 3.4 of the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL (2003).

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

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

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

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

3.19 Closing Argument

A. In General

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

B. Response to Objectionable Closing Argument

The district court has a duty to dispel prejudice from the government's argument. *See United States v. Rodrigues,* 159 F.3d 439, 450-51 (9th Cir. 1998), *amended by* 170 F.3d 881 (9th Cir. 1999) (where district court did not "rebuke" government's counsel for "gratuitous attack on the veracity of defense counsel," district court took inadequate steps to dispel prejudice).

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

C. Admonishment of Counsel

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

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

D. Curative Jury Instructions

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

E. Time Limits

"A district court has wide discretion in limiting time for closing arguments. Provided a defendant has adequate time to make all legally tenable arguments supported by the facts of the case, the district court will not be reversed for limiting closing arguments." *United States v. Munoz*, 233 F.3d 1117, 1129 (9th Cir. 2000) (citations omitted) (trial court did not abuse discretion in denying defense attorney's request to use the remainder of his allotted time for argument after the government's rebuttal argument and a weekend recess). But care should be taken not to limit closing arguments unduly or arbitrarily.

3.20 Permitting Government to Reopen After Motion for Judgment of Acquittal

"A district court is afforded wide discretion in determining whether to allow the government to reopen and introduce evidence after it has rested its case." *United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001) (citation omitted).

"One purpose of [Fed. R. Crim P.] Rule 29 motions is to alert the court to omitted proof so that, if it so chooses, it can allow the government to submit additional evidence." *Id*. (citations omitted).

Chapter Four: Jury Instructions

Description:

This chapters contains materials dealing with instructing the jury.

Topics:

4.1 Duty of the Judge

"The district court must formulate jury instructions so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Abromson v. American Pac. Corp.*, 114 F.3d 898, 901 (9th Cir. 1997); *see also Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). Nonetheless, the district court has substantial latitude in tailoring jury instructions, and thus a party is not entitled to any particular form of instruction, *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir.), *cert. denied*, 506 U.S. 989 (1992), nor the precise words given in a proposed instruction. *United States v. Romero-Avila*, 210 F.3d 1017, 1023 (9th Cir. 2000); *Pavon v. Swift Transp. Co.,* 192 F.3d 902, 907 (9th Cir. 1999); *see also Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001), *cert. denied*, 535 U.S.1018 (2002).

It is also clear that a party is not entitled to a jury instruction that is unsupported by the evidence. *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1013 (9th Cir. 1999), *cert. denied*, 529 U.S. 1021 (2000).

In considering a party's request to give jurors an instruction that defines a common word, the trial court should take into account "the obvious, almost banal, proposition that the district court cannot be expected to define the common words of everyday life for the jury." *United States v. Somsamouth*, 352 F.3d 1271, 1275 (9th Cir. 2003) (in criminal prosecutions for making false representations to Social Security Administration–viz., that defendant could not work, thereby entitling him to SSI benefits–no error for trial court to refuse to define "work"), *cert. denied*, 124 S. Ct. 2049 (2004).

4.2 Submission of Instructions

Rule 30, Fed. R. Crim. P. and Rule 51, Fed. R. Civ. P., govern instructions to a jury in a criminal and civil case, respectively. Both rules provide that at the close of the evidence or at an earlier time that the court reasonably sets, a party may file a written request that the court instruct the jury on the law as specified in the request. In civil cases a party may also file requests for instructions after the close of the evidence on issues that could not reasonably have been anticipated at an earlier time set for requests. Fed. R. Civ. P. 51(a)(2). When the request is made, the requesting party must furnish copies to every other party. The court should be careful to consider instructions submitted at any time during trial. *See* Fed. R. Crim. P. 30; Fed. R. Civ. P. 51.

Ordinarily a party may not assert error where an instruction was not submitted in writing, *Swiderski v. Moodenbaugh*, 143 F.2d 212, 213 (9th Cir. 1944). However, where the pretrial order specified the parties' legal contention, and the record demonstrated that the trial court was fully informed but believed the contention in error, the fact that the charge was requested orally did not preclude a finding of error. *Id*.

4.3 Model Jury Instructions

1. The Ninth Circuit Jury Instructions Committee has prepared Manuals of Model Jury Instructions, both civil and criminal. These instructions are continually reviewed by the Committee and updated on a regular basis. In addition to the book format, the model instructions, and revisions thereto, are available online by accessing the "Publications" area of the Ninth Circuit's website at http://www.ce9.uscourts.gov.

2. When requesting instructions relative to state law, counsel should be instructed that, where possible, they should utilize model jury instructions approved in that state.

3. As the introductions to the Ninth Circuit model instructions note, the instructions are models that must be carefully reviewed for use in a particular case. They are not intended to discourage judges from using their own forms and techniques for instructing juries. *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997), *cert. denied*, 523 U.S. 1103 (1998).

Practical Suggestions

Manner of Submission of Instructions

1. The trial court should require that counsel submit proposed instructions prior to the commencement of the trial. Notwithstanding any deadline set by the court, however, the court is obligated under Fed. R. Crim. P. 30 to consider any instructions submitted by counsel during the trial.

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

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

4.4 Record on Instructions

A. In General

Both the civil and criminal rules provide that the court must inform counsel of its proposed action upon the requested instructions prior to their arguments to the jury. The purpose of these rules is to avoid error by affording the trial judge an opportunity to correct instructions before the jury has decided the case. *Investment Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975). A failure to inform counsel of the disposition of their requested instructions is reversible error if it affects closing argument. *United States v. Gaskins,* 849 F.2d 454, 458 (9th Cir. 1988).

Both the civil and criminal rules require the court to provide an opportunity for counsel to make the objection out of the hearing of the jury and, in the case of criminal cases, out of the presence of the jury. It is customary for the court to have an in chambers conference with counsel in which the instructions are discussed and settled. While it is clear that a defendant in a criminal case need not be present during the discussions settling the instructions, *see United States v. Romero*, 282 F.3d 683, 689-90 (9th Cir.), *cert. denied*, 537 U.S. 858 (2002); *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987), some judges prefer to settle the instructions in open court with the jury excused and the defendant present**.** If so, it would appear advisable that the entire discussion concerning instruction be on the record.

B. Criminal Cases

It is the court's responsibility to ensure that the instructions adequately present the defendant's theory of the case. *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir. 2000). Moreover, upon proper request, a specific instruction as to the defendant's theory of the case must be given, *United States v. Hall*, 552 F.2d 273, 275 (9th Cir. 1977), unless there is no evidence to support it. *United States v. Winn*, 577 F.2d 86, 90 (9th Cir. 1978).

Rule 30, Fed. R. Crim. P., requires that a defendant object to instructions with adequate specificity; an objection must distinctly state the matter to which the party objects, as well as "the grounds for the objection." Fed. R. Crim. P. 30; *see also United States v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989) (Rule 30 requires that a party make a "formal, timely and distinctly stated objection"). Offering an alternative instruction alone is not enough to satisfy the specificity objection. *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Williams*, 990 F.2d 507, 511 (9th Cir.), *cert. denied*, 510 U.S. 926 (1993). The district court must be made fully aware of the objecting party's position. *See Kessi*, 868 F.2d at 1102.

Global objections to the court's instructions, for instance "to the extent they are inconsistent to the ones that [were] submitted" are insufficient. *United States v. Elias*, 269 F.3d 1003, 1016 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002). Where there is no objection, review of jury instructions is subject to plain error analysis. *United States v. Matsumaru*, 244 F.3d 1092, 1102 (9th Cir. 2001); *see also United States v. Keys*, 133 F.3d 1282 (9th Cir.) (en banc), *amended by* 143 F.3d 479 (9th Cir.) and 153 F.3d 925 (9th Cir.), *cert. denied*, 525 U.S. 891 (1998)).

All instructions must be read by the judge to the jury, *Morris v. United States*, 156 F.2d 525, 531 n.4 (9th Cir. 1946), in the presence of counsel and the defendant. *People of the Territory of Guam v. Marquez*, 963 F.2d 1311, 1314 (9th Cir. 1992).

C. Civil Cases

Rule 51, Fed. R. Civ. P., which was substantively amended in 2003, allows a party to file a written request for instructions. The Ninth Circuit has said, however, that "[w]e have recognized one exception to the requirement of strict compliance with Rule 51. That exception is when it is obvious that in the process of settling the jury instructions the court was made fully aware of the objections of the party and the reasons therefor and further objection would have been unavailing." *United States for Use &*

Benefit of Reed v. Callahan, 884 F.2d 1180, 1184 (9th Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

The court must inform the parties of its proposed instructions and proposed action on the requests for instructions before final arguments are made to the jury. Fed. R. Civ. P. 51(b)(1). A party must object to the instructions on the record "stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51(c)(1). An objection is timely if (A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments objects as provided in Rule 51(b)(2); or (B) a party that has not been informed of an instruction or action on a request objects promptly after learning that the instruction will be, or has been, given or refused. Fed. R. Civ. P. 51(c)(2).

Rule 51 provides that a party may assign as error (A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or (B) a failure to give an instruction if that party made a proper request under Rule 51(a), and, unless the court made a definitive ruling on the record rejecting the request, also made a proper objection under Rule 51(c). Fed. R. Civ. P. 51(d)(1). However, "[a] court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B)." Fed. R. Civ. P. 51(d)(2).

As with Rule 30, Fed. R. Crim. P., the court in civil cases must give the parties an opportunity to make the objections out of the hearing of the jury. Fed. R. Civ. P. 51(b)(2). The parties should make all objections on the record.

4.5 Preliminary Charge and Final Instructions

A. Preliminary Charge to Jurors

In addition to the preliminary instructions, some judges give a preliminary charge to the jury regarding the elements of the offense and related principles. *See* 9TH CIR. CRIM. JURY INSTR. Preliminary Instructions 1.1-1.13 (2003); 9TH CIR. CIV. JURY INSTR. Preliminary Instructions 1.1-1.16 (2001). If the judge gives the jury a preliminary charge on the elements of the offense, the jury should be cautioned that the formal charge to the jury will come at the end of the trial and will be binding on the jury.

See also §§ 3.2 and 3.3.

B. Formal Charge at End of Trial

Many courts are now instructing at the close of the evidence and before argument. The Federal Rules were specifically amended in 1987 to permit this practice. *See* Fed. R. Crim. P. 30(c); Fed. R. Civ. P. 51(b)(3). Accordingly, a judge has discretion to give the bulk of the instructions (including a description of the elements of the claims or offenses) before argument. The judge may then instruct on the rules governing deliberations after counsel have concluded their arguments.

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

C. Providing Copies of Instructions to Jury

The trial court should furnish the jury with a copy of the written instructions to assist them during deliberations. *See United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir.) (". . . the preferred procedure [is] sending a copy of [the] instructions to the jury at the start of deliberations"), *cert. denied*, 592 U.S. 1066 (1990); *and see United States v. Tagalicud*, 84 F.3d 1180, 1184 (9th Cir. 1996) (criticizing the trial court for giving instructions once, orally, and for not sending the jury instructions into the jury room). The trial court may consider providing a copy of the jury instructions to each juror during the reading of the instructions and for use during deliberations.

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

D. Supplemental Instructions During Deliberations

See § 5.2.C.

4.6 Jury's Use of Indictment (Criminal)

A. Availability of Indictment to Jury During Trial and Deliberations

It is established that the trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment during jury deliberations. *See United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974), *cert denied,* 419 U.S. 1120 (1975). *See also United States v. Petersen*, 548 F.2d 279, 280 (9th Cir. 1977) (holding that a trial judge has the discretion to refuse a defendant's request that a copy of the information be furnished to the jury). Nonetheless, the Committee believes that great caution should be exercised in providing a jury with the indictment since it is frequently cast in highly prejudicial language.

B. Tailoring the Indictment

If the judge nonetheless determines that it is appropriate to provide the jury with a copy of the indictment, care should be taken to tailor the indictment limiting it to the issues before the jury. So long as the court does not add anything or broaden the scope of the indictment, it may withdraw surplusage from the jury's consideration. *See Ford v. United States*, 273 U.S. 593, 602 (1927) (holding that the striking of surplusage is not an unconstitutional amendment of an indictment); *see also United States v. Fullbright*, 105 F.3d 443, 452 (9th Cir.), *cert denied,* 520 U.S. 1236 (1997).

Practical Suggestion

Redacting Indictment for Jury's Use

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

Chapter Five: Jury Deliberations

Description:

This chapter contains materials dealing with jury deliberations and verdicts.

Topics:

5.1 Communications with a Deliberating Jury

A. In General

The judge should utilize procedural safeguards during communications with the jury. *See United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979) (noting that defendants should have adequate opportunities to evaluate the propriety of proposed responses or instructions). Such safeguards should include the judge providing the parties with the question, hearing comments, communicating the decision, allowing an opportunity to object, and announcing an answer to the jury question before relaying that answer to the jury. All of these procedures should be on the record.

B. Judge's Physical Absence During Deliberations

Trial judges are encouraged to be physically present for proceedings during jury deliberations, and their absence under many circumstances would constitute error. *United States v. Arnold*, 238 F.3d 1153, 1155 (9th Cir.) (replying to jury's question after telephonic conference with attorneys was not error since judge dictated a response to the question, which was delivered to the jury), *cert denied*, 533 U.S. 937 (2001). In addition, a substitute judge should certify, if possible, that he is familiar with the record. *United States v. Lane*, 708 F.2d 1394, 1396 (9th Cir. 1983).

C. Improper Communications

1. *Ex Parte Communications and Contacts*

The court should refrain from all communications with members of the jury outside the presence of counsel. *United States v. United States Gypsum Co.*, 438 U.S. 422, 460-61 (1978) (holding improper an ex parte communication between the trial judge and the foreperson).

Ninth Circuit precedents "distinguish between introduction of 'extraneous evidence' to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case." *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir.), *cert denied*, 531 U.S. 919 (2000). "Where ex parte contacts are involved, the defendant will receive a new trial only if the court finds 'actual prejudice' to the defendant." *Id*. at 906 (*quoting United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991)).

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 142 (1892). The Ninth Circuit has held that *Mattox* established a bright-line rule: "[a]ny unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing." *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 696 (9th Cir.) (citations omitted), *cert. denied,* 125 S. Ct. 314 (2004); *see also Rinker v. County of Napa*, 724 F.3d 1352, 1354 (9th Cir. 1983) (applying the *Mattox* rule to a civil action). On the other hand, if "an unauthorized communication with a juror is *de minimis,* the defendant must show that the communication could have influenced the verdict before the burden of proof shifts to the prosecution." *Caliendo,* 365 F.3d at 696. (citations omitted). Whether an unauthorized communication between a juror and a third party concerned the case is only one factor in determining whether the communication raised a risk of influencing the verdict. Other factors may include "the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction." *Id.* at 697-98.

2. *Extrinsic Material During Deliberations*

The jury's exposure to extrinsic material will only warrant a new trial "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *United States v. Plunk,* 153 F.3d 1011, 1024 (9th Cir. 1998) (*quoting Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987)). Courts evaluate "five separate factors to determine the probability of prejudice: (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict." *Plunk*, 153 F.3d at 1024-25 (internal quotation marks omitted).

See §§ 3.14 and 6.3.

3. *Jury Tampering*

"In a criminal case, any . . . tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . .." *Remmer v. United States*, 347 U.S. 227, 229 (1954). *See also United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999) (tampering with jury by co-defendant required reversal of conviction unless government could show no reasonable possibility existed that jury's decision was affected).

D. Investigating Alleged Jury Misconduct

1. *In General*

The trial judge may examine each juror concerning the circumstances of alleged misconduct. This should be done on the record in the presence of counsel and the defendant (in a criminal

case). Counsel should be permitted to ask questions, through the court, and provided an opportunity to be heard (outside of the juror's presence).

When examining jurors individually, the trial judge should bear in mind that repeated questioning could itself be prejudicial in causing jurors to become curious about the subject matter of the inquiry. Each juror should be admonished not to discuss the content of such inquiries with the other jurors. *Silverthorne v. United States*, 400 F.2d 627, 640-41 (9th Cir. 1968). *See also Smith v. Phillips*, 455 U.S. 209, 216-17 (1982).

2. *Necessity for Evidentiary Hearing*

"An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) (internal citations omitted). *See also United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir. 1999) (finding no error where district court refused to conduct evidentiary hearing on juror bias).

5.2 Jury Questions During Deliberation

A. General Procedure for Considering Jury Questions

There are many procedures for handling jury questions. Jury instructions should direct jurors to submit any questions they have to the court in writing, and to continue deliberations until the court responds. *See* 9TH CIR. CRIM. JURY INSTR. 7.6 (2003). Upon receipt, a question should be delivered promptly to the trial judge.

The judge should then assemble the attorneys for the respective parties, either in person or by telephone on the record. The question should be read and comments should be elicited from the attorneys regarding an appropriate response. Criminal defendants have a Sixth Amendment right to attorney representation at a conference with the judge concerning a jury's question. *United States v. Barragan-Devis,* 133 F.3d 1287, 1289 (9th Cir. 1998). Criminal defendants also have the right to be present, unless the subject matter concerns solely questions of law. *See also* § 1.6.

After consulting with counsel on the record, the court may deliver the response to the jury in writing or on the record orally in open court. If the court wishes to respond in writing, the recommended procedure is to obtain the consent of the parties.

Occasionally, a jury's note may reveal how it stands, numerically or otherwise, on a given issue despite the court's standard instruction to the contrary. *See* 9TH CIR. CRIM. JURY INSTR. 7.6 (2003). While it might not be an abuse of discretion under certain circumstances to withhold the existence or nature of the jury split from counsel, *United States v. Henry*, 325 F.3d 93, 106 (2nd Cir.), *cert. denied,* 124 S. Ct. 203 (2003), in general, "district courts should reveal the existence and the contents of any and all jury notes to both sides and allow counsel to suggest an appropriate response." *Id*. at 105.

Moreover, the court should be especially cautious when giving an *Allen* charge after learning of the jury's numerical split. *See*

§ 5.4.C(4); *see also United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992). An *Allen* charge should not be given if the court learns the identity of the holdout jurors. *See United States v. Sae-Chua*, 725 F.2d 530, 532 (1984).

If the jury submits a question regarding the consequences of a guilty verdict, it is recommended that the court give 9TH CIR. CRIM. JURY INSTR. 7.4 (2003) (Jury Consideration of Punishment).

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

B. Responding to Questions from the Jury about Jury Instructions

The court may reread an instruction to the jury, or advise the jury to reread an instruction in the set provided in writing. *See* § 4.5.C. It may reject a party's request to repeat other instructions in conjunction with the jury's question. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 446 U.S. 923 (1980); *United States v. Bay*, 820 F.2d 1511, 1514-15 (9th Cir. 1987).

C. Supplemental Jury Instructions

When a question indicates confusion about the original instructions, supplemental instructions may be necessary to eliminate the apparent confusion. In these circumstances, it may be error to merely refer the jury to the original instructions.

The court should carefully consider additional instructions, and ensure that they are not coercive or prejudicial to either party. *See e.g. United States v. Hannah*, 97 F.3d 1267, 1269 (9th Cir. 1996), *cert. denied*, 519 U.S. 1137 (1997); *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir. 1988); *United States v. Tham*, 665 F.2d 855, 858 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982); *United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976).

"[I]f a supplemental jury instruction given in response to a jury's question introduces a new theory to the case, the parties should be given an opportunity to argue the new theory . . . to prevent unfair prejudice." *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). *See also Hannah*, 97 F.3d at 1269 (holding no prejudice where court permitted additional closing argument on supplemental instructions); *United States v. Warren*, 984 F.2d 325, 329-30 (9th Cir. 1993); *Gaskins*, 849 F.2d at 458 (finding prejudice where the court gave supplemental instructions but no additional time for argument to address the new theory).

D. Requests for Readbacks of Testimony

Practical Suggestion

Evaluating Requests for Readbacks

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

1. *In General*

The court has discretion to read back portions of testimony to a jury. *United States v. Binder*, 769 F.2d 595, 600 (9th Cir. 1985). *See also Jury Requests to Have Transcripts of Testimony Read Back or Furnished*, BENCH COMMENT (Fed. Jud. Center, Washington D.C.), August 1991.

Although the court has broad discretion on readbacks, it "should balance the jurors' need to review the evidence before reaching their verdict against the difficulty involved in locating the testimony to be read back, the possibility of undue emphasis on a particular portion of testimony read out of context, and the possibility of undue delay in the trial." *United States v. Criollo,* 962 F.2d 241, 243 (2d Cir. 1992). *See also United States v. Felix-Rodriguez*, 22 F.3d 964, 966 (9th Cir. 1994) (weighing need for evidence against danger of undue influence and delay).

Furnishing prior testimony may place undue emphasis on that testimony. This is particularly true when the testimony repeated to the jury directly contradicts the defendant's testimony or that of

other defense witnesses. *United States v. Sacco*, 869 F.2d 499, 501-02 (9th Cir. 1989).

2. *Cautionary Instruction Regarding Readbacks*

Jurors should be told to give full consideration to the entirety of the testimony when a specific witness's testimony is read back in part or in full. *United States v. Sandoval*, 990 F.2d 481, 486-87 (9th Cir.), *cert. denied*, 510 U.S. 878 (1993). *See also United States v. Hernandez,* 27 F.3d 1403, 1409 (9th Cir. 1994), *cert. denied*, 513 U.S. 1171 (1995) ("[T]he district court permitted undue emphasis when it failed to admonish the jury to weigh all the evidence . . .").

A cautionary instruction can mitigate the danger of undue emphasis. *See United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989) (finding no error from testimony read back where "trial court cautioned the jury about the danger of concentrating on the testimony of only one witness and instructed the jurors to reach their decision on the basis of all of the evidence."), *cert. denied*, 498 U.S. 845 (1990).

3. *Blanket Refusal to Provide Readback Disapproved*

The Ninth Circuit has found no error, absent a showing of prejudice, in the trial judge's admonishing the jury not to abuse the readback privilege. *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995) ("[T]he trial judge's statement, 'I want you to use [the readback privilege] if you need it but please don't utilize the reporter frivolously,' did not violate Turner's constitutional rights."), *cert. denied*, 522 U.S. 1153 (1998), *overruled in part by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999).

However, one Court of Appeals has concluded that "the district court erred in announcing before jury deliberations began a prohibition against readbacks of testimony." *Criollo,* 962 F.2d at 244. *See also United States v. Damsky,* 740 F.2d 134, 138 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984) (discouraging readbacks

by urging jurors to "exhaust [their] collective memories" first "does not seem to be a particularly wise policy"). *But see United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir. 1976) (per curiam) (although not subscribing to wisdom of policy of no readbacks, not abuse of discretion where court explained its rule as being an inducement to jurors to pay close attention).

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

4. *A Defendant's Right to be Present at Readbacks*

Defendant has the right to be present at readbacks when defendant's absence could undermine "the fairness of the proceedings." *Fisher v. Roe*, 263 F.3d 906, 915 (9th Cir. 2001). *See also*, *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (harmless error on facts presented), *cert. denied*, 522 U.S. 1153 (1998), *Felix-Rodriguez*, 22 F.3d at 967-68 (concluding absence was harmless); *La Crosse v. Kernan,* 244 F.3d 702, 707-08 (9th Cir. 2001) (noting that while the Supreme Court has not recognized readbacks as a critical stage of the trial, triggering the defendant's right to be present, the Ninth Circuit generally recognizes this right).

E. Materials Sent to Jury Room

1. *Transcript of Testimony*

The trial court should probably never send a transcript of testimony into the jury room. If it decides to do so, great caution should be exercised. "To avoid the possibility of this undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the court, with the defendant and attorneys present." *United States v. Hernandez*, 27 F.3d 1403, 1404, 1408 (9th Cir. 1994) (reversing because court allowed

witness transcript into jury room without adequate precautions), *cert. denied*, 513 U.S. 1171 (1995).

2. *Tape Recordings*

a) *Recordings Played During Trial*

Generally, recordings played during trial should not be sent to the jury room without the defendant's personal consent or waiver. "[T]he period when the jurors listen to tapes is 'properly viewed as a stage of the trial at which the presence of the defendant is required.'" *See United States v. Noushfar*, 78 F.3d 1442, 1444 (9th Cir. 1996) (summarizing prior cases). However, any such error is reviewed for harmlessness. *Id*. at 1445.

b) *Recordings Not Played During Trial*

Tape recordings that have not been played to the jury during trial should not be sent to the jury room during deliberations. Permitting the jury to replay such recordings without any meaningful cautionary instructions from the judge and over the vigorous objections of defense counsel is structural error requiring automatic reversal. *Noushfar*, 78 F.3d at 1445-46.

3. *Translated Transcripts of Tape Recordings*

a) *Transcripts Used At Trial*

Where there is no dispute as to the accuracy of the translated transcripts, it is within the discretion of the district court to permit the jury to take these transcripts into the jury room. *United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001).

b) *Transcripts Not Used At Trial*

It is "not a preferred procedure to send translated transcripts into the jury room when they have not been read to or by the jury in open court . . .." *United States v. Franco*, 136 F.3d 622, 625-28 (9th Cir. 1998) (distinguishing *Noushfar* and finding no reversible error in permitting translated transcripts into the jury room after defendants stipulated to authenticity, did not object, and had "excused" the reading of the transcripts to the jury during trial).

5.3 Number of Jurors, Removal, and Seating Alternates (Criminal)

A. Size of Jury

1. *Generally*

Unless provided otherwise in Fed. R. Crim. P. 23, a jury in a criminal case consists of 12 persons. Fed. R. Crim. P. 23(b)(1).

2. *Upon Stipulation of the Parties*

At any time before the verdict (even after the beginning of deliberations), the parties may stipulate in writing, with the court's approval, that:

a) the jury may consist of fewer than 12 persons, or
b) a jury of fewer than 12 persons may return a verdict if a juror is excused by the court for good cause. (In 2002, Rule 23 was amended to substitute "good" for "just" cause.)
Fed. R. Crim. P. 23(b)(2)(A), (B).

Although there is not a clear minimum number of jurors required to return a verdict upon the parties' stipulation and the court's approval, a sufficient number of jurors must remain so as to constitute the "essential feature of a jury." *See Advisory Committee Notes to 1983 Amendments to Rule 23.*

3. *Without Stipulation of the Parties*

After the jury begins deliberations, the court may permit a jury of 11 persons to return a verdict, even absent stipulations of the parties, if the court excuses a juror for good cause. Fed. R. Crim. P. 23(b)(3).

B. Removal of Jurors

1. *In General*

The court must have an adequate basis for finding good cause to excuse a juror. (In 2002, Rule 23 was amended to substitute "good" for "just" cause.) Good cause "generally focuses on sickness, family emergency, or juror misconduct." *See United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998). Good cause may arise when the length of a juror's absence is unknown, such as from sickness. Good cause may also exist when a prolonged absence would result in dulled memories during a lengthy and complex trial. *See United States v. Tabacca*, 924 F.2d 906, 914-15 (9th Cir. 1991) (excusing a juror who could not attend one day of a two-and-one-half-day trial was reversible error). *See also United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985) (excusing juror who notified the court of upcoming religious holiday was not an abuse of discretion since jury would have been forced to wait four and one-half days), *cert. denied*, 476 U.S. 1162 (1986).

2. *Grounds for Excusing a Deliberating Juror*

Trial courts may dismiss and replace jurors whose physical or mental condition prevents effective participation in deliberations. *Perez v. Marshall*, 119 F.3d 1422, 1426-28 (9th Cir. 1997) (replacing juror who was emotionally incapable of deliberating was not error), *cert. denied*, 522 U.S. 1096 (1998).

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

C. Alternate Jurors

1. *Seating Alternate Jurors*

The court may impanel up to 6 alternate jurors who (1) have the same qualifications, and (2) were selected and sworn in the same manner as any other juror to replace any jurors who are unable to perform or who are disqualified from performing their duties. Fed. R. Crim. P. 24(c).

2. *Retaining Alternate Jurors*

"The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged." Fed. R. Crim. P. 24(c)(3).

3. *Substituting Alternate Jurors During Deliberations*

"If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." Fed. R. Crim. P. 24(c)(3).

5.4 "*Allen*" Charge

A. In General

"An *Allen* charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty." *Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th Cir. 1997), *cert. denied*, 524 U.S. 919 (1998).

In *Allen v. United States*, 164 U.S. 492, 501-02 (1896), the United States Supreme Court upheld a supplemental instruction given to a deadlocked jury that urged jurors to reconsider their opinions and continue deliberating. All circuit courts of appeal have since upheld some form of supplemental "*Allen*" charge. *Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1 (1988). The circuits differ, however, in their approval of the form and timing of supplemental instructions. *United States v. Wills*, 88 F.3d 704, 716 n.6 (9th Cir.) (reviewing circuit case law on *Allen* instruction), *cert. denied*, 519 U.S. 1000 (1996).

In the Ninth Circuit, an *Allen* charge is upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury. *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992). *See also United States v. Croft*, 124 F.3d 1109, 1123 (9th Cir. 1997); *United States v. Mason*, 658 F.2d 1263, 1266 (9th Cir. 1981) (approving charges "only if in a form not more coercive than that approved in *Allen*"). The same instruction is recommended for both civil and criminal trials. *See* NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS– CRIMINAL INSTR. 7.7 Deadlocked Jury (2003); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL INSTR. 4.6 Deadlocked Jury (2001).

B. Timing

The *Allen* instruction is usually delivered after the jury announces a deadlock, but may be given as part of an original charge. *Wills*, 88 F.3d at 716. An *Allen* charge included in the

initial instructions is less coercive than one provided after the jury reaches impasse. *United States v. Armstrong*, 654 F.2d 1328, 1334-35 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

Generally, a second *Allen* charge is impermissible. *United States v. Seawell*, 550 F.2d 1159, 1162-63 (9th Cir. 1977), *cert. denied*, 439 U.S. 991 (1978). However, it may not be error under certain limited circumstances to repeat the *Allen* charge after the jury announces a deadlock if the first *Allen* charge was given as part of the original instructions. *Armstrong*, 654 F.2d at 1334. The court should not give an *Allen* charge again in response to the jury's disclosure that it remains deadlocked. *See United States v. Nickell*, 883 F.2d 824, 828 (9th Cir. 1989).

C. Coercion

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

1. *Form or Content of Allen Charge*

See NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CRIMINAL INSTR. 7.7 Deadlocked Jury (2003); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS–CIVIL INSTR. 4.6 Deadlocked Jury (2001).

Allen instructions should caution jurors not to abandon their conscientiously held views. *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995). While it is helpful to incorporate an instruction on the burden of proof, its absence does not necessarily require reversal. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1350 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996); *United*

States v. Cuozzo, 962 F.2d 945, 952 (9th Cir.), *cert. denied*, 506 U.S. 978 (1992).

Allen charges should not refer to the possibility of a retrial. *United States v. Hernandez*, 105 F.3d 1330, 1334 (9th Cir.) ("The district court should not have mentioned the possibility of retrial."), *cert. denied*, 522 U.S. 890 (1997).

2. *Period of Deliberation Following the Allen Charge*

A relatively short deliberation after an *Allen* charge does not raise a suspicion of coercion if the jury decided simple issues. *Hernandez*, 105 F.3d at 1334 (40 minutes of additional deliberations); *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985) (one and one-half hours of additional deliberations). Nor do extended deliberations after the supplemental instruction necessarily raise a suspicion of coercion. *Wills*, 88 F.3d at 718 (four days of additional deliberations); *United States v. Easter*, 66 F.3d 1018, 1023 (9th Cir. 1995) (two and one-half hours of additional deliberation), *cert. denied*, 516 U.S. 1150 (1996); *Lorenzo*, 43 F.3d at 1307 n.3 (five and one-half hours additional deliberations). However, "[a] jury verdict reached immediately after an *Allen* charge can be an indication of coercion." *Bonam*, 772 F.2d at 1451.

3. *Total Time of Jury Deliberations*

In addition to the deliberation time following the charge, appellate courts will also consider the total amount of time the jury deliberated. *Cuozzo*, 962 F.2d at 952 (finding no appearance of coercion where the total time of deliberation was proportionate for an eleven-day trial, after which the jury deliberated two days before receiving the *Allen* charge, and six additional hours after it).

4. *Indicia of Coercion*

a. Court's Reference to Expense of Trial or Retrial

An *Allen* charge should not refer to the costs of trial or the possible need for retrial. *Hernandez*, 105 F.3d at 1334; *Bonam*, 772 F.2d at 1450.

b. Court's Knowledge of Division of Jurors

No indication of coercion arises when the judge does not know the numerical division of the jury, the jury's leaning, or any particular juror's inclination. *Easter*, 66 F.3d at 1023. The judge should avoid learning the split or the identity of holdout jurors. *Ajiboye*, 961 F.2d at 894.

If the judge learns of a numerical split, even inadvertently, extreme caution should be exercised before giving an *Allen* instruction. *Ajiboye*, 961 F. 2d at 893-94. Similarly, an *Allen* charge should not be given if the court learns the identity of the holdout jurors. *United States v. Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984).

5.5 Declaring the Jury Deadlocked

A. In General

In either a civil or criminal trial, if the jury is unable to agree upon a verdict, the court may either discharge the jury or return the jury to the jury room for further deliberations. Prior to discharging the jury, the trial judge must determine whether there is a probability that the jury can reach a verdict within a reasonable time. Upon receiving a communication from the jury stating that it cannot agree, the trial court is required to question the jury to determine independently whether further deliberations might overcome the deadlock. *United States v. Cawley*, 630 F.2d 1345, 1349 (9th Cir. 1980). Questioning the foreperson individually and the jury either individually or as a group is satisfactory. *United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). Merely questioning the jury foreperson may be insufficient. *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978).

B. Deadlock Resulting in Mistrial

If a criminal defendant does not seek a mistrial, to forestall double jeopardy claims, the court must find that manifest necessity supports discharging the jury. *United States v. Sammaripa*, 55 F.3d 433, 434 (9th Cir. 1995). A deadlocked jury is a classic example of "manifest necessity," authorizing the court to declare a mistrial without violating the prohibition against double jeopardy. *See Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Richardson v. United States*, 468 U.S. 317, 326 (1984); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000).

> In determining whether to declare a mistrial because of jury deadlock, relevant factors for the district court to consider include the jury's collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of

exhaustion or coercion on the jury. *Hernandez-Guardado*, 228 F.3d at 1029.

Before discharging a jury and declaring a mistrial, the court should provide the parties an opportunity to "comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Fed. R. Crim. P. 26.3. After taking the above steps, the court's decision to discharge the jury and declare a mistrial is afforded great deference upon finding the jury hopelessly deadlocked. *Hernandez-Guardado*, 228 F.3d at 1029.

Practical Suggestions

Procedure for Determining if Jury is Deadlocked

Initially, the court may ask the foreperson the following questions:

> "Is there anything else the court can do to assist in the jury's deliberations?"
>
> "Would an additional instruction assist in your deliberations?"
>
> "Would the rereading of any testimony help the jury reach a conclusion?"

If the foreperson's response to all three questions is, "No," then inquire "In your opinion, is the jury hopelessly deadlocked?" If the foreperson's response is, "Yes," ask the foreperson, "Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?"

If the foreperson's response is,"No," then ask the following question of each member of the panel, "Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?" The court may wish to poll the jury and record their answers which must be yes or no. *See Hernandez-Guardado*, 228 F.3d at 1029 ("The most critical factor is the jury's own statement that it is unable to reach a verdict. Without more, however, such a statement is insufficient to support a declaration of mistrial.") (internal quotations and citations omitted).

C. Jury's Numerical Division

A court's inquiry into the jury's numerical division constitutes reversible error. *Brasfield v. United States*, 272 U.S. 448, 449-50 (1926); *Jimenez v. Myers*, 40 F.3d 976, 980 n.3 (9th Cir. 1993), *cert. denied*, 516 U.S. 813 (1995).

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

See also § 5.2A.

5.6 Verdicts

A. In General

An agreement among jurors becomes a final verdict only after it has been returned in open court and recorded. *United States v. Kanahele*, 951 F. Supp. 945, 946 (D. Haw. 1997), citing *Rice v. Wood,* 44 F.3d 1396, 1402 (9th Cir. 1995), *vacated in part on reh'g en banc on other grounds*, 77 F.3d 1138 (9th Cir. 1996).

B. Written Verdict Controls

When a court misreads a written verdict, the written verdict controls, even if the jurors failed to correct the trial court's misreading. It is unreasonable to expect the jurors to correct the court, or to conclude by their silence their assent to the misread verdict. *United States v. Boone*, 951 F.2d 1526, 1532-33 (9th Cir. 1991).

C. Partial Verdicts

In a case involving multiple defendants and/or multiple counts, a jury may return verdicts on some counts and deadlock on others. *See* Fed. R. Crim. P. 31(b).

Juries "should be neither encouraged nor discouraged to return a partial verdict but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants." *United States v. Dolah,* 245 F.3d 98, 108 (2d Cir. 2001) (citing *United States v. DiLapi*, 651 F.2d 140, 147 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982). "The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one." *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) (*citing United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986)).

The trial court has broad discretion to question a potentially deadlocked jury about its ability to reach a partial verdict. *See United States v. Armstrong*, 654 F.2d 1328, 1333 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); *United States v. Kanahele*, 951 F. Supp. 945, 947 (D. Haw. 1996).

D. Forms of Special Verdicts

1. *Civil*

The court has wide discretion to use a variety of forms of verdict. Fed. R. Civ. P. 49(a). *See also Zhang v. American Gem Seafoods, Inc.,* 339 F.3d 1020, 1031-32 (9th Cir. 2003) (discussing various forms of verdict), *cert. denied*, 124 S. Ct. 1602 (2004).

Before closing arguments, the form of the verdict should be decided so that counsel can effectively structure their final arguments. This also enables the court to tailor its instructions. *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1374 (9th Cir. 1987); *see also* MANUAL FOR COMPLEX LITIGATION § 11.633 (Fed. Jud. Center, 4th ed. 2004) (discussing the benefits of having counsel draft and submit proposed verdict forms at the pretrial conference).

2. *Criminal*

"Although there is no per se prohibition '[a]s a rule, special verdicts in criminal trials are not favored.'" *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) (*quoting United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976)).

"Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances." *Reed*, 147 F.3d at 1180 (citing numerous cases in which special verdicts have been upheld). Special verdict forms are often necessary to satisfy the

requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

E. Coerced Verdict

Coerced verdicts require a new trial. *Rinehart v. Wedge*, 943 F.2d 1158, 1160 (9th Cir. 1991) (affirming the grant of a new trial where the court recalculated a general verdict, and polled the jury to ratify the recalculated verdict, thereby intruding on the jury's deliberative process and coercing the verdict). *See also* § 5.4.

Chapter 6: Post-Verdict Considerations

Description:

This chapter contains materials dealing with post-trial matters.

Topics:

6.1 Post-Verdict Interview of Jurors

A. Court Interviews

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

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

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

B. Attorney Interviews

Attorneys frequently request post-trial interviews to learn how the jurors reacted to their presentation during trial and to explore whether the verdict is vulnerable to legal challenge. However, interviews are discouraged in the Ninth Circuit. *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980); *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972). The local rules in some districts prohibit post-trial interviews of jurors without leave of the court.

Such interviews may have only limited value to the attorneys because a verdict may not be impeached on the basis of the jury's deliberations or the manner in which it arrived at its verdict. Federal Rule of Evidence 606(b) prohibits a juror's subsequent testimony as to matters occurring during deliberations except that a juror may testify as to extraneous prejudicial information or outside influence improperly brought to bear upon any juror. *See also United States v. Williams,* 990 F.2d 507, 513 (9th Cir. 1993) (once jury has been discharged, generally its verdict is no longer impeachable for lack of unanimity).

The Ninth Circuit has held that it is improper and unethical to interview jurors to discover their course of deliberations. *N. Pac. Ry. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954). Post-trial juror interviews may be appropriate if there is reason to believe that a juror intentionally made an untrue statement during voir dire about a material issue and, had the question been answered truthfully, it would have provided a valid basis to challenge that juror for cause. *See United States v. Saya*, 247 F.3d 929, 936-37 (9th Cir.) (considering juror affidavits for that purpose), *cert. denied*, 534 U.S. 1009 (2001); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) (although post-verdict juror interviews to attack verdicts are disfavored, plaintiff was allowed to offer such evidence to show that juror concealed past contacts with defendant during voir dire and then interjected extraneous information during jury deliberations).

C. Interviews by the Media

The court should avoid direct restraints on the media. *See* Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press--Fair Trial" Issue, 87 F.R.D. 519 (1980). News gathering is an activity protected by the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). There is a heavy presumption against the constitutional validity of any restraint on the media. *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).

Practical Suggestion

Discharge of Jury

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

Ladies and gentlemen:

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Many times jurors ask if they are now at liberty to discuss the case with anyone. Now that the case is over, you are of course free to discuss it with any person you choose. By the same token, however, I would advise you that you are under *no obligation whatsoever* to discuss this case with any person. If you *do* decide to discuss the case with anyone, I would suggest you treat it with a degree of solemnity in that whatever you do decide to say, you would be willing to say in the presence of the other jurors or under oath here in open court in the presence of all the parties. Also, always bear in mind if you do decide to discuss this case, that the other jurors fully and freely stated their opinions with the understanding they were being expressed in confidence. Please respect the privacy of the views of the other jurors.

6.2 Use of Juror Exit Questionnaire

Some courts have used exit questionnaires which are completed at the end of a person's term of jury service. Caution should be used to ensure that this practice does not lead to a proliferation of post-trial motions.

6.3 Post-Verdict Evidentiary Hearing Regarding Extraneous Information or *Ex Parte* Contacts

A. In General

When extraneous information has improperly been brought to the jury's attention, the moving party is entitled to a new trial if there is "a reasonable possibility that the extrinsic information *could* have affected the verdict." *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (emphasis in original). *Accord Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206 F.3d 900, 906 (9th Cir.), *cert denied*, 531 U.S. 919 (2000) (in this Circuit, the same standard applies to both civil and criminal cases). "The inquiry is objective: a court 'need not ascertain whether the extrinsic evidence actually influenced any specific juror.'" *United States v. Mills,* 280 F.3d 915, 921 (9th Cir.), *cert denied*, 535 U.S. 1120 (2002), quoting *United States v. Keating*, 147 F.3d 895, 901-02 (9th Cir. 1998).

A non-exclusive list of factors to be considered includes (1) whether the extrinsic information was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic information was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other factors which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic information affected the verdict. *United States v. Navarro-Garcia*, 926 F.2d 818, 822-23 (9th Cir. 1991).

The introduction of extrinsic information assumes particular importance in criminal cases. When jurors learn of extrinsic facts regarding the defendant or the alleged crime, whether from another juror or otherwise, the speaker "becomes an unsworn witness within the meaning of the Confrontation Clause" of the Sixth Amendment. *See Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997). *See also Dickson*,

849 F.2d at 406 (effectively denied the rights of confrontation, cross-examination, and the assistance of counsel).

B. Burden of Proof

Once it is has been established that extraneous information reached one or more jurors, "the burden is generally on the party opposing a new trial to demonstrate the absence of prejudice." *Sea Hawk Seafoods*, 206 F.3d at 906.

A special standard may apply to allegations of "jury tampering," as distinguished from "prosaic kinds of jury misconduct." *United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999). At least in criminal cases, "jury tampering" creates a presumption of prejudice, and the government carries the heavy burden of rebutting that presumption by establishing that the contact with the juror was harmless to the defendant. *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001), citing *Remmer v. United States*, 347 U.S. 227 (1954) and 350 U.S. 377 (1956). *See also Henley*, 238 F.3d at 1115-19 (examining this issue, and offering examples of less serious intrusions of extraneous information, where a lesser standard may apply).

C. *Ex Parte* Contacts Distinguished

Allegations of "*ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case," and do not involve jury tampering, require a new trial only if the court finds actual prejudice to the moving party. *Sea Hawk Seafoods*, 206 F.3d at 906-08 (tasteless joke by bailiff). *But cf. Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) ("Any unauthorized communication between a party or an interested third person and a juror creates a rebuttable presumption of prejudice" which "requires a strong contrary showing" to overcome).

See § 5.1.C(1) ("Communication with a Deliberating Jury").

D. When an Evidentiary Hearing is Required

Ordinarily, the court will conduct an evidentiary hearing before ruling on a motion for new trial based on allegations of jury tampering or misconduct, or the imparting of extraneous information, especially if the court is considering granting the motion. *See United States v. Angulo*, 4 F.3d 843, 847-48 (9th Cir. 1993); *United States v. Jackson*, 209 F.3d 1103, 1109-10 (9th Cir. 2000) (abuse of discretion not to conduct evidentiary hearing to consider allegations of jury tampering). However, an evidentiary hearing is not required every time there is an allegation of jury misconduct or bias. In determining whether to hold a hearing, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. *United States v. Saya*, 247 F.3d 929, 934-35 (9th Cir.), *cert. denied*, 534 U.S. 1009 (2001). An evidentiary hearing is not necessary if the court knows the exact scope and nature of the extraneous information, *id.*, or it is clear that the alleged misconduct or bias could not have affected the verdict or the allegations are not credible. *Angulo*, 4 F.3d at 848, n. 7; *Navarro-Garcia*, 926 F.2d at 822.

E. What Evidence May be Considered

Rule 606(b) of the Federal Rules of Evidence governs the scope of a juror's testimony upon an inquiry into the validity of a verdict or indictment. A juror may not testify about how the jurors reached their conclusions. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir.) (error to grant new trial based on juror's statements to the press regarding the impact of evidence), *cert. denied*, 528 U.S. 1047 (1999).

Rule 606(b) does permit a juror to testify regarding "extraneous prejudicial information [that] was improperly brought to the jury's attention." However, it is essential to distinguish between testimony regarding the fact that extrinsic information was brought to the jury's attention (*e.g.,* the substance of the communication, who knew about it and when, and the extent it was

discussed) versus the subjective effect of that extraneous information upon the mental processes of a particular juror in reaching a verdict (*e.g.,* "I changed my vote as a result of that new information"). Testimony regarding the former is permissible, but testimony about the latter is not. *See Rushen v. Spain*, 464 U.S. 114, 121 n. 5 (1983); *Henley,* 238 F.3d at 1117-18; *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000). *But cf. Mills*, 280 F.3d at 922 (suggesting the rule may not be absolute).

Thus, a juror may testify that he conducted an independent investigation and reveal the substance of what he communicated to his fellow jurors concerning that investigation, but he may not be questioned about the subjective impact of that information upon their deliberations. *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982). *See also Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th Cir. 1993) (jurors could be asked whether they saw the defendant shackled during trial and whether they had discussed it with other jurors).

Testimony regarding a juror's "general fear and anxiety following a tampering incident" is admissible. *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002). Testimony regarding racial bias during deliberations may also be permissible. *See Henley*, 238 F.3d at 1119-21 (discussing, but ultimately not deciding, that question). *Cf. Rushen*, 464 U.S. at 121, n. 5 (a juror may testify on any mental bias in matters unrelated to specific issues that the juror was called on to decide).

Under Fed. R. Evid. 606(b), jurors may not testify about other jurors' use of alcohol or drugs during the trial. *Tanner v. United States*, 483 U.S. 107, 122 (1987).

See also §§ 3.14.C and 5.1.C.

6.4 New Trial Motion Premised on False Answer During Jury Selection

A new trial may be ordered if the moving party demonstrates "that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). A mistaken, though honest, response to a question does not meet this test. *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000). A "new trial is warranted only if the district court finds that the juror's voir dire responses were dishonest, rather than merely mistaken, and that her reasons for making the dishonest response call her impartiality into question." *Id.* at 1164. *But cf. Fields v. Woodford*, 309 F.3d 1095, 1105 (9th Cir. 2002) ("it is an open question whether dishonesty is required before bias may be found"), *op. amended and superseded on other grounds by* 315 F.3d 1062 (9th Cir. 2002). An evidentiary hearing is usually necessary to establish a record upon which the court can make the requisite findings. *Id.* at 1105-06; *Pope*, 209 F.3d at 1164.

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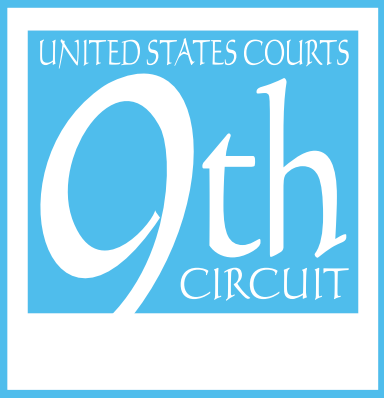

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