Agenda

Supreme Court Advisory Committee
Utah Rules of Civil Procedure
January 25, 2023
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of Oct. and Nov. minutes	Tab 1	Lauren DiFrancesco
Public Comments to Rule 41, 59	Tab 2	Lauren DiFrancesco
Rule 10(d) – change top margins to 1" – update	Tab 3	Keri Sargent/Susan Vogel
Rule 45(e)(3), (e)(4)(A), note – update	Tab 4	Lauren DiFrancesco
Rule 100A – Office of Recovery Svcs exemption	Tab 5	Jim Hunnicut/Jace Willard
Rule 26 legislative note - update	Tab 6	Lauren DiFrancesco
Rule 26 – Standard Protective Order form	Tab 7	Ash McMurray
Rules 12(a)(1), 26.1(h), and 104 – update	Tab 8	Loni Page/Susan Vogel
Rule 6 – Juneteenth update		Lauren DiFrancesco
Rule 47 – attorney voir dire – feedback from Bd. of Dist. Ct. Judges; update	Tab 9	Judge Holmberg/Lauren DiFrancesco
Consent agenda - *None*		
Pipeline items: • Rule 30(b)(6) (Justin, Rod, Tonya, Kim) • Rule 3(a)(2) (Trevor) • Rule 53A (Brent Hall)		Lauren DiFrancesco

Next Meeting: February 22

Meeting Schedule: 4th Wednesday at 4pm unless otherwise scheduled

Committee Webpage: http://www.utcourts.gov/committees/civproc/

SUBCOMMITTEES

Subject	Members	Primary	Contact Info
Probate	Judge Scott, Allison Barger, Brant Christiansen, David Parkinson, Judge Kelly, Kathie Brown Roberts, Keri Sargent, Russ Mitchell, Shonna Thomas, Sarah Box	Judge Scott	lsscott@utcourts.gov
Terminology	Susan Vogel, Ash McMurray, Trevor Lee, Leslie Slaugh	Susan Vogel	susanv@utcourts.gov
Court Notices	Susan Vogel, Loni Page	Susan Vogel	susanv@utcourts.gov
Records Classification	Judge Stone, Justin Toth, Jim Hunnicutt, Susan Vogel, Crystal Powell	Judge Stone	ahstone@utcourts.gov
Standard POs	Judge Holmberg, Judge Stucki, Judge Oliver, Bryan Pattison	Judges Oliver and Holmberg	aoliver@utcourts.gov; kholmberg@utcourts.gov
Rule 5	Susan Vogel, Loni Page, Tonya Wright, Keri Sargent	Loni Page	lonip@utcourts.gov
Rule 45	Jim Hunnicutt and Susan Vogel	Jim Hunnicutt	jim@dolowitzhunnicutt.com
Rule 30(b)(6)	Justin, Tonya, Rod, Kim	Justin Toth	jtoth@rqn.com
Rule 101	Jim Hunnicutt and Susan Vogel	Jim Hunnicutt	jim@dolowitzhunnicutt.com
Rule 30(b)(6)	Kim Neville, Tonya, Rod, Justin	Justin Toth	jtoth@rqn.com
Rule 3(a)(2)	Trevor, Susan, Judge Stucki, Keri, Tonya	Trevor	tlee@mc2b.com
Rule 81			
Eviction Expungements	Judge Stucki, Tonya, Lauren	Lauren	
HISTORICAL:			
Technology			
Pandemic			

TAB 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – October 26, 2022

DUE TO THE COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason	X		Stacy Haacke, Staff
Lauren DiFrancesco, Chair	X		Crystal Powell, Recording Secretary
Judge Kent Holmberg	X		Keri Sargent
James Hunnicutt	X		
Trevor Lee	X		
Ash McMurray	X		
Kim Neville		X	
Timothy Pack	X		
Loni Page	X		
Bryan Pattison	X		
Judge Laura Scott		X	
Judge Clay Stucki	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish	X		
Vacant Commissioner Seat			
Vacant Academic Seat			
Vacant Academic Seat			
Vacant Self-Rep Perspective Seat			
Vacant Self-Rep Perspective Seat			
2 *Emeritus* Seats Vacant			

(1) INTRODUCTIONS

The meeting started at 4:01 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) APPROVAL OF MINUTES

Ms. DiFrancesco asked for approval of the Minutes subject to minor amendments noted by the Minutes subcommittee. Mr. Rod Andreason moved to adopt the Minutes as amended. Mr. Jim Hunniucutt seconded. The Minutes were unanimously approved.

(3) RULE 47. ATTORNEY VOIR DIRE

Ms. DiFrancesco reported to the Committee that the invited representatives are not finished consultations with the defense bar on this proposed rule change and will not present on the voir dire issue at this meeting. The Committee made some suggestions of other considerations they would like the proposal to address such as input from academia regarding equity and making sure that opposing viewpoints are selected objectively. The Committee discussed some practical issues regarding convening a jury pool by Webex versus in person across the various court districts and how the proposed rule change taking discretion away from judges would impact that.

(4) RULE 26. EDITS TO COMMENTS

Judge Clay Stucki reported the changes made in the comments of the Rule where the cross-references no longer match. Judge Stucki raised the issue of the legislative note that appears to be outdated. The Committee had previously reached out to the legislative liaison regarding how to address the legislative note. The Committee discussed whether the Committee has the authority to remove a legislative note from the comments. It was suggested that in transmitting the draft rule to the Supreme Court, the Committee would also include the draft comments omitting the legislative note along with a note on the reason for the deletion. Another suggestion was to resolve the outdated comment by deleting it and leaving a reference for the legislative history citing to the resolution originally adopting the legislative note. Ultimately, the Committee decided that it is the Supreme Court that should make the decision on how to resolve the expired legislative comment. Judge Stucki moved to refer the note with the suggestions to the Supreme Court for final decision. Judge Cornish seconded. The motion passed unanimously.

(5) NEW MEMBER SEATS

Lauren DiFrancesco advised the Committee that she and Ms. Susan Vogel will meet with Mr. Nick Stiles to further discuss best ways to recruit the desired representation.

(6) RULE 12(a)(1). SUPREME COURT DIRECTION TO REVIEW FILING AN ANSWER

The Rule 5 subcommittee is not yet prepared to present on this issue.

(7) RULE 26.1(h). SUPREME COURT DIRECTION TO CLARIFY WHEN DISCLOSURES ARE REQUIRED.

The Committee has sent out changes to the Rule for comments but have not made any draft changes to reflect the Supreme Court's concern to make it clear that disclosures are only required if the other party files an answer or otherwise disagrees with the petition but deadline to serve the disclosures is only triggered by the filing of the answers to the complaint. Ms. Vogel expressed that even though the deadlines are set, parties still get confused on whether they have to file disclosures where there had been a stipulation leading to the respondent not filing an answer. The Committee reviewed subpart 26.1 (b). Ms. Vogel suggested that the clarification be placed in 26.1(a) where the initial disclosures are not required if the claim is uncontested. Mr. Hunnicutt noted that it might be unclear to self-represented persons what it means for a case to be contested or uncontested when there is some agreement, but other information is still necessary such as financial disclosures relating to child support. The Committee also wondered if the clarification is best placed on the forms because the deadlines are clear in the rules. The committee decided without motion to discuss this issue more carefully with Nick Stiles before proceeding further.

(8) RULE 104. SUPREME COURT DIRECTION TO CONSIDER REPEALING OR CLARIFYING WHEN PLEADING WOULD SUFFICE FOR AFFIDAVIT (IN A DIVORCE).

Mr. Jim Hunnicutt reviewed how persons historically went to court in person to get their divorce finalized even if the divorce was settled. The modern rule no longer requires parties to physically go to court because jurisdiction is typically spelt out in the original petition. He expressed that this is not always the case when there are no minor children involved or in a default divorce. He explained that the issue in the Rule is to clarify whether an affidavit (declaration of jurisdiction and grounds) is needed to finalize a divorce or if a sworn pleading would suffice. Ms. Vogel also added that the majority of persons are using OCAP which provides a verified petition that then confuses many persons when they also have to do a findings of facts and conclusions. The Committee also considered that the party should swear to the court that the findings of fact has not been altered from the petition where there is a default divorce. The Committee also raised that amending Rule 104 to no longer require the affidavit, then Rule 7 may need to be changed also as in many situations there would no longer be a verification of jurisdiction. The Committee decided to table the issue and discuss further with Mr. Nick Stiles for more guidance.

(9) RULE 59 (e) AND UTAH CODE 78B-6-811 INCONSISTENCY

Ms. DiFrancesco relayed that an inconsistency was brought to the attention of the Committee where Utah Code 78B-6-811 allows for a modification of judgment within 180 days. The Committee suggested amending rule 59(e) to include "unless otherwise provided by statute or rule." The Committee also discussed whether an augmented judgement was also a modification of a judgment and noted that those motions usually come well beyond 28 days outlined in Rule 59. Judge Stucki moved to approve the change. Ms. Tonya Wright seconded. The motion was passed by majority.

(10) 6(a)(6). ADDING JUNETEENTH HOLIDAY

The Utah government has a different rule on how to observe the holiday than the federal government. The Committee is asked to add Juneteenth to Rule 6 under the list of legal holidays. The concern on how to add it is that the state has designated it to be observed on a Monday; but under the Federal government it is observed on the day of or either the Friday or Monday depending on which weekend day it falls on. The Committee discussed whether it would create an ambiguity on which day should be followed or if both the State and Federal days would be observed. The issue would affect not the observation of the holiday but the filing deadlines in cases and how the deadline is calculated. The Committee also discussed that the courts should make this decision and referred the issue back to the Supreme Court.

(11) RULE 60. FINALITY AND WHETHER FRAUD ON THE COURT CAN BE EFFECTIVELY ADDRESSED

A subcommittee (preventing fraud on the court subcommittee) was created to look at the case law on the issue and report whether a Rule change is needed and the draft language. The subcommittee will comprise Judge Holmberg, Justin Toth, Susan Vogel and Judge Cornish.

(12) OTHER BUSINESS

Ms. DiFrancesco suggested pushing November meeting to 30th of November on the fifth Wednesday. The December meeting is cancelled. The Committee discussed briefly the status of pipeline issues

(13) ADJOURNMENT.

The meeting adjourned at 5:55 p.m.

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – November 30, 2022

DUE TO PARKING CONSTRUCTION AT THE MATHESON COURTHOUSE
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason		X	Jace Willard, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Judge Kent Holmberg	X		Nick Stiles
James Hunnicutt	X		Jon Puente
Trevor Lee	X		Clark Sabey
Ash McMurray	X		Brandon Baxter
Kim Neville		X	John Bogart
Timothy Pack		X	Kara H. North
Loni Page	X		
Bryan Pattison	X		
Judge Laura Scott	X		
Judge Clay Stucki		X	
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish		X	
Vacant Commissioner Seat			
Vacant Academic Seat			
Vacant Academic Seat			
Vacant Self-Rep Perspective Seat			
Vacant Self-Rep Perspective Seat			
2 *Emeritus* Seats Vacant			

(1) INTRODUCTIONS

Ms. Lauren DiFrancesco welcomed the Committee and guests.

(2) APPROVAL OF MINUTES

Approval of minutes from October 26, 2022 Committee Meeting was deferred.

(3) RULES 7, 7A, AND 7B. REVIEW OF PUBLIC COMMENTS

The proposed amendments to these rules did not receive any public comments and are to be submitted to the Supreme Court for final approval.

(4) RULES 7, 7A, AND 83. MOTION TO STRIKE IMPROPER VEXATIOUS LITIGANT FILINGS

Mr. John Bogart presented as to the difficulty of enforcing a vexatious litigant order entered pursuant to Rule 83, and the lack of clarity as to whether a party must proceed under Rule 7A's procedures for enforcing an order, which involves full briefing and considerable delay. He said the rules are not clear as to how Rule 83 should interact with other rules. He proposed that a subparagraph be added to Rule 7(l)(1) for a motion to strike an improper vexatious litigant filing. This would allow a judge to decide the motion to strike without awaiting a response to such motion.

Judge Andrew H. Stone expressed doubt as to the need for the proposed amendment, saying that in his experience with vexatious litigants, a clerk would generally refuse an improper filing attempt by a vexatious litigant. Mr. Bogart responded that the proposed amendment is intended to address the exception, where a vexatious litigant manages to file a document that should not have been allowed.

Judge Stone also said that, even in such circumstances, the opposing party may simply ignore an improper filing, and that the court is highly unlikely to rule in favor of a vexatious litigant on anything of significance, even if no opposition is filed. Mr. Bogart responded that failing to respond is still risky, and that the other side shouldn't have to take that risk. Judge Stone agreed that the proposed amendment should be approved to receive public comments on the matter.

Judge Laura Scott moved to adopt the amendment as proposed. Judge Stone seconded the motion, which was unanimously approved.

(5) RULE 7. MOTION TO APPEAR REMOTELY

Ms. Susan Vogel proposed that Rule 7(l)(1) be further amended to allow a motion to appear remotely to be added to the list of motions that a judge may decide without awaiting a response. Ms. Vogel moved to so amend the rule. Mr. Justin Toth seconded the motion, which passed unanimously.

(6) RULE 83. NOTICE OF APPEAL

Mr. Nick Stiles presented as to an issue that has arisen where a trial court enters a filing restriction on a vexatious litigant, who then attempts to file a notice of appeal, but the clerk rejects the filing attempt based on the restriction. Trial court filing restrictions, if applied like that, would prevent a party from taking an appeal. He proposed amending Rule 83(b)(4) and (d)(1) to allow vexatious litigants to file a notice of appeal without first obtaining leave from the trial judge.

Judge Stone agreed that parties should be able to pursue appellate remedies, but he suggested that, in the case of vexatious litigants, such remedies may need to be pursued through the extraordinary writ process. Because a petition for an extraordinary writ may be filed directly with the appellate court, a trial court filing restriction would not interfere with a vexatious litigant's ability to obtain appellate relief that way.

Mr. Clark Sabey said the problem is that the notice of appeal filed with the trial court is the document used to determine whether a party has timely appealed. Under the appellate rules, the appellate court looks to the notice of appeal in determining whether it has jurisdiction. If the notice of appeal is not allowed, there is no documentation to support appellate jurisdiction.

Judge Stone moved to adopt the proposed amendment. Ms. Loni Page seconded the motion, which passed unanimously.

(7) RULE 83. PHRASE "OBTAIN LEAVE OF THE COURT"

Ms. Vogel proposed that Rule 83 be further amended to change the phrase "obtain leave of the court" in the rule to "obtain permission of the court" in order to make the rule more understandable to laypersons. Ms. Vogel moved to so amend the rule. Mr. Toth seconded the motion, which passed unanimously.

(8) RULE 100A. ORS EXEMPTION FROM CASE MANAGEMENT CONFERENCES

Mr. Jim Hunnicutt presented as to a request by the Office of Recovery Services (ORS) to be exempted from the Rule 100A case management conference requirement. ORS says that because its actions usually involves serving two parties, it often happens that one of them will be served and file an answer, prompting a case management conference to be set. The setting will often be premature because the other party has not yet been served or has not yet responded. In other cases a case management conference is unnecessary because the responding parties agree with ORS's pleading.

ORS has suggested different possible amendments to address the problem, the first being adding a new subparagraph (c) that would exempt ORS from case management conferences, and the second being to amend subparagraph (a) to provide that, where an action involves more than two parties, a case management conference would not be scheduled until proof of service has been filed for each responding party and at least one party has timely filed an answer.

Mr. Hunnicutt moved to adopt the first option proposed. Ms. Vogel seconded the motion, which passed unanimously.

(9) RULE 47. ATTORNEY VOIR DIRE

Ms. DiFrancesco reported that she received a list from Ms. Kara North identifying a number of attorneys consulted thus far with regard to Ms. North's proposed amendment to Rule 47.

Mr. Brandon Baxter presented in support of the proposal, urging the Committee to talk with judges from the First District regarding the proposal, who could provide a neutral perspective. He reported having had a discussion with First District Court Judge Spencer D. Walsh, who responded favorably to the proposal.

Mr. Jonathan Puente introduced himself as the director of the Office of Fairness and Accountability (OFA). He suggested presentation of the proposed rule to the OFA at a meeting in mid-December.

Judge Stone responded regarding Mr. Baxter's proposal to present the matter to judges as neutral parties. Judge Stone has informally presented the proposal to Third District Court judges, who try more than half of the cases in the state. He reported vigorous opposition to the proposal, saying the proposal is inconsistent with the voir dire process outlined in *State v. Williams*, 2018 UT App 96, 427 P.3d 434, which suggests use of a case-specific questionnaire, then general questions to all potential jurors, and then individual juror questions.

Mr. Baxter said he has never not been allowed to do attorney-directed voir dire. Ms. North inquired about the basis for Judge Stone's opposition.

Judge Stone expressed concern that mistrials would result from adopting the proposal due to the likelihood of improper questions. He says that in practice, most of the questions during voir dire are presented by attorneys, so Utah practice is not inconsistent with that of other states, as has been suggested.

Ms. DiFrancesco suggested that the merits of the proposal be postponed until further stakeholders have been consulted.

Judge Kent Holmberg asked whether the First District judges were given a copy of the proposed rule. Mr. Baxter responded that discussions have only treated the issue of attorney-directed voir dire generally. Judge Holmberg expressed concern that the proposed rule removes the trial judge's discretion to allow attorney-directed voir dire. He referenced a Task Force study of the issue concluding that judges need to take a more active role in voir dire and believes that reflects the national trend.

Ms. North expressed being open to suggestions for keeping trial judge discretion.

Ms. DiFrancesco said she would try to solicit more input on the issue, and accepted Mr. Puente's invitation to present the issue to the OFA. She said that the Rule 47 materials would be supplemented with *State v. Williams*, and that everyone would have one week to add other materials to go out.

Ms. North mentioned a Utah study done with Justice Durham's involvement and emphasized the Denver Study included in the Rule 47 materials. She offered to draft the letter to other stakeholders. Judge Stone encouraged all to read *State v. Williams*, and said the Denver Study incorrectly places Utah in the minority.

Ms. DiFrancesco summarized efforts to solicit input, saying that Judge Holmberg would reach out to the Board of District Court Judges, and that Ms. DiFrancesco would reach out to the Utah Defense Lawyers Association and the National Center for State Courts. Ms. DiFrancesco will also draft a letter regarding the materials provided, inviting supplemental materials from any other stakeholders, which letter will go out early the week of December 12 to give enough time prior to the next Committee meeting on January 25.

Ms. Vogel will obtain data as to the annual number of *pro se* civil jury trial cases in Utah district courts.

(10) RULE 10(d). 1" TOP MARGIN

Ms. DiFrancesco addressed a request to change the top margin for paper filings to 1" and asked whether a 1" margin would be sufficient for draft orders, which usually place the judge's signature on the top of the first page. Judge Stone asked whether it would really matter if the judge's signature was placed over someone else's name. Ms. Keri Sargent said that where judge and commissioner signatures are both needed, 1" might not be enough space for both and she will double-check this and report back in January.

Ms. Vogel said that because she is already working to collect all forms, and to make them more user-friendly and understandable to self-represented parties, she can work the margin issue into the same undertaking.

(11) RULE 4(d)(1)(D). PERSONAL SERVICE ON INMATES

Ms. DiFrancesco addressed Judge Orme's recent proposal (in *Jordan Credit Union v. Sullivan*, 2022 UT App 120, ¶18), expressing concern that his proposed wording could suggest that an attempt must be made to effect personal service on an incarcerated person. She said the solution is just to make the rule say that personal service is always sufficient service.

Ms. Vogel suggested alternative language for a proposed amendment of Rule 4(d)(1)(D) as follows: "by delivering a copy of the summons and complaint to the individual personally, to the

person . . . .” She moved to so amend Rule 4. Judge Stone seconded the motion, which passed unanimously. Mr. Stiles or Ms. Vogel will inform Judge Orme of the modification.

(12) RULE 53A. STATUS

Ms. DiFrancesco inquired as to the status of Rule 53A (special masters in family law cases). Judge Holmberg thinks this was approved in September to go to the Supreme Court for approval. Ms. DiFrancesco indicated she would check minutes regarding status; she doesn't recall having presented it. She will give an update later in the week.

Update: On Friday, December 2, 2022, Ms. DiFrancesco sent an email to the Committee advising that she did present Rule 53A to the Supreme Court in September, and had received a redline draft back with comments from the Supreme Court. She shared the draft with the Committee and indicated that Rule 53A would be added to the agenda for January, but she suggested that the subcommittee would likely need to reconsider the matter and could do so either before the January meeting or have it pushed back to February.

(13) RULES 12(a)(1), 26.1(h), AND 104. STATUS

Ms. DiFrancesco reported on a discussion with Mr. Stiles as to the process to be followed when the Supreme Court suggests an amendment, as with Rules 26.1(h) and Rule 104. Proposals as to these rules, and others similarly made in the future, will be addressed by reaching out to the person requesting the change, requesting materials, and referring the matter to a subcommittee.

Ms. Vogel says Mr. Nathanael Player was the one who suggested the proposals mentioned in the September 2, 2022 memo from the Supreme Court, so the forms subcommittee can tackle all three of the proposed amendments: Rule 12(a)(1), Rule 26.1(h), and Rule 104. Ms. Vogel to present on all three in January.

(14) COMMITTEE VACANCIES

Ms. DiFrancesco and staff to review applications and make recommendations to the Supreme Court regarding filling the nonacademic vacancies later this month. She will also suggest appointments from University of Utah faculty for the open academic positions on the Committee.

(15) RULE 3(a)(2). STATUS

Mr. Trevor Lee provided an update regarding the proposed amendment to eliminate this subparagraph. The subcommittee has spoken with debt collectors, who like the existing rule, as it is often difficult to serve defendants in debt collection actions. There is no formal proposal at this point but the subcommittee will continue working on the issue and he will present a full report in January.

Judge Holmberg has included Judge Clay Stucki and will try to get input from Justice Court judges.

(16) ADJOURNMENT

The meeting adjourned at about 5:55.

TAB 2

Rules Returning from Public Comment:

Rule 41

We are in favor of this. It would help to close out a lot of cases that get hung up often unnecessarily.
--Dave Todd

The amendment is a good idea now that the ambiguity has been uncovered. I believe in practice, district courts and the parties have routinely assumed a single party could be dismissed. However, 1(A)(1) now would create more of an issue – by requiring court approval if a single answer has been filed takes away the right of the Plaintiff to dismiss a single defendant in the face of a motion to dismiss, an early settlement, or determining that they have named an improper defendant. I would suggest that section 1(A)(1) state: "a notice of dismissal before the party being dismissed serves an answer or a motion for summary judgment." This allows the plaintiff to narrow down its claims without having to seek the approval of other defendants who are likely adversarial, especially in light of the fact they are not being dismissed as well.
--Mike Stout

Rule 59

No public comments.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect.

~~(a)~~**(1) By the plaintiff.**

~~(a)(1)~~(A) Subject to Rule 23(e) and any applicable statute, the plaintiff may dismiss an action, a claim, or a party without a court order by filing:

~~(a)(1)(A)~~(i) a notice of dismissal before ~~the~~ any opposing party serves an answer or a motion for summary judgment; or

~~(a)(1)(A)~~(ii) a stipulation of dismissal signed by all parties who have appeared.

~~(a)(1)~~(B) Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

~~(a)~~**(2) By court order.** Except as provided in paragraph (a)(1), an action, a claim, or a party may be dismissed at the plaintiff's request by court order only on terms the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication by the court. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect. If the plaintiff fails to prosecute or to comply with these rules or any court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order otherwise states, a dismissal under this paragraph and any dismissal not under this rule, other than a dismissal for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits.

(c) Dismissal of counterclaim, crossclaim, or third-party claim. This rule applies to the dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under paragraph (a)(1) must be made before a responsive pleading is served or, if there is no responsive pleading, before evidence is introduced at a trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court may order the plaintiff to pay all or part of the costs of the previous action and may stay the proceedings until the plaintiff has complied.

(e) Bond or undertaking to be delivered to opposing party. If a party dismisses a complaint, counterclaim, crossclaim, or third-party claim, under paragraph (a)(1) after a provisional remedy has been allowed the party, the bond or undertaking filed in support of the provisional remedy must be delivered to the party against whom the provisional remedy was obtained.

Advisory Committee Note

The 2016 amendments adopt the plain language class of Federal Rule of Civil Procedure 41. And, like the federal rule, the 2016 amendments move a central provision of paragraph (b) from this rule to Rule 52(e). Formerly, if a plaintiff had presented its case and the evidence did not support the claim, the court—in a trial by the court—could find for the defendant without having to hear the defendant's evidence. The equivalent provision now found in Rule 52(e) extends that principle to claims other than the plaintiff's and, if a party's evidence on any particular element of the cause of action is complete but insufficient, allows the court to make findings and conclusions and enter judgment accordingly.

In these circumstances the court's action goes beyond simple dismissal; the court is finding for a party on the merits. This principle more properly belongs in the rule on findings and conclusions than in the rule on dismissing an action.

TAB 3

Rule 10

A proposal to amend Rule 10(d) to narrow the top margin to 1 inch because the larger 1½ inches are no longer needed.

Email from Jeffrey Enquist

From: Jeffrey Enquist <jenquist@fabianvancott.com>
Sent: Tuesday, November 1, 2022 5:55 PM
To: DiFrancesco, Lauren E. (Shld-SLC-LT) <Lauren.DiFrancesco@gtlaw.com>
Subject: Suggestion - Rules of Civil Committee modification

Lauren,

Hope all is well. I'll keep it short. Can I suggest a rule modification to Utah Rule of Civil Procedure 10(d)? Rule 10(d) states:

> **(d) Paper format**. All pleadings and other papers, other than exhibits and court-approved forms, must be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 1½ inches and a right, left and bottom margin of not less than 1 inch. All text or images must be clearly legible, must be double spaced, except for matters customarily single spaced, must be on one side only and must not be smaller than 12-point size.

My only suggestion to change this rule is to modify the top margin from 1½ inches to 1 inch. The rule was instituted to allow for the filing of paper copies in a folder with a top hole punches. The move to electronic filing, including at all levels of the court, has negated the need for the additional top margin. Moreover, those that file paper pleadings are typically pro se and either use electronic court forms available online or otherwise abide by a 1 inch margin when drafting by hand and those filings are typically scanned and produce electronically. The online court forms can be modified to accommodate a change in the rule. Finally, a ½ inch change on a motion that is 15 to 25 pages equates to an additional 1 to 1.5 pages of briefing. I don't have the stats on this, but I suspect an additional page or page-and-a-half would eliminate some of the need to ask for overlength briefing.

Rule 10. Form of pleadings and other papers.

Effective: 5/1/2022

(a) Caption; names of parties; other necessary information.

(1) All pleadings and other papers filed with the court must contain a caption setting forth the name of the court, the title of the action, the file number, if known, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must include in the caption the discovery tier for the case as determined under Rule 26.

(2) In the complaint, the title of the action must include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known must be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties must be designated as "all unknown persons who claim any interest in the subject matter of the action."

(3) Every pleading and other paper filed with the court must state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed.

(4) A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, must also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(5) Domestic relations actions, as defined in Rule 26.1, must be captioned as follows:

(i) In petitions for divorce, annulment, separate maintenance, and temporary separation: “In the matter of the marriage of [Party A and Party B].”

(ii) In petitions to establish parentage: "In the matter of the parentage of children of [Party A and Party B]."

(iii) In petitions to otherwise establish custody, parent-time, or child support: "In the matter of the children of [Party A and Party B]."

(iv) If a domestic relations action includes additional interested parties, such as the Office of Recovery Services, they must be listed in the case caption after the text described above.

(b) Paragraphs; separate statements. All statements of claim or defense must be made in numbered paragraphs. Each paragraph must be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials must be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d) Paper format. All pleadings and other papers, other than exhibits and court-approved forms, must be 8½ inches wide x 11 inches long, on white background, with ~~a top margin of not less than 1½ inches and~~ a right, left, top, and bottom margin of not less than 1 inch . All text or images must be clearly legible, must be double spaced, except for matters customarily single spaced, must be on one side only and must not be smaller than 12-point size.

(e) Signature line. The name of the person signing must be typed or printed under that person's signature. If a proposed document ready for signature by a court official is electronically filed, the order must not include the official's signature line and must, at the end of the document, indicate that the signature appears at the top of the first page.

(f) Non-conforming papers. The clerk of the court may examine the pleadings and other papers filed with the court. If they are not prepared in conformity with paragraphs (a) - (e), the clerk must accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) No improper content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) Electronic papers.

(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(2) A paper electronically signed and filed is the original.

(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(4) An electronic copy of a paper must conform to the format of the original.

(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Additional Rule 10(d) proposed amendment info:

Keri Sargent:

. . . I reached out to Holly in IT and she gave me this answer:

> I don't think we would have to change the signature block at all, if there is a document that doesn't allow enough room at the top of the document the signature block could go over the top of some of the document information, but I'm not sure how many documents that would effect. In most of the efiled documents the attorney information takes up about 3 inches of space at the tops of the documents so having the signature block go into that space would not be a problem. It would only be on documents where they don't have that much blank white space on the right side of the document for us to put the signature in. I hope this makes sense. If not let me know.

So Susan may have the bigger problem with forms where there's no address added at the top of the document.

Susan Vogel:

. . . I am told that the Forms Committee is very interested in addressing the Rule 10 margin suggestion and making sure that the forms (including the electronic forms) that self represented parties are required or encouraged to use are included in this discussion. (Nearly 90% of civil cases in the Utah State Courts include at least one self-represented party.) Thank you for the opportunity to address this.

TAB 4

Rule 45. Subpoena.

(a) Form; issuance.

(1) Every subpoena shall:

(A) issue from the court in which the action is pending;

(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(C) command each person to whom it is directed

(i) to appear and give testimony at a trial, hearing or deposition, or

(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(iv) to appear and to permit inspection of premises;

(D) if an appearance is required, give notice of the date, time, and place for the appearance and, if remote transmission is requested, instructions for participation and whom to contact if there are technical difficulties; and

(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) **Service; fees; prior notice.**

(1) A subpoena may be served by any person who is at least 18 years of age

and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) **Appearance; resident; non-resident.**

(1) A person who resides in this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(2) A person who does not reside in this state but who is served within this state may be required to appear:

(A) at a trial or hearing in the county in which the case is pending; and

(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information, or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting

party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) **Protection of persons subject to subpoenas; objection.**

(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(3) Although not required, ~~The~~ the person subject to the subpoena or a non-party affected by the subpoena may file a motion to quash under Rule 37 ~~object under Rule 37~~ if the subpoena:

(A) fails to allow reasonable time for compliance;

(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(F) subjects the person to an undue burden or cost;

(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

Commented [JW1]: Should this be "file a motion to quash under Rule 37 or otherwise object if the subpoena"? Lauren to seek clarification from Justice Pohlman here. At 12/7 SC conf, Justice Pohlman agreed that only an objection should be required, and all sub (3) paras apply to objections and to motions to quash.

(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(4) T**iming and form of objections.**

(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be ~~made~~ in writing and made before the date for compliance.

(B) The objection shall be stated in a concise, non-conclusory manner.

(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or

harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) **Duties in responding to subpoena.**

(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(A) that the declarant has knowledge of the facts contained in the declaration;

(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the subpoena.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of

the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) **Procedure when witness evades service or fails to attend.** If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) **Procedure when witness is an inmate.** If the witness is an inmate as defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j) **Subpoena unnecessary.** A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

~~**Advisory Committee Note:**~~

~~With regard to paragraph (a)(2), an attorney admitted to practice in Utah includes a Utah Licensed Paralegal Practitioner pursuant to Rule 86(a) and (b). Licensed paralegal practitioners may sign and issue subpoenas provided they use a court-issued form approved by the Judicial Council in accordance with UCJA Rule 14-802(c).~~

Effective ~~May 1, 2021~~

TAB 5

Rule 100A. Case Management of Domestic Relations Actions.

(a) **Case management tracks.** Except those initiated by the Office of Recovery Services, ~~All~~ all domestic relations actions, as defined in Rule 26.1, will be set for a case management conference before the court, or a case manager assigned by the court, after an answer to the action is filed. At the case management conference, the court or a case manager assigned by the court must determine into which of the following tracks the case will be placed:

(1) Track 1: Standard Track. This category includes all cases that do not require expert witnesses or complex discovery. The court will certify a Track 1 case directly for trial. If the parties have not yet mediated, the court will order the parties to participate in good faith mediation before the trial takes place.

(2) Track 2: Complex Discovery Track. This category includes cases with complex issues that require extraordinary discovery, such as valuation of a business. For a Track 2 case, at the case management conference the court will set a discovery schedule with input from the parties and schedule the case for a pretrial hearing.

(3) Track 3: Significant Custody Dispute Track. This category includes cases with significant custody disputes, including custody disputes involving allegations of child abuse or domestic violence. For a Track 3 case, at the case management conference the court and parties will address: 1) whether a custody evaluation is necessary, and, if so, the form of the evaluation and appointment considerations; and 2) whether appointment of a private guardian ad litem is necessary, and if so, the scope of the appointment and apportionment of costs. The court will prepare and issue any resulting orders appointing a custody evaluator or guardian ad litem and schedule the case for either a pretrial hearing or a custody evaluation settlement conference.

(b) The court may set additional hearings as necessary under Rules 16 or 101. Nothing in this rule prohibits a court from assigning a case to more than one track, at the court's discretion, or otherwise managing a case differently from the above guidelines for good cause.

(c) **Exemption.** Actions initiated by the Office of Recovery Services are exempt from case management conferences.

Effective: May/Nov. 1, 202_.

Commented [JW1]: Alternative 1: use this language if court doesn't need to have all domestic cases assigned to a track for purposes of data entry or monitoring.

Otherwise (if the court needs to have them assigned to a track):

Alternative 2: "Cases initiated by the Office of Recovery Services are automatically assigned to Track 1 without the need for a case management conference. All other domestic relations actions . . . ."

Alternative 3: "Except for those initiated by the Office of Recovery Services, all domestic. . . (1) Track 1: Standard Track. Cases initiated by the Office of Recovery Services are automatically assigned to this category. This category also includes. . . ."

Commented [JW2]: Supreme Court suggested this could be "exempt from this rule." This paragraph to be deleted if Alternative 1 above is used.

TAB 6

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party must, without waiting for a discovery request, serve on the other parties:

(A) the name and, if known, the address and telephone number of:

(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries, and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(C) a computation of any economic damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(E) a copy of all documents to which a party refers in its pleadings.

(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) must be served on the other parties:

(A) by a plaintiff within 14 days after the filing of the first answer to that plaintiff's complaint; and

(B) by a defendant within 42 days after the filing of that defendant's first answer to the complaint.

(3) Exemptions.

(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(ii) governed by Rule 65B or Rule 65C;

(iii) to enforce an arbitration award;

(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(4) Expert testimony.

(A) Disclosure of retained expert testimony. A party must, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) the facts,

data, and other information specific to the case that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition must not exceed four hours and the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition. A report must be signed by the expert and must contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert must pay the costs for the report.

(C) Timing for expert discovery.

(i) The party who bears the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the close of fact discovery. Within 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted.

(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph (a)(4)(C)(i) is due, or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to

paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted.

(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses, it must serve on the other parties the information required by paragraph (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due or (B) service of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within 14 days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report must be served on the other parties, within 42 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert must be permitted. The court may preclude an expert disclosed only as a rebuttal expert from testifying in the case in chief.

(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is

expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A deposition of such a witness may not exceed four hours and, unless manifest injustice would result, the party taking the deposition must pay the expert's reasonable hourly fees for attendance at the deposition.

(5) Pretrial disclosures.

(A) A party must, without waiting for a discovery request, serve on the other parties:

(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition;

(iii) designations of the proposed deposition testimony; and

(iv) a copy of each exhibit, including charts, summaries, and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(B) Disclosure required by paragraph (a)(5)(A) must be served on the other parties at least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) must also be filed on the date that they are served. At least 14 days before trial, a party must serve any counter designations of deposition testimony and any objections and grounds for the objections to the use of any deposition, witness, or exhibit if the grounds for the objection are apparent before trial. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, other objections not listed are waived unless excused by the court for good cause.

(6) Form of disclosure and discovery production. Rule 34 governs the form in which all documents, data compilations, electronically stored information, tangible things, and evidentiary material should be produced under this Rule.

(b) Discovery scope.

(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below.

(2) Privileged matters.

(A) Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include:

(i) all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in Utah Code Title 78B, Chapter 3, Part 4, Utah Health Care Malpractice Act, for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider; and

(ii) except as provided in paragraph (b)(2)(C), (D), or (E), all communications, materials, and information in any form specifically created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including any findings or conclusions from the investigation and any offer of compensation.

(B) Disclosure or use in a medical candor process of any communication, material, or information in any form that contains any information described in paragraph (b)(2)(A)(i) does not waive any privilege or protection against admissibility or discovery of the information under paragraph (b)(2)(A)(i).

(C) Any communication, material, or information in any form that is made or provided in the ordinary course of business, including a medical record or a business record, that is otherwise discoverable or admissible and is not created for or during a medical candor process is not privileged by the use or disclosure of the communication, material or information during a medical candor process.

(D) (i) Any information that is required to be documented in a patient's medical record under state or federal law is not privileged by the use or disclosure of the information during a medical candor process.

(ii) Information described in paragraph (b)(2)(D)(i) does not include an individual's mental impressions, conclusions, or opinions that are formed outside the course and scope of the patient's care and treatment and are used or disclosed in a medial candor process.

(E) (i) Any communication, material or information in any form that is provided to an affected party before the affected party's written agreement to participate in a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(ii) Any communication, material, or information described in paragraph (b)(2)(E)(i) does not include a written notice described in Utah Code section 78B-3-452.

(F) The terms defined in Utah Code section 78B-3-450 apply to paragraphs (b)(2)(A)(ii), (B), (C), (D), and (E).

(G) Nothing in this paragraph (b)(2) shall prevent a party from raising any other privileges provided by law or rule as to the admissibility or discovery of any communication, information, or material described in paragraph (b)(2)(A), (B), (C), (D), or (E).

(3) Proportionality. Discovery and discovery requests are proportional if:

(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(C) the discovery is consistent with the overall case management and will further the just, speedy, and inexpensive determination of the case;

(D) the discovery is not unreasonably cumulative or duplicative;

(E) the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive; and

(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(4) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(5) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost must describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(6) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by

other means. In ordering discovery of such materials, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(7) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(8) Trial preparation; experts.

(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(6) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(6) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(9) Claims of privilege or protection of trial preparation materials.

(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence, and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery must not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2. Domestic relations actions are permitted standard discovery as described for Tier 4.

(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs (a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,00 or more	30	20	20	20	210
4	Domestic relations actions	4	10	10	10	90

(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party must:

(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, file a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2)

and, for each party represented by an attorney, a statement that the attorney consulted with the client about the request for extraordinary discovery;

(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, file a request for extraordinary discovery under Rule 37(a) or

(C) obtain an expanded discovery schedule under Rule 100A.

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(1) A party must make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party must act through one or more officers, directors, managing agents, or other persons, who must make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case, the party challenges the sufficiency of another party's disclosures or responses, or another party has not made disclosures or responses.

(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document, or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The

supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery, and objection to a request for discovery must be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party must not file with the court a disclosure, a request for discovery, or a response to a request for discovery, but must file only the certificate of service stating that the disclosure, request for discovery, or response has been served on the other parties and the date of service.

(g) Standard protective order for civil discovery.

(1) **Applicability.** Except in cases exempt under paragraph (a)(3) of this rule, cases to which Rules 26.1, 26.3, or 26.4 apply, or cases filed as debt collection matters, a party may elect to invoke the Standard Protective Order for Civil Discovery, available on the court's website.

(2) **Effectiveness.** The Standard Protective Order for Civil Discovery is effective at the time a party files a Notice of Election and serves a copy of the order on ~~the opposing party~~all parties. The order need not be entered by the court to be effective.

(3~~2~~) **Improper withholding and discovery objections.** Except as the court may otherwise order, if a party has filed a Notice of Election ~~has been filed~~ and served~~ice of~~ the order on all parties ~~has occurred~~, a party may not ~~it is improper to~~ withhold disclosures or object to a discovery request ~~because~~on the basis that the court has not entered a protective order.

(43) **Relief from the standard protective order.** A party may move for relief from the Standard Protective Order for Civil Discovery.

Effective: 5/4/2022

Advisory Committee Notes

Note Adopted 2011

Disclosure requirements and timing. Rule 26(a)(1).

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that– a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior

version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. *See RJW Media Inc. v. Heath*, 2017 UT App 34, ¶¶ 23-25, 392 P.3d 956. This information is important because of the other discovery limits contained in Rule 26.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

Expert disclosures and timing. Rule 26(a)(4~~3~~). Disclosure of the identity and subjects of expert opinions and testimony is automatic under Rule 26(a)(4~~3~~) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)~~(4)~~(5)(iv) pretrial disclosures when trial is imminent.

If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the

area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26 (a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert.

Scope of discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in paragraph~~subpart~~ (b)(~~1~~3).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)-(C).

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in paragraph ~~subpart~~ (b)(~~2~~3) and the discovery tiers in paragraph~~subpart~~ (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for nonmonetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies.

Consequences of failure to disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Legislative Note

Legislative Note adopted 2012

[As Amended by the Advisory Committee --- 2022 to conform to current rule]

S.J.R. 15

(1) The ~~amended~~ language in paragraph (b)(~~1~~2)(A)(i) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure, which protections were placed in ~~part~~paragraph (b) pursuant to Senate Joint Resolution 15 upon approval by a constitutional two-thirds vote of all members elected to each house on March 6, 2012. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or

regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

~~(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.~~

~~(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.~~

~~Effective date. Upon approval by a constitutional two-thirds vote of all members elected to each house. [March 6, 2012]~~

TAB 7

IN THE _____ ~~UNITED STATES~~ JUDICIAL DISTRICT COURT
_____ COUNTY, ~~FOR THE DISTRICT~~ STATE OF UTAH

_____, Plaintiffs, vs. _____, Defendants.	STANDARD PROTECTIVE ORDER FOR CIVIL DISCOVERY ~~Civil~~ Case No. Honorable ~~Magistrate~~

Pursuant to Rule 26(~~ge~~) of the ~~Federal~~ Utah Rules of Civil Procedure and for good cause,

IT IS HEREBY ORDERED THAT:

1. Scope of Protection

This Standard Protective Order for Civil Discovery (Standard Protective Order) shall govern any record of information produced in this action and designated pursuant to this Standard Protective Order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, interrogatory answers, admissions, documents and other discovery materials, whether produced informally or in response to interrogatories, requests for admissions, requests for production of documents or other formal methods of discovery.

This Standard Protective Order shall also govern any designated record of information produced in this action pursuant to required disclosures under ~~any federal procedural rule or local rule of the Court~~ the Utah Rules of Civil Procedure and any supplementary disclosures thereto.

This Standard Protective Order shall apply to the parties and to any nonparty from whom discovery may be sought who desires the protection of this Standard Protective Order.

Nonparties may challenge the confidentiality of the protected information by filing a motion to intervene and a motion to de-designate.

2. Definitions

(a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information designated as such by the producing party.

(b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Standard Protective Order the producing party reasonably and in good faith believes would likely cause harm.

(c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

(d) For entities covered by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the term CONFIDENTIAL INFORMATION shall include Confidential

Health Information. Confidential Health Information shall mean information supplied in any form, or any portion thereof, that identifies an individual or subscriber in any manner and relates to the past, present, or future care, services, or supplies relating to the physical or mental health or condition of such individual or subscriber, the provision of health care to such individual or subscriber, or the past, present, or future payment for the provision of health care to such individual or subscriber. Confidential Health Information includes claim data, claim forms, grievances, appeals, or other documents or records that contain any patient health information required to be kept confidential under any state or federal law, including 45 C.F.R. Parts 160 and 164 promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (*see* 45 C.F.R. §§ 164.501 & 160.103), and the following subscriber, patient, or member identifiers:

(1) names;

(2) all geographic subdivisions smaller than a State, including street address, city, county, precinct, and zip code;

(3) all elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, age, and date of death;

(4) telephone numbers;

(5) fax numbers;

(6) electronic mail addresses;

(7) social security numbers;

(8) medical record numbers;

(9) health plan beneficiary numbers;

(10) account numbers;

(11) certificate/license numbers;

(12) vehicle identifiers and serial numbers, including license plate numbers;

(13) device identifiers and serial numbers;

(14) web universal resource locators ("URLs");

(15) internet protocol ("IP") address numbers;

(16) biometric identifiers, including finger and voice prints;

(17) full face photographic images and any comparable images; and/or any other unique identifying number, characteristic, or code.

(e) The term TECHNICAL ADVISOR shall refer to any person who is not a party to this action and/or not presently employed by the receiving party or a company affiliated through common ownership, who has been designated by the receiving party to receive another party's PROTECTED INFORMATION, including CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, and CONFIDENTIAL INFORMATION. Each party's TECHNICAL ADVISORS shall be limited to such person as, in the judgment of that party's counsel, are reasonably necessary for development and presentation of that party's case. These persons include outside experts or consultants retained to provide technical or other expert services such as expert testimony or otherwise assist in trial preparation.

3. Disclosure Agreements

(a) Each receiving party's TECHNICAL ADVISOR shall sign a disclosure agreement in the form attached hereto as Exhibit A ("Disclosure Agreement"). Copies of the Disclosure Agreement signed by any person or entity to whom PROTECTED INFORMATION is disclosed shall be provided to the other party promptly after execution by facsimile and overnight

mail. No disclosures shall be made to a TECHNICAL ADVISOR until seven (7) days after the executed Disclosure Agreement is served on the other party.

(b) Before any PROTECTED INFORMATION is disclosed to outside TECHNICAL ADVISORS, the following information must be provided in writing to the producing party and received no less than seven (7) days before the intended date of disclosure to that outside TECHNICAL ADVISOR: the identity of that outside TECHNICAL ADVISOR, business address and/or affiliation and a current curriculum vitae of the TECHNICAL ADVISOR, and, if not contained in the TECHNICAL ADVISOR's curriculum vitae, a brief description, including education, present and past employment and general areas of expertise of the TECHNICAL ADVISOR. If the producing party objects to disclosure of PROTECTED INFORMATION to an outside TECHNICAL ADVISOR, the producing party shall within seven (7) days of receipt serve written objections identifying the specific basis for the objection, and particularly identifying all information to which disclosure is objected. Failure to object within seven (7) days shall authorize the disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR. As to any objections, the parties shall attempt in good faith to promptly resolve any objections informally. If the objections cannot be resolved, the party seeking to prevent disclosure of the PROTECTED INFORMATION to the expert shall move within seven (7) days for an Order of the Court preventing the disclosure. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within seven (7) days, disclosure to the TECHNICAL ADVISOR shall be permitted. In the event that objections are made and not resolved informally and a motion is filed, disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR shall not be made except by Order of the Court.

(c) Any disclosure agreement executed by any person affiliated with a party shall be provided to any other party who, based upon a good faith belief that there has been a violation of this order, requests a copy.

(d) No party shall attempt to depose any TECHNICAL ADVISOR until such time as the TECHNICAL ADVISOR is designated by the party engaging the TECHNICAL ADVISOR as a testifying expert. Notwithstanding the preceding sentence, any party may depose a TECHNICAL ADVISOR as a fact witness provided that the party seeking such deposition has a good faith, demonstrable basis independent of the Disclosure Agreement or the information provided under subparagraph (a) above that such person possesses facts relevant to this action, or facts likely to lead to the discovery of admissible evidence; however, such deposition, if it precedes the designation of such person by the engaging party as a testifying expert, shall not include any questions regarding the scope or subject matter of the engagement. In addition, if the engaging party chooses not to designate the TECHNICAL ADVISOR as a testifying expert, the non-engaging party shall be barred from seeking discovery or trial testimony as to the scope or subject matter of the engagement.

4. Designation of Information

(a) Documents and things produced or furnished during the course of this action shall be designated as containing CONFIDENTIAL INFORMATION, by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION

(b) Documents and things produced or furnished during the course of this action shall be designated as containing information which is CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY

(c) During discovery, a producing party shall have the option to require that all or batches of materials be treated as containing CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY during inspection and to make its designation as to particular documents and things at the time copies of documents and things are furnished.

(d) A party may designate information disclosed at a deposition as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the reporter to so designate the transcript at the time of the deposition.

(e) A producing party shall designate its discovery responses, responses to requests for admission, briefs, memoranda, and all other papers sent to the court or to opposing counsel as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY when such papers are served or sent.

(f) A party shall designate information disclosed at a hearing or trial as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the court, at the time the information is proffered or adduced, to receive the information only in the presence of those persons designated to receive such information and court personnel, and to designate the transcript appropriately.

(g) The parties will use reasonable care to avoid designating any documents or information as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that is not entitled to such designation or which is generally available to the public. The parties shall designate only that part of a document or deposition that is

CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL – ATTORNEYS EYES ONLY, the party will designate only that part of the document setting forth the specific pricing information as ATTORNEYS EYES ONLY, rather than the entire document.

(h) In multi-party cases, Plaintiffs and/or Defendants shall further be able to designate documents as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS for documents that shall not be disclosed to other parties.

5. Disclosure and Use of Confidential Information

Information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be disclosed by the receiving party only to Qualified Recipients. All Qualified Recipients shall hold such information received from the disclosing party in confidence, shall use the information only for purposes of this action and for no other action, and shall not use it for any business or other commercial purpose, and shall not use it for filing or prosecuting any patent application (of any type) or patent reissue or reexamination request, and shall not disclose it to any person, except as hereinafter provided. All information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be carefully maintained so as to preclude access by persons who are not qualified to receive such information under the terms of this Order.

In multi-party cases, documents designated as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT

TO BE DISCLOSED TO OTHER DEFENDANTS shall not be disclosed to other plaintiffs and/or defendants.

6. Qualified Recipients

For purposes of this Order, “Qualified Recipient" means

(a) For CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY:

(1) Outside counsel of record for the parties in this action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in the action, outside copying services, document management services and graphic services;

(2) Court officials involved in this action (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

(3) Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(4) Any outside TECHNICAL ADVISOR employed by the outside counsel of record, subject to the requirements in Paragraph 3 above;

(5) Any witness during the course of discovery, so long as it is stated on the face of each document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document. Where it is not stated on the face of the confidential document being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document, the party seeking disclosure may nonetheless disclose the

confidential document to the witness, provided that: (i) the party seeking disclosure has a reasonable basis for believing that the witness in fact received or reviewed the document, (ii) the party seeking disclosure provides advance notice to the party that produced the document, and (iii) the party that produced the document does not inform the party seeking disclosure that the person to whom the party intends to disclose the document did not in fact receive or review the documents. Nothing herein shall prevent disclosure at a deposition of a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to the officers, directors, and managerial level employees of the party producing such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, or to any employee of such party who has access to such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY in the ordinary course of such employee's employment; and

(6) Any designated arbitrator or mediator who is assigned to hear this matter, or who has been selected by the parties, and his or her staff, provided that such individuals agree in writing, pursuant to the Disclosure Agreement, to be bound by the terms of this Order.

(b) FOR CONFIDENTIAL INFORMATION:

(1) Those persons listed in paragraph 6(a);

(2) In-house counsel for a party to this action who are acting in a legal capacity and who are actively engaged in the conduct of this action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary;

(3) The insurer of a party to litigation and employees of such insurer to the extent reasonably necessary to assist the party's counsel to afford the insurer an opportunity to investigate and evaluate the claim for purposes of determining coverage and for settlement purposes; and

(4) Representatives, officers, or employees of a party as necessary to assist outside counsel with this litigation.

7. Use of Protected Information

(a) In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission, or other papers of any kind that are served or filed include another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the papers must be appropriately designated pursuant to paragraphs 4(a) and (b) and ~~governed by DUCivR 5-3~~ shall be marked and treated as "PROTECTED" BY THE PARTIES AND THE Court as that term is used in the Utah Code of Judicial Administration 4-202.02 and 4-202.03.

(b) All documents, including attorney notes and abstracts, that contain another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall be handled as if they were designated pursuant to paragraph 4(a) or (b).

(c) Documents, papers, and transcripts that are filed with the court and contain any other party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be filed, marked and treated as "PROTECTED" by the parties and the Court as that term is used in the Utah Code of Judicial Administration 4-202.02 and 4-202.03 ~~in sealed envelopes and filed in accordance with DUCivR 5-3~~.

(d) To the extent that documents are reviewed by a receiving party prior to production, any knowledge learned during the review process will be treated by the receiving party as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY until such time as the documents have been produced, at which time any stamped classification will control. No

photograph or any other means of duplication, including but not limited to electronic means, of materials provided for review prior to production is permitted before the documents are produced with the appropriate stamped classification.

(e) In the event that any question is asked at a deposition with respect to which a party asserts that the answer requires the disclosure of CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, such question shall nonetheless be answered by the witness fully and completely. Prior to answering, however, all persons present shall be advised of this Order by the party making the confidentiality assertion and, in the case of information designated as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY at the request of such party, all persons who are not allowed to obtain such information pursuant to this Order, other than the witness, shall leave the room during the time in which this information is disclosed or discussed.

(f) Nothing in this Standard Protective Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon his examination of materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not disclose the specific contents of any materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

8. Inadvertent Failure to Designate

(a) In the event that a producing party inadvertently fails to designate any of its information pursuant to paragraph 4, it may later designate by notifying the receiving parties in

writing. The receiving parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation.

(b) It shall be understood however, that no person or party shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

9. Challenge to Designation

(a) Any receiving party may challenge a producing party's designation at any time. A failure of any party to expressly challenge a claim of confidentiality or any document designation shall not constitute a waiver of the right to assert at any subsequent time that the same is not in-fact confidential or not an appropriate designation for any reason.

(b) Any receiving party may disagree with the designation of any information received from the producing party as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. In that case, any receiving party desiring to disclose or to permit inspection of the same otherwise than is permitted in this Order, may request the producing party in writing to change the designation of a document or documents, stating with particularity the reasons for that request, and specifying the category to which the challenged document(s) should be de-designated The producing party shall then have seven (7) days from the date of service of the request to:

(1~~i~~) advise the receiving parties whether or not it persists in such designation; and

(2~~ii~~) if it persists in the designation, to explain the reason for the particular designation and to state its intent to seek a protective order or any other order to maintain the designation.

(c) If no response is made within seven (7) days after service of the request under subparagraph (b), the information will be de-designated to the category requested by the receiving party. If, however, the request under subparagraph (b) above is responded to under subparagraph (b)(i) and (ii), within seven (7) days the producing party may then file a statement of discovery issues pursuant to Rule 37 ~~move the court for a protective order or any other order~~ to maintain the designation. The burden of proving that the designation is proper shall be upon the producing party. If no such ~~motion~~ statement of discovery issues if filed ~~is made~~ within seven (7) days after the statement to seek an order under subparagraph (b)(ii), the information will be de-designated to the category requested by the receiving party. In the event objections are made and not resolved informally and a ~~motion~~ statement of discovery issues is filed, disclosure of information shall not be made until the issue has been resolved by the Court (or to any limited extent upon which the parties may agree).

No party shall be obligated to challenge the propriety of any designation when made, and failure to do so shall not preclude a subsequent challenge to the propriety of such designation.

(d) With respect to requests and applications to remove or change a designation, information shall not be considered confidential or proprietary to the producing party if:

(1~~i~~) the information in question has become available to the public through no violation of this Order; or

(2~~ii~~) the information was known to any receiving party prior to its receipt from the producing party; or

(3~~iii~~) the information was received by any receiving party without restrictions on disclosure from a third party having the right to make such a disclosure.

10. Inadvertently Produced~~ed~~ing Privileged Documents

The parties hereto also acknowledge that regardless of the producing party's diligence an inadvertent production of attorney-client privileged or attorney work product materials may occur. In accordance with ~~Fed.~~Utah R. Civ. P. 26(b)(8~~5~~) and ~~Fed.~~Utah R. Evid. ~~502~~504 and 510, they therefore agree that if a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party that the document or thing is subject to a claim of attorney-client privilege or attorney work product and request that the document or thing be returned to the producing party. The receiving party shall return to the producing party such document or thing. Return of the document or thing shall not constitute an admission or concession, or permit any inference, that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or attorney work product, nor shall it foreclose any party from moving the Court pursuant to ~~Fed.~~Utah R. Civ. P. 26(b)(8~~5~~) and ~~Fed.~~Utah R. Evid. ~~502~~ 504 and 510 for an Order that such document or thing has been improperly designated or should be produced.

11. Inadvertent Disclosure of Confidential Information

In the event of an inadvertent disclosure of another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to a non-Qualified Recipient, the party making the inadvertent disclosure shall promptly upon learning of the disclosure: (i) notify the person to whom the disclosure was made that it contains CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY subject to this Order; (ii) make all reasonable efforts to preclude dissemination or use of the CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY by the person to whom disclosure was inadvertently made including, but not limited to, obtaining all copies of such materials from the non-Qualified Recipient; and (iii) notify the producing party of the identity of the person to whom the disclosure was made, the circumstances surrounding the disclosure, and the steps taken to ensure against the dissemination or use of the information.

12. Limitation

This Order shall be without prejudice to any party's right to assert at any time that any particular information or document is or is not subject to discovery, production or admissibility on the grounds other than confidentiality.

13. Conclusion of Action

(a) At the conclusion of this action, including through all appeals, each party or other person subject to the terms hereof shall be under an obligation to destroy or return to the producing party all materials and documents containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY and to certify to the producing party such destruction or return. Such return or destruction shall not relieve said parties or persons from any of the continuing obligations imposed upon them by this Order.

(b) After this action, trial counsel for each party may retain one archive copy of all documents and discovery material even if they contain or reflect another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. Trial counsel's archive copy shall remain subject to all obligations of this Order.

(c) The provisions of this paragraph shall not be binding on the ~~United~~ State~~s~~ of Utah, any insurance company, or any other party to the extent that such provisions conflict with applicable f~~F~~ederal or s~~S~~tate law. The ~~Department of Justice~~Utah Attorney General's Office, any

insurance company, or any other party shall notify the producing party in writing of any such conflict it identifies in connection with a particular matter so that such matter can be resolved either by the parties or by the Court.

14. Production by Third Parties Pursuant to Subpoena

Any third party producing documents or things or giving testimony in this action pursuant to a subpoena, notice or request may designate said documents, things, or testimony as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. The parties agree that they will treat CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY produced by third parties according to the terms of this Order.

15. Compulsory Disclosure to Third Parties

If any receiving party is subpoenaed in another action or proceeding or served with a document or testimony demand or a court order, and such subpoena or demand or court order seeks CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY of a producing party, the receiving party shall give prompt written notice to counsel for the producing party and allow the producing party an opportunity to oppose such subpoena or demand or court order prior to the deadline for complying with the subpoena or demand or court order. No compulsory disclosure to third parties of information or material exchanged under this Order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction.

16. Jurisdiction to Enforce Standard Protective Order

After the termination of this action, the Court will continue to have jurisdiction to enforce this Order.

17. Modification of Standard Protective Order

This Order ~~is without prejudice to the right of any person or entity to seek a modification of this Order~~may be modified at any time either through stipulation or Order of the Court.

18. Confidentiality of Party's Own Documents

Nothing herein shall affect the right of the designating party to disclose to its officers, directors, employees, attorneys, consultants or experts, or to any other person, its own information. Such disclosure shall not waive the protections of this Standard Protective Order and shall not entitle other parties or their attorneys to disclose such information in violation of it, unless by such disclosure of the designating party the information becomes public knowledge. Similarly, the Standard Protective Order shall not preclude a party from showing its own information, including its own information that is filed under seal by a party, to its officers, directors, employees, attorneys, consultants or experts, or to any other person.

19. Finding and Conclusions Pursuant to Rule 4-202.04(6) of the Utah Code of Judicial Administration

The Court makes the following Findings and Conclusions regarding the filing of documents or information designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY under this Standard Protective Order:

(a) Certain information and documents, including pleadings, disclosures, discovery requests, or responses, motions, briefs, or other papers may be filed in this litigation that contain information that the parties have designated as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, pursuant to this Standard Protective Order. As defined above, CONFIDENTIAL INFORMATION and CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY includes confidential information, including but

not limited to trade secrets, confidential or proprietary financial information, operational data, business plans, business records, competitive analyses, personnel files, personal information that is protected by law, and other sensitive information.

(b) "The [C]ourt may classify [a] record as private, protected, or sealed, … or redact information from the record if the record or information … is classified as private, protected, sealed … under Rule 4-202.02" or "is a record containing information the disclosure of which constitutes an unwarranted invasion of personal privacy." Utah Code of Judicial Admin. R. 4-202.04(4).

(c) Protected records include:

(1) any records submitted to a governmental entity "that the person believes should be protected under Subsection 63G-2-305(1) or (2)," UTAH CODE ANN. § 63G-2-309(1);

(2) "confidential business records under Utah Code Section 63G-2-309." Utah Code of Judicial Admin. R. 4-202.02(5)(I);

(3) "trade secrets as defined in Utah Code Section 13-24-2," Utah Code of Judicial Admin. R. 4-202.02(5)(R); and

(4) "other records as ordered by the court under Rule 4- 202.04." *See* Utah Code of Judicial Admin. R. 4-202.02(5)(V).

(d) As set forth herein, the disclosing parties have made "a written claim of business confidentiality" and provided "a concise statement of reasons supporting the claim of business confidentiality." UTAH CODE ANN. § 63G-2-309(1)(a)(i).

(e) The Court finds that, if filings containing such CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY are not

closed to the public, the disclosing party may be subject to competitive or financial injury or potential legal liability to third parties.

(f) The Court further finds that, given the confidential and sensitive nature of the CONFIDENTIAL INFORMATION and CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the public's right of access to filings containing such CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY is outweighed by the interests of the disclosing party in the confidentiality of such information.

(g) The Court further finds that the disclosing party's good faith designation of such filings as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY justifies closing such records to the public by classifying such filings as protected, pursuant to Rule 4-202.04(5) of the Utah Code of Judicial Administration.

(h) The Court concludes that, on balance, the interests of the parties disclosing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that may be included in filings in this action outweighs the public's interest in open court records and that no reasonable alternative exists to closing filings to the public that the parties in good faith designate as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, subject to the parties' and public's right to challenge the designation of information as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY and the closure of certain filings to the public.

(i) Accordingly, the Court classifies as protected documents and information designated as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY, pursuant to this Standard Protective Order.

(j) The Court orders the Clerk to maintain CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY as protected, pursuant to Rule 4-202.04(4) and 4-202.09(9) of the Utah Code of Judicial Administration. Accordingly, and pursuant to Rules 4-202.04(4) and 4-202.09(9) of the Utah Code of Judicial Administration, the Clerk of this Court is directed to maintain as protected all pleadings, disclosures, discovery requests or responses, motions, briefs, or other papers filed in this litigation that have been classified, in whole or in part, as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY under this Standard Protective Order.

SO ORDERED AND ENTERED BY THE COURT PURSUANT TO ~~DUCivR 26-2~~RULES 26(g) and 37(a)(7)(G) OF THE UTAH RULES OF CIVIL PROCEDURE, EFFECTIVE UPON THE FILING OF THE NOTICE OF ELECTION AND SERVICE OF THE ORDER ~~AS OF THE COMMENCE OF THE ACTION~~.

Commented [DLE(SL1]: If this order is going to be signed in cases, should we add a reference to URCP 10(e) here?

IN THE ~~UNITED STATES~~ _____ JUDICIAL DISTRICT COURT
_____ COUNTY, ~~FOR THE DISTRICT~~ STATE OF UTAH

_____, Plaintiffs, vs. _____, Defendant.	DISCLOSURE AGREEMENT Case No. Honorable ~~Magistrate Judge~~

Commented [DLE(SL2]: NOTE: The proposal previously sent did not include this document, but did reference it in the main document, so I made what I thought were the appropriate changes to the federal court document, but this has not been reviewed by our committee at all yet.

I, _____, am employed by _____. In connection with this action, I am:

_____ a director, officer or employee of _____ who is directly assisting in this action;

_____ have been retained to furnish technical or other expert services or to give testimony (a "TECHNICAL ADVISOR");

_____ Other Qualified Recipient (as defined in the Standard Protective Order) (Describe:_____).

I have read, understand and agree to comply with and be bound by the terms of the Standard Protective Order in the matter of _____, Civil Action No. _____, pending in the ~~United States~~ _____ Judicial District Court, _____ County, ~~for the District~~ State of Utah. I further state that the Standard Protective Order entered by the Court, a copy of which has been given to me and which I have read, prohibits me from using any PROTECTED INFORMATION, including documents, for any purpose not appropriate or necessary to my participation in this action or disclosing such documents or information to any

person not entitled to receive them under the terms of the Standard Protective Order. To the extent I have been given access to PROTECTED INFORMATION, I will not in any way disclose, discuss, or exhibit such information except to those persons whom I know (a) are authorized under the Standard Protective Order to have access to such information, and (b) have executed a Disclosure Agreement. I will return, on request, all materials containing PROTECTED INFORMATION, copies thereof and notes that I have prepared relating thereto, to counsel for the party with whom I am associated. I agree to be bound by the Standard Protective Order in every aspect and to be subject to the jurisdiction of the ~~United States~~ _____ Judicial District Court, _____ County, ~~for the District~~ State of Utah for purposes of its enforcement and the enforcement of my obligations under this Disclosure Agreement. I declare under penalty of perjury that the foregoing is true and correct.

_____
Signed by Recipient

_____
Name (printed)

Date: _____

TAB 8

MEMORANDUM

TO: Supreme Court Advisory Committee on the Rules of Civil Procedure

FROM: Subcommittee re Rules 12(a)(1), 26.1(h) and 104 (Loni Page, Tonya Wright, Keri Sargent and Susan Vogel)

DATE: January __, 2023

RE: Supreme Court request to review/revise Rules 12(a)(1), 26.1(h) and 104 per letter of September 2, 2022

RULE 12(a)(1)

The current rule states:

Rule 12. Defenses and objections.
Effective: 11/1/2021
(a) When presented.
(1) In actions other than domestic relations. Unless otherwise provided by statute or order of the court, a defendant must serve an answer within 21 days after the service of the summons and complaint is complete within the state and within 30 days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim must serve an answer thereto within 21 days after the service. The plaintiff must serve an answer to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 14 days after notice of the court's action;

(B) If the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the service of the more definite statement.

The Supreme Court commented:

"URCP 12(a)(1) directs a defendant to serve an answer within a specific time. However, the rule does not tell the defendant to file the answer as well, often leading to default. We would like the Committee to evaluate whether adding the requirement in the rule that the answer be filed would reduce the number of cases ending in default.

Recommendations of our Subcommittee:

(Green indicates the language that we believe would address the Supreme Court's concerns. Red indicates other changes we suggest to make the Rule more understandable to self-represented parties.)

Rule 12. Defenses and objections.
Effective: 11/1/2021
(a) When presented.
(1) In actions other than domestic relations. Unless otherwise provided by statute or order of the court, a defendant must file and serve an answer within 21 days after the service of the summons and complaint ~~is complete~~ within the state and within 30 days after service of the summons and complaint ~~is complete~~ outside the state. A party served with a ~~pleading stating~~ a cross-claim must file and serve an answer ~~there~~to the crossclaim within 21 days after ~~the~~ service. The plaintiff must file and serve an answer to a counterclaim ~~in the answer~~ within 21 days after service of the counterclaim ~~answer or, if a reply is ordered by the court, within 21 days after service of the order~~, unless the court orders otherwise ~~directs~~. The service of a motion under this rule alters these periods of time as follows, unless a different time is ~~fixed by~~ ordered by ~~of~~ the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 14 days after notice of the court's action;

(B) If the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the service of the more definite statement.

Another suggestion is to add a table to make it easier to understand deadlines:

DOCUMENT SERVED	UPON	RESPONSE OF PARTY SERVED IF NOT IN AGREEMENT	DEADLINE AFTER SERVICE FOR FILING and SERVING ON OTHER PARTIES
Complaint or Petition and Summons	Defendant/Respondent	Answer, and (optional) Counterclaim or Counterpetition	21 days after service in-state or 30 days after service out of state
Counterclaim or Counterpetition	Plaintiff	Answer or Reply to Counterclaim/Counterpetition	21 days
Crossclaim	Co-plaintiff or co-defendant	Answer to Crossclaim	21 days

RULE 26.1(h)

The current rule states:

"**(h) Notice of requirements.** Notice of the requirements of this rule must be served on the other party and all joined parties with the initial petition."

The Supreme Court commented:

"URCP 26.1(h) requires parties in domestic relations actions to be served with notice of the requirements to exchange initial disclosures and financial declarations. However, in practice, when parties agree on all terms, the disclosure are not required. The Court would like the Committee to consider amending the rule to clarify that the disclosures are only required if the responding party files an answer or otherwise disagrees with the petition."

Recommendations of our Subcommittee:

h) Notice of requirements. Notice of the requirements of this rule must be served on the other party and all joined parties ~~with the initial petition~~ if the responding party files an Answer or other paper disagreeing with the petition.

RULE 104

The current rule states:

Rule 104. Divorce decree upon affidavit.
Effective: 11/1/2021

"A party in a divorce case may apply for entry of a decree without a hearing in cases in which the other party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree must accompany the application. The affidavit must contain evidence sufficient to support necessary findings of fact and a final judgment."

The Supreme Court commented:

"URCP 104 requires the filing of a separate affidavit in support of a divorce decree, even though court form pleadings articulate the grounds for jurisdiction and for divorce as sworn statements under the Unsworn Declarations Act, Utah Code Title 78B, Chapter 18a. This rule duplications work, adds more generation of paperwork, and more confusion in divorce actions. The Court would like the Committee to consider 2 repealing this rule or amending it to clarify that a sworn pleading can suffice for the affidavit mentioned in the rule."

Recommendations of our Subcommittee:

"A court may enter a divorce decree without a hearing if the documents filed in the case contain evidence sufficient to support necessary findings of fact and a final divorce decree."

Or

Rule 104. Divorce decree upon affidavit.
Effective: 11/1/2021

"A party in a divorce case may ~~apply for~~ request entry of a decree without a hearing in cases in which the other party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. A~~n affidavit~~ declaration in support of the decree must accompany the request

~~application~~. The declaration ~~affidavit~~ must contain evidence sufficient to support necessary findings of fact and a final judgment. A sworn pleading, such as a Verified Petition, can suffice for the declaration mentioned in the rule."

TAB 9

Aug 22, 2022

Fact sheet on Attorney-Conducted Voir Dire:

Utah is in the minority

As of 2007, Utah was one of only 10 states in which judges predominantly conducted voir dire.[1]

Table 21: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge-Conducted Voir Dire	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Conduct Voir Dire Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney-Conducted Voir Dire	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

That number has decreased at least by one though since Massachusetts adopted attorney-conducted voir dire in 2015 (see article and rule below).

Length of Attorney-Conducted Voir Dire

The Center for Jury Studies conducted a study on how much time attorney-conducted voir dire adds to a trial. As a reference point, they calculated that the average 12 person civil jury trial with equal time between judge and attorney-conducted questioning and three peremptoriness takes 114 minutes, or approximately 2 hours to complete.[2]

When voir dire is conducted predominantly by attorneys the average times increase by 70 minutes.[4] This additional time, little more than an hour, is a relatively small price to pay in the grand scheme of the importance impartial jurors play to the process. Since the attorneys on the case are more likely to know the finite details of their case, which the Judge may not be aware of, it makes sense that questions the attorneys have are not always the same as those a judge may ask.

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[1] Center for Jury Studies, *State of the States Survey of Jury Improvement Efforts*, 27, available at https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey?SQ_VARIATION_5888=0.
[2] See *Id.* at 30 showing a table of how different variables increase or decrease the average time for voir dire when compared to the reference.
[3] *Id.*
[4] *Id.* Using the table, when judges conduct voir dire exclusively, it saves 47 minutes compared to the reference, and when attorneys predominantly conduct voir dire, it adds 25 minutes. By comparison, when attorneys exclusively conduct voir dire, it adds 105 minutes instead of 25.

The Benefit of Attorney Conducted Voir Dire

Repeated studies show that attorney-conducted voir dire elicit far more truthfulness about juror biases than judge-conducted voir dire.[5]

Jurors are twice as honest when attorneys ask them questions than with judges ask the identical questions.[6]

Jurors are significantly more likely to face the pressure of "evaluation anxiety" when asked questions by judges as well as an "expectancy effect" that when they are asked by a judge if they can be impartial that the judge is implicitly encouraging them to answer "yes."[7]

Attorney-conducted Voir Dire is encouraged in Utah[8] but rarely permitted by courts outside of a few jurisdictions.

In *State v. Williams*, the Utah Court of Appeals has given guidance on how Utah courts should oversee attorney-conducted voir dire, with details about what should, and shouldn't, be allowed based on how other jurisdictions handle attorney-conducted voir dire.[9] Although criminal in nature, this case and its guidelines can be equally as informative to the use of attorney-conducted voir dire in civil cases.

The proposed rule change adopts guidance by *Williams* while also looking to other jurisdictions as supplemental guidance to construct a comprehensive rule.

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[5] John Campbell et. al., *An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices,* U DENVER LEGAL STUDIES RESEARCH PAPER NO. 20-11 (April 24, 2020), available at SSRN: https://ssrn.com/abstract=3584582 or http://dx.doi.org/10.2139/ssrn.3584582; Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investiga**tion** of Juror Candor,* 11 LAW AND HUMAN BEHAVIOR, 131 (1987); Richard Seltzer, et. al. *Juror Honesty During the Voir Dire,* JOURNAL OF CRIMINAL JUSTICE 451, 453 (1991); Roger W. Shuy, *How a Judge's Voir Dire can Teach a Jury What to Say,* 6 DISCOURSE & SOCIETY, 207 *(1995).*

[6] Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investiga**tion** of Juror Candor,* 11 LAW AND HUMAN BEHAVIOR, 131 (1987).

[7] *Id.*

[8] *State v. Williams,* 2018 UT App 96, ¶ 37, n. 14 ("In Utah's trial courts, the days of perfunctory — and often insufficient — judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination, *see* Utah R. Crim. P. 18(b), and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire.").

[9] *State v. Williams,* 2018 UT App 96,

Rule 47. Jurors.

(a) Examination of jurors. Upon a motion by either party, t~~T~~he court ~~shall~~ shall ~~may~~ permit the parties or their attorneys to conduct the examination of prospective jurors. If such a motion is made, the court shall permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial. If no motion is made, the court ~~or~~ may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. ~~The court may permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial.~~

(b) Procedure for Attorney-Conducted Jury Selection.

(b)(1) The Court may impose reasonable restrictions on attorney-conducted jury selection; including, a reasonable time limited allotted to each side. In determining a reasonable time limit, the court should consider the complexity of the issues in the case, the length of the overall trial, and any stipulations of the parties.

(b)(2) A party may give a preliminary statement of the case to the entire panel. The statement should orient the panel to the questions that will be asked without commenting on specific facts to be presented during trial. The statement may not be used as a tool to persuade members of the panel to adopt a position or predisposition to the evidence, or bolster an anticipated witness's credibility. The party may inform the panel about a relevant law, such as an anticipated defense, if needed to inquire into any bias on following that law. The party may make additional statements during the time allotted for questioning as needed to orient the panel to new topics.

(b)(3) Questions should be targeted to reveal prospective jurors' biases or prejudices. The court may not prohibit a questions simply because the bias or prejudice of concern is not related to a for-cause strike or because the questions relates to a sensitive topic. Either by objection from opposing counsel, or by the court acting sua sponte, the court may prohibit a question that:

(b)(3)(A) may confuse the person asked;

(b)(3)(B) is rhetorical or waits for no answer;

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(eb) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.

(fc) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror.

(gd) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(he) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

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(if) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(if)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(if)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(fi)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(if)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(if)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(if)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(ig) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(ig)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and

the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.
(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Rule 47. Jurors.

(a) Examination of jurors. Upon a motion by either party, t~~T~~he court ~~shall~~ shall ~~may~~ permit the parties or their attorneys to conduct the examination of prospective jurors. If such a motion is made, the court shall permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial. If no motion is made, the court ~~or~~ may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. ~~The court may permit the parties or their attorneys to make a preliminary statement of the case and notify the parties in advance of trial.~~

(b) Procedure for Attorney-Conducted Jury Selection.

(b)(1) The Court may impose reasonable restrictions on attorney-conducted jury selection; including, a reasonable time limited allotted to each side. In determining a reasonable time limit, the court should consider the complexity of the issues in the case, the length of the overall trial, and any stipulations of the parties.

(b)(2) A party may give a preliminary statement of the case to the entire panel. The statement should orient the panel to the questions that will be asked without commenting on specific facts to be presented during trial. The statement may not be used as a tool to persuade members of the panel to adopt a position or predisposition to the evidence, or bolster an anticipated witness's credibility. The party may inform the panel about a relevant law, such as an anticipated defense, if needed to inquire into any bias on following that law. The party may make additional statements during the time allotted for questioning as needed to orient the panel to new topics.

(b)(3) Questions should be targeted to reveal prospective jurors' biases or prejudices. The court may not prohibit a questions simply because the bias or prejudice of concern is not related to a for-cause strike or because the questions relates to a sensitive topic. Either by objection from opposing counsel, or by the court acting sua sponte, the court may prohibit a question that:

(b)(3)(A) may confuse the person asked;

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Also see discussion in State v. Jonas, 904 N.W.2d 566 (Iowa 2017).

"As noted in People v. Merrow, answers to the trial judge's generalized and leading questions "may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality" but are unreliable."

(eb) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.

(fc) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror.

(gd) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(he) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(if) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(if)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(if)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f~~i~~)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(if)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(if)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(if)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(ig) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(ig)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(ig)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and

the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.
(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

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I. INTRODUCTION

The jury trial is sacrosanct in the United States. While other countries place restrictions or eliminate it altogether, trial by jury is a bedrock form of democracy in America. The United States Constitution guarantees the right in both criminal and civil trials.[1] Indeed, early architects of the American judicial system point to the foundational nature of the jury trial. Advocating for the fundamental necessity of jury trials, Thomas Jefferson stated, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[2]

Though the Seventh Amendment is not binding on the states, every states, with the exception of three, provide civil litigants the right to a jury trial equivalent to the Seventh

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[1] In criminal cases, the Constitutional protection extends to the states via the Fourteenth Amendment. But currently this same type of sweeping extension has not been enforced in civil cases. New jurisprudence from the United States Supreme Court has changed the analysis relating to how to determine whether a guarantee within the Bill of Rights is incorporated via the Fourteenth Amendment in order to apply to the states. *McDonald v. City of Chi.*, 561 U.S. 742, 761–65, 130 S. Ct. 3020, 3032-35, 177 L. Ed. 2d 894 (2010). Existing precedent holds that the Seventh Amendment is not incorporated, and at least one federal court has reaffirmed such precedent in recent years. *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015). However, there are some who believe that changes in the composition of the Supreme Court and changes to the test it uses to decide incorporation could shift this result.

[2] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (*quoting* 3 *The Writings of Thomas Jefferson* 71 (Washington ed., 1861)).

Amendment guarantee through respective state constitutional provisions, case law, or state statutes.[3] And even in states that do not guarantee a civil jury trial in all settings, the practice is still reasonably common, as it is typically provided through rules of civil procedure, case precedent, statutes, or some combination of all three.[4]

The founders, legislatures, and judges all sense, however, that a bare guarantee of a jury trial is insufficient. The right to an unbiased and impartial jury is essential to the American trial guarantee.[5] This belief is common at the state and federal level.[6]

But if a fair jury is the real goal, how do we ensure we have one? Which jurors should be seated, and which excluded? And how do we achieve the goal of finding the biases that could

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[3] Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 Stan. L. Rev. 851, 858 (2013) ("Trial by jury is not a constitutional right in Colorado, Louisiana, or Wyoming."); Ted A. Donner & Richard K. Gabriel, *Jury Selection Strategy and Science* § 35:2 (3d ed.) (2016).

[4] For example, Colorado has held there is no constitutionally guaranteed right to a jury trial in civil proceedings. *Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 27 (Colo. App. 2010). Rather, such right is derived from Colorado Rules of Civil Procedure strictly for actions at law, in contrast to those brought in equity, which lack a right to a jury trial. *See Worchester v. State Farm Mut. Auto. Ins. Co.*, 172 Colo. 352, 473 P.2d 711 (1970).

[5] *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.").

[6] When the right to a jury trial exists, regardless of the source, the language used to describe the composition and the unbiased, impartial role of a jury is similar. *See, e.g., Kendall v. Prudential Ins. Co. of Am.*, 327 S.W.2d 174, 177 (Mo. 1959) ("The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution."). For example, in Colorado, where there is no constitutional guarantee to a civil jury trial, courts have nonetheless embraced the right to a fair and impartial jury as "of fundamental importance." *Whaley v. Keystone Life Ins. Co.*, 811 P.2d 404, 404-05 (Colo. App. 1989) ("Although not a protected right under the Colorado Constitution, the right to a jury trial in civil cases has been an essential part of Colorado's justice system almost from its inception.") (citations omitted). *See also Blades v. DaFoe*, 704 P.2d 317, 320 (Colo. 1985) ("[I]t is axiomatic that all litigants who are entitled to a jury trial in a proceeding, whether civil or criminal, are entitled to fair and impartial jurors."), *overruled on other grounds by, Laura A. Newman, LLC v. Roberts*, 2016 CO 9, 365 P.3d 972; *Halliburton v. Cty. Ct.*, 672 P.2d 1006, 1011 (Colo. 1983) (holding that limited judicial resources and oppressive caseloads were not compelling reasons to burden plaintiff's substantial right to a jury trial). This mirrors language the United States Supreme Court has used. *Thiel*, 328 U.S. at 220 ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."). *See also Parklane Hosiery*, 439 U.S. at 351 (Rehnquist, J., dissenting) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.").

pervert the jury system? These questions point directly at jury selection. Yet despite the soaring language applied to the good of juries, we know little in the civil setting about how jury selection (*voir dire*) impacts the aspirations of our founders and the guarantees of our courts. Indeed, there is a spectrum of views on how much *voir dire* is necessary or whether it is even necessary at all.[7] Some courts conclude that little *voir dire* is crucial because too much questioning could taint a jury or "unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial."[8] Other courts diametrically oppose this limiting sentiment and stress the exigency for extensive *voir dire* to reveal and exclude juror biases.[9] Beyond these initial divides, there are others. Some courts reason that even if jurors enter with predispositions, and even if those predispositions may relate to civil lawsuits generally or topics specific to a case, these views can be cured by instructions from a judge to follow the law and a commitment from the juror to do the same.[10] Other courts presume that biases are stubborn and that even strongly worded instructions, written and from the judge, cannot cage the biases.[11] These courts exclude such jurors "for cause."

These clashing perspectives result in the seating of starkly dissimilar juries. One can imagine that in a court where *voir dire* is conducted only by the judge and touches on only

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7 Hon. Gregory E. Mize, et al., *The State-Of-The-States Survey of Jury Improvement Efforts: A Compendium Report,* Nat'l Ctr. St. Cts., at 30 (2007) www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendium Final.ashx.

8 *Id*.

9 Am. Bar Ass'n, *Principles for Juries and Jury Trials*, Am. Jury Project, at 72 (2005) ("[V]oir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is *voir dire* conducted by the judge alone. A simple, perfunctory examination by a judge does not 'reveal preconceptions or unconscious bias.' ").

10 Crocker, C. B. & Kovera, M. B. "The Effects of Rehabilitative *Voir dire* on Juror Bias and Decision Making." *L. & Hum. Behav.*, 212 (2010) ("In many jurisdictions, judges will question venirepersons who have admitted bias and ask if they will be able to put aside their biases during the trial and decide the case based upon the evidence. Acquiescence to this request is legally sufficient in many jurisdictions to deem the venireperson unbiased and fit to serve on the jury." (Internal citations omitted)).

11 *Montgomery v. Com*., 819 S.W.2d 713, 718 (Ky. 1991) ("[O]bjective bias renders a juror legally partial, despite his claim of impartiality.").

general topics, most jurors are deemed competent. In those courts, jurors are often asked basic questions such as, "Do you have any biases or prejudices that might impact your decision?" The onus is on the juror to search their life views, identify any "biases," and report them. Courts may ask jurors to make such revelations after having heard only a condensed summary of the case. In this scenario, few jurors are excluded for cause. The result might be that the parties exercise peremptory strikes, and then seat a jury that is, for the most part, a random draw of the panel.[12]

In another court, a judge might allow attorneys to question prospective jurors for a day or more, and the law may allow the attorneys to ask detailed questions about the general views of the jurors, as they relate to the subject matter of the case. Rather than a general *voir dire* that may take 30 minutes, attorneys guide the discussion where some jurors may talk for several minutes each or longer. For example, if a case involves a doctor alleged to have committed malpractice on a young child, besides questions about the burden of proof, noneconomic damages and the like, the attorneys could also inquire further into the viewpoints of jurors regarding their opinions of doctors, whether they have young children, how they would feel about awarding large sums of money if the evidence supported it, and whether they have experienced medical malpractice. This court may also favor allowing jurors to be excused for cause if they express biases such as "I don't trust doctors at all" or "I think doctors do the most important work on earth and should be immune from liability." There, the seated jury would look far different than if there were no *voir dire*. Those who express strong views on a variety of subjects, perceived as favorable to one side or the other, are excluded. The result is often a panel

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[12] It is beyond this paper to discuss whether the panel that appears in court is representative of the community. But it is worth noting that there is reason to believe it is not. For example, some juries are drawn from a voter registration list. This may disproportionately exclude some community groups, who for a variety of reasons, are less likely to register to vote. The same can occur if a court pulls from those with driver's licenses.

of jurors who have expressed no strong views about the specific dispute or particularly strong views about lawsuits generally.

Finding clear answers to how best to seat a fair jury is made all the more important by existing Federal Rules of Evidence[13], corresponding state rules[14], and appellate deference to jury decisions[15], which make it, by and large, impossible to question the decision of a jury once it is reached. Some courts do not let attorneys talk to juries after trial.[16] In that case, the jury is literally a black box. In other courts, attorneys may talk with jurors, but talking with jurors to learn how they reached their decision, including what evidence they considered and how they resolved disputes, differs greatly from presenting any problems with that reasoning to a court. Courts typically will not even entertain an affidavit from a juror unless it proves there was (A) "extraneous prejudicial information was improperly brought to the jury's attention"; (B) "any outside influence improperly brought to bear upon any juror"; or (C) "whether the verdict reported was the result of a clerical mistake."[17] And even then, such evidence does not guarantee a new trial. A proponent for a new trial would have to show that this information substantially

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13 Fed. R. Evid. 606(b). *See also Pena-Rodriguez v. Colo.*, 137 S. Ct. 855, 861, 197 L. Ed. 2d 107 (2017) (holding that the no-impeachment rule "give[s] substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.").
14 Colo. R. Evid. 606(b).
15 *See Mata-Medina v. People*, 71 P.3d 973, 983 (Colo. 2003) ("jury verdicts deserve deference and a presumption of validity…"); *Goodman v. OS Rest. Servs., LLC,* No. A-1-CA-35971, 2019 WL 3492240, at *7 (N.M. Ct. App. July 31, 2019) (holding that the court reviews "jury verdicts deferentially because appellate reversal of jury verdicts must be done cautiously and only under a strict standard of review in order to safeguard a litigant's constitutional right to a jury trial." (internal quotation marks omitted)).
16 U.S. Dist. Ct. Rules D. Conn., L.Civ.R. 83.5 (2017) ("Unless explicitly authorized by the Court, no party, and no attorney or person acting on behalf of a party or attorney, shall question a juror concerning the deliberations of the jury, votes of the jury or the actions or comments of any other juror.").
17 Fed. R. Evid. 606(b)(2).

impacted the result.[18] Similarly, even if a jury's decision seems to disregard the evidence in a case, it will be difficult to disturb such a decision on appeal. Courts defer to jury fact-finding in most instance, largely due to the standard of review.[19]

All of these factors mean that once a verdict is returned, it is likely to stick. The permanence of verdicts and their virtual impregnability from review, demands seating the fairest jury possible in order to conform with constitutional customs, case precedent, and public expectation.

But which of the existing approaches recognizes the normative purpose of juries and complies with the positive law mirroring that purpose? Research can answer the various empirical questions that trickle down from this overarching issue. It is surprising, then that these questions are seldom explored in the civil setting, while the role of bias receives significant attention in the criminal literature. To begin to fill this void, we designed a study that contributes to our understanding of bias in civil juries, and the role jury selection plays in guaranteeing, or potentially interfering with, "a fair trial." We attempted to answer a variety of core questions, including:

1. Do minimal versions of *voir dire* that rely on jurors identifying their own biases pinpoint biases that predict jurors' decisions?

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[18] *See Lorusso v. Members Mut. Ins. Co*., 603 S.W.2d 818 (Tex.1980) (aggrieved party must establish that the jury's conduct resulted in a materially unjust trial); *Santilli v. Pueblo*, 184 Colo. 432, 521 P.2d 170 (1974) (holding jury misconduct that requires an inquiry into the mental processes of the jury during deliberations is not proper grounds for new trial).

[19] *See e.g. People, in Interest of M.C.*, 844 P.2d 1313 (Colo. App. 1992) (reversing the judgment notwithstanding the verdict and demonstrating the strong deference appellate courts give to the fact-finding function of a jury). *See also,* Kevin Casey, et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 Fed. Cir. B.J. 279, 286 (2001) ("An even more deferential standard of review is reserved for jury fact-findings, which are reviewed for substantial evidence."); Joseph A. Parr, *Berry v. Risdall: When Can We Amend the Verdict?*, 44 S.D. L. Rev. 147 (1999) ("The American legal system places 'great emphasis on the weight and finality of a jury verdict, and courts tend to defer to a jury's judgment.' ").

2. How common are various predispositions (referred to as biases in this paper) that could be identified with more extended *voir dire*? Specifically, how common are general biases towards civil litigation? These could develop from concerns with the burden of proof (believing it is too high or too low), concerns about the nature of lawsuits, beliefs about noneconomic damages, views of lawyers, etc. We also wondered, how common are specific biases – biases related to specific issues in the case (views of doctors, insurance companies, social issues implicated in the dispute, etc.)?
3. If general and/or specific biases exist in jurors, do such biases impact how jurors decide cases?
4. Do those biases favor the plaintiff, favor the defendant, or cut both ways?
5. Can bias be cured by merely calling jurors' awareness to their potential biases during *voir dire* before they evaluate a case?
6. Can a judge cure bias using rehabilitation?
7. Can jurors recognize when their bias influenced their decision?

To answer these questions, we gathered massive amounts of data, both nationally and in Colorado (the research was conducted under the auspices of the Denver Empirical Justice Institute at the University of Denver Sturm College of Law). The result was a sample of 2,041 jurors. We exposed each juror to one of three different cases. Each "case" was based on a real case so that there was significant, detailed evidence, real argument from both sides, and so that the case bore significant verisimilitude to situations that occur in court. We experimentally manipulated whether jurors underwent *voir dire*, the extent of that *voir dire*, and whether jurors encountered rehabilitation from a judge.

To our knowledge, the descriptive measures of the prevalence of partiality in the jury pool are the first of their kind. Further, the data reveal whether biases impact jury behavior, how significantly they impact it, whether rehabilitation can cure biases, and whether jurors can self-diagnose, which can inform best practices for jury selection to ultimately impanel impartial jurors. The data raise serious concerns of the risks associated with seating juries that fail to meet constitutional, statutory, and precedential guarantees of impartiality when juries are formed without meaningful *voir dire* to eliminate biases.

II. VOIR DIRE

For the uninitiated, jury selection is often referred to as *voir dire,* defined as the preliminary questioning of the venire panel—the group of jurors called to serve.[20] Following examination, prospective jurors are seated unless excluded.[21] The court excludes jurors for logistical reasons, including plans conflicting with the trial (i.e. a college student with scheduled exams, a person with a nonrefundable ticket, etc.).[22] The court will also exclude a potential juror who doesn't speak English well enough to understand the case, a person who is ill and may struggle to participate, or a juror who doesn't receive paid leave from work and can't afford to miss the time anticipated for trial.[23]

Beyond these exclusions, there are two other principle means to exclude jurors. First, attorneys may exclude jurors for cause.[24] This occurs when one party moves to exclude the

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20 6 *Colo. Prac., Civil Trial Practice* § 10.5 (2d ed.), Westlaw (database updated August 2019). *See also People v. Cerrone*, 854 P.2d 178, 183 n.7 (Colo. 1993) (defining "venire" as a group of citizens from whom a jury is chosen from the original jury pool in a case).
21 *Id.*
22 Colo. Rev. Stat. § 13-71-119 (2019).
23 *See* Colo. Rev. Stat. § 13-71-105(2)(b) (disqualified as juror for inability to read, speak, and understand the English language); Colo. Rev. Stat. § 13-71-127 (financial hardship of employer or self-employed juror); Colo. Rev. Stat. § 13-71-119.5(2)(a)(I) (excused as juror if service would cause undue or extreme physical hardship).
24 12 *Colo. Prac., Civil Procedure Forms & Commentary* § 47:8 (3d ed.), Westlaw (database updated August 2019).

juror, arguing that the answers provided suggest the juror holds views that will prevent them from being completely impartial.[25] The court retains discretion in deciding these requests to "strike for cause," and courts differ significantly on what is sufficient to justify a prospective juror's partiality.[26] Once jurors are excluded for the logistical reasons mentioned above, and for cause, attorneys exercise peremptory challenges.[27] The number of challenges varies by state but is often three or four in civil trials.[28] These strikes do not require justification but cannot be based on race or gender.[29]

The actual mechanism for this entire process to occur can vary greatly, ranging from a 10-minute, judge-conducted *voir dire* to a multi-day *voir dire* in which the judge is absent.[30] A judge or attorney conducting *voir dire* may question jurors in groups, individually, or even in chambers.[31] Jurors are sometimes excluded for cause at the end of questioning, or sometimes they are excluded throughout the attorney's questioning.[32] Some courts have both sides submit peremptory strikes to the court simultaneously.[33] Other courts require the plaintiff to go first.[34]

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25 *Id.*
26 *Id.*
27 12 *Colo. Prac., Civil Procedure Forms & Commentary* § 47:9 (3d ed.), Westlaw (database updated August 2019).
28 *Id.* (Colorado allows for four peremptory challenges per "side" in litigation).
29 *Id.* (discussing a peremptory challenge is permitted if it is based upon a juror characteristic other than race or gender).
30 Nat'l Ctr. St. Cts., *Civil Action*, Vol. 6, No. 1, (2007), available at http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/CivilAction-Summer2007-Vol6No1-v4_000.ashx.
31 *Id.*
32 *Compare* "White's method"—peremptory challenges are utilized throughout various "rounds" of questioning—*with* the "struck method"—peremptory challenges exercised after questioning and challenges for cause have concluded. 22 N.Y.C.R.R. § 202.33, Appendix E (2019) (discussed in note 61 and note 62).
33 *See, e.g.*, Tenn. R. Civ. P. 47.03.
34 *See* 22 N.Y.C.R.R. § 202.33, Appendix E (discussing peremptory challenges under the "Struck Method" begin with counsel for the plaintiff).

Regardless of the process, ultimately the court seats a jury ranging from 6-12 jurors, often with at least one alternate (in case a juror is later excluded for improper behavior, becomes ill, etc.).[35]

A. Evaluation of Various Approaches to *Voir dire*: State and Federal Systems

Due to competing intuitions from courts about how prevalent bias might be, whether it influences decisions, and whether it can be cured by rehabilitation, the law regarding jury selection varies significantly across venues. Some states seem to prioritize speed, presumably operating under the assumption that *voir dire* is a waste of time or, perhaps worse, a means to manipulate outcomes. As Crocker and Kovera explain,

> In many jurisdictions, judges will question venirepersons who have admitted bias and ask if they will be able to put aside their biases during the trial and decide the case based upon the evidence. Acquiescence to this request is legally sufficient in many jurisdictions to deem the venireperson unbiased and fit to serve on the jury. Courts rely on rehabilitation to increase the general efficiency of *voir dire*. Concerns abound over the time spent on *voir dire*.[36]

Other states take a diametrically different approach, presuming *voir dire* is essential and courts should give attorneys significant latitude.[37]

What follows are the positions of a few states that allow longer *voir dire*, on a broader range of topics. An effort was made to sample both "progressive" states and states that trend "conservative," as there is a common belief that such perspectives may impact views on juries

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[35] *See* Colo. Constitution. Art. 2, § 23 (providing civil juries may consist of less than twelve persons); C.R.C.P. 48 ("jury shall consist of six persons"); 12 *Colo. Prac., Civil Procedure Forms & Commentary* § 47:10 (alternate jurors).
[36] Crocker, *supra* note 10, at 212 (internal citations and quotations omitted).
[37] *See, e.g.*, *Littell v. Bi-State Transit Dev. Agency*, 423 S.W.2d 34, 36–37 (Mo. App. 1967) ("A wide latitude is allowed counsel in examining jurors on their *voir dire* . . . to gain knowledge as to their mental attitude toward the issues to be tried.").

and jury selection.[38] These states are spread across the country and include Missouri, New York, and California. We note each state's approach to rehabilitation when appropriate. We also include Florida, specifically focusing on its view of juror rehabilitation. As one might anticipate, rehabilitation is most commonly litigated and discussed in appellate decisions in states with more extensive *voir dire*. Motions to strike for cause require information, so in courts with limited *voir dire*, both motions to strike and efforts to rehabilitate are slightly less common.

We have also summarized some views of federal courts, drawn in part from their local rules, in part from discussion with attorneys, and in part from reported decisions.

The section after turns to Colorado, a state that traditionally allows less time for *voir dire* and, based on the experience of one of the authors and conversations with other attorneys, often allows some rehabilitation by judges or attorneys seeking to "save" a juror from a strike for cause.

B. *Voir dire* in Missouri

Article I, § 22(a) of the Missouri Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." This provision guarantees the right to a jury only insofar as such a right existed at common law.[39] Although the right is constitutionally

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[38] The reality is far more complex. For example, Missouri allows lengthy and detailed *voir dire* due to state courts' belief that bias is prevalent, case specific, and must be rooted out. Florida allows similar *voir dire* and rejects most rehabilitation of jurors, despite the fact that Florida is, on net, moderate to conservative. Meanwhile, California, a state that has voted for the Democratic presidential candidate since 1992, allows extensive *voir dire*. Meanwhile, Colorado—which recently elected a Democratic governor, attorney general, senate and house of representatives at the state level—allows rehabilitation in many situations and has, in many courts, a presumption of very brief *voir dire*. This perspective aligns with many federal courts, who, regardless of location, tend to disfavor lengthy *voir dire* (with some notable exceptions).

[39] *Plaza Exp. Co. v. Galloway*, 365 Mo. 166, 176, 280 S.W.2d 17, 24 (1955).

embedded, it functions similarly to the right to trial by jury in some states that established the right by statute, rules of civil procedure, or through case precedent.

In Missouri, *voir dire* is used to promote the constitutional right to a fair and impartial jury. "The constitutional right to a trial by jury would be a mockery of justice if it did not guarantee a jury with minds free of bias."[40] Courts require an elimination of bias – though the term is not necessarily defined.

Purpose of Voir dire. The purpose of jury selection in Missouri is "to discover bias or prejudice in order to select a fair and impartial jury."[41] This goal is achieved "through questions which permit the intelligent development of facts which may form the basis of challenges for cause, and to learn such facts as might be useful in intelligently executing peremptory challenges."[42]

Balancing Discretion and Latitude. Missouri trial courts are vested with broad discretion to control *voir dire*, but such discretion is exercised with the understanding that counsel should be afforded "wide latitude in examining prospective jurors for possible bias and their state of mind regarding the matter at hand."[43] Evaluating whether prospective jurors can be impartial to enable a fair and impartial trial is impossible without the investigation of the attitudes and thoughts embedded within the jurors. Correspondingly, "[g]reat liberality is allowed in inquiring into attitudes and experiences of the jury panel."[44] However, the trial court

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40 *Littell*, 423 S.W.2d at 36.
41 *State v. Skelton*, 851 S.W.2d 33, 35 (Mo. App. 1993).
42 *Pollard v. Whitener*, 965 S.W.2d 281, 286 (Mo. Ct. App. 1998). *See also Kendall v. Prudential Ins. Co. of Am.*, 327 S.W.2d 174, 177 (Mo. 1959) ("The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution.").
43 *Blanks v. Fluor Corp*., 450 S.W.3d 308, 385 (Mo. Ct. App. 2014).
44 *State v. Coleman*, 553 S.W.2d 885 (Mo. App. 1977).

may exercise discretion in "limiting the number of questions and imposing other curbs on the nature of the examination."[45] In doing so, the court must remember that the *voir dire* process "is also one of the highest duties of courts, in the administration of the law concerning selection of jurors and juries, to seek to accomplish that purpose [of an impartial jury]."[46]

Time Restrictions. In Missouri, time restrictions "cannot be set without regard to the variable latitude which is reasonably necessary to accomplish the purpose of *voir dire*."[47] Trial courts may not arbitrarily limit *voir dire* questioning.[48] "While the efficient administration of jury resources is to be encouraged, it cannot be accomplished at the price of an arbitrarily limited *voir dire* examination."[49] "Since bias often lies deep within the minds of prospective jurors, counsel should be allowed a wide latitude to expose that bias."[50] While Missouri gives trial courts the discretion to place time limitations on *voir dire*, judges do not set such limits at the outset of trial "without regard to the variable latitude which is reasonably necessary to accomplish the purpose of *voir dire*."[51] It is customary for *voir dire* to last approximately one to two days.[52]

In *Pollard*, the appellate court affirmed the lower court's judgment limiting plaintiff's *voir dire* examination to one hour and forty-five minutes after the court had conducted its own questioning for one hour, and stating, "the restriction, under the circumstances described, was

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45 *Gooch v. Avsco, Inc.*, 340 S.W.2d 665, 667 (Mo. 1960).
46 *Littell*, 423 S.W.2d at 38.
47 *Pollard*, 965 S.W.2d at 288.
48 *Id*.
49 *Id*.
50 *Littell*, 423 S.W.2d at 36.
51 *Pollard*, 965 S.W.2d at 288.
52 *See* Br. for Appellants at 159, *Blanks, v. Fluor Corp*., 2012 WL 3207128 (Mo. App. E.D.) (No. ED97810) ("The next day, while *voir dire* was still underway…"); Appellants' Amend. Br. at *4, *Terpstra v. Mo. Dep't of Lab. & Indus. Rel.*, 2018 MO App. Ct. Briefs LEXIS 2050 (WD80967) (August 28, 2018) (" . . . during almost two days of *voir dire* . . . ").

not an abuse of discretion."[53] Despite this conclusion, the court emphasized that it does "not encourage fixed time limitations on counsel's examination" and recognized "the dangers of arbitrary, unyielding time limits."[54] Setting time limits ahead of trial fails to consider "the unpredictability of the panel member responses."[55]

Based on discussions with attorneys in Missouri, time limits are rare.[56] Instead, it is common for *voir dire* to last a day or more in complex civil trials. Similarly, most judges, based on the precedent, allow questions dealing with both general bias and biases specific to the case.

C. *Voir dire* in New York

In New York, the purpose of *voir dire* is twofold: (1) it ensures that a fair and impartial jury tries the case and (2) it exposes grounds for counsel to exercise challenges.[57] Section 202.33 of the Uniform Civil Rules for the Supreme Court and the County Court (hereafter "Uniform Civil Rules") provides the guidelines for lower courts in conducting *voir dire*.[58] If the case cannot be resolved, the trial judge:

1. discusses the logistics of jury selection with the parties.
2. directs the method of jury selection used for *voir dire*, which could involve:

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53 *Pollard*, 965 S.W.2d at 288.
54 *Id*.
55 *Id*.
56 One of the authors of this paper is licensed in Missouri, practiced there for years, and picked juries there. Courts in some of the largest venues routinely provide a full day for selection.
57 Hon. Cheryl E. Chambers, *The statutory framework—Conduct of voir dire*, 4 N.Y. Prac., Com. Litig. N.Y St. Cts. § 37:21 (4th ed.), Westlaw (database updated September 2019) ("The principal purpose of jury selection is to insure that the case is tried by a fair and impartial jury chosen from a fair cross-section of the community."). *See also* Thomas Muskus, *Purpose of voir dire*, 35 Carmody-Wait 2d § 191:22, Westlaw (database updated November 2019).
58 *See* 22 N.Y.C.R.R. § 202.33.

a) "White's method";[59]

b) "struck method";[60]

c) "strike and replace method";[61]

d) or other methods approved by the Chief Administrator.

3. establishes time limitations for the question of prospective jurors, including:

a) a general period for completing *voir dire*, after which counsel must report back to the judge on the progress of the *voir dire*; and

b) specific time periods for counsel's questioning of panels of jurors or individual jurors.[62]

Under the Uniform Civil Rules, a trial judge must supervise the commencement of *voir dire* and open the jury selection proceedings "to ensure an efficient and dignified selection process."[63]

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[59] *See* 22 N.Y.C.R.R. § 202.33, Appendix E (Under "White's method", counsel ask general questions to the venire as a group to determine whether any of the potential jurors have knowledge of the subject matter, the parties involved, their attorneys, or the prospective witnesses. Counsel is allowed to ask follow-up questions to individual potential jurors. The prospective jurors are questioned in small groups with rounds dedicated to each group. Following questions and challenges for cause during each round, peremptory challenges are exercised. At the end of each round, jurors who remain unchallenged are sworn and excused from the room. A new round is commenced until all the necessary seats on the jury are filled and alternatives are selected).

[60] *Id*. (The "struck method" involves questioning an entire pool of potential jurors summoned at once, where no initial panel is selected. This method allows counsel to gain familiarity with all the prospective jurors before peremptory challenges are used. Before exercising any challenges, each side is able to determine the pros and cons of each juror with an eye to the composition of the overall pool of jurors. The attorneys then exercise peremptory challenges by alternately striking names from the juror list until a jury is paneled along with alternates. If there happens to be too many jurors remaining after the parties have made challenges, names are selected at random to sit on the jury).

[61] *See* Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York*, 10 St. John's J. Legal Comment. 263, 278 (1995) (Under the "strike and replace" method, an initial panel of prospective jurors is randomly chosen from the pool of prospective jurors. These selected prospective jurors are seated in the jury box and questioned. Challenges for cause are exercised, and those excused are replaced from the remaining juror pool. The replacement jurors are questioned and challenged for cause. Replacement venirepersons are added as necessary until there are no challenges for cause to be made. Counsels then use peremptory challenges, additional venire are added to fill vacancies, and the procedure continues until no challenges for cause for either party to make and the parties have exercised all of peremptory challenges. The alternate jurors are selected using the same approach).

[62] 22 N.Y.C.R.R. § 202.33.

[63] 22 N.Y.C.R.R. § 202.33(e).

Counsel generally leads the remainder of *voir dire* outside the immediate supervision of the judge, who retains discretion to remain during parts or all of the examination.[64] Rule 4107 of the Civil Practice Law and Rules provides, "[o]n the application of any party, a judge shall be present at an examination of the jurors."[65] In practice, based on discussion with counsel, this can mean that in a complex case, counsel spends the better part of a week talking with jurors, largely outside the presence of a judge. A judge is occasionally brought in to resolve disputes between counsel.

Counsel for plaintiff and defendant may "state generally the contentions of his or her client and the identity of the parties, attorneys and witnesses."[66] Counsel interrogates the prospective jurors to determine bias and other grounds for disqualification, and subsequently, each side will make necessary challenges to the qualifications of a juror. "An objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him."[67] A non-exhaustive list of the statutory grounds for exercising a valid challenge for cause include that a juror is: an employee or stockholder of a corporate party; a stockholder, director, officer, or employee or has an interest in any liability insurance carrier; or related to a party within sixth degree of consanguinity.[68] Both sides can exercise their three peremptory challenges plus one peremptory challenge per alternate.[69]

Time Limitations. In New York, the trial judge has discretion in setting time limits on *voir dire* provided that each side has an ample opportunity to ask relevant and material

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64 *Id.*
65 N.Y. C.P.L.R. 4107 (McKinney).
66 22 N.Y.C.R.R. § 202.33, Appendix E (A)(4) (attorneys are prohibited from reading any content found within the pleadings or discussing the amount of money at issue).
67 N.Y. C.P.L.R. 4108.
68 N.Y. C.P.L.R. 4110.
69 N.Y. C.P.L.R. 4109.

questions.[70] While the trial judge has discretion in setting time limits, *voir dire* usually ranges anywhere from a few hours to several days to ensure that counsel can properly question and determine whether each juror can arrive at a fair and impartial decision.[71]

The trial judge's discretion in limiting *voir dire* is restricted. For example, an appellate division found a trial court's 15-minute time limit for questioning in each round of *voir dire* unreasonable because the case was not simple and straightforward.[72] The case comprised of factual and medical disputes, including proof regarding four separate injuries and four surgeries, challenges to causation relating to the individual injuries, plaintiff's preexisting conditions, consideration of several experts with starkly different assessments, and proper damages to award.[73]

Instead of setting limits beforehand, the suggested practice is for the judge, based on consultation with counsel, to set only a general time period after which counsel should report the progress of *voir dire* back to the judge.[74] "In a routine case a reasonable time period to report on the progress of *voir dire* is after about two or three hours of actual *voir dire* and, if requested by the judge . . . periodically thereafter until jury selection is completed."[75]

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70 *People v. Beecham*, 74 A.D.3d 1216, 904 N.Y.S.2d 727 (2d Dep't 2010).
71 *See* Affirmation in Opposition for Defendants, *Adler v. 3M Co.*, 2014 WL 1716748 (N.Y. Sup.) (No. 1903922012) (Jan. 3, 2014) (discussing a recent trial where "jury selection process took two-plus weeks"); Motion in Limine for Defendants, *Balusu v. NYU Hosps. Ctr.*, 2013 WL 2432351 (N.Y. Sup.) (No. 3626-10) (Mar. 18, 2013) (counsel "completed (4) days of jury selection…"); Affirmation in Opposition for Plaintiff, *Perez v. 347 Lorimer LLC, et al.*, 2011 WL 8198735 (N.Y. Sup.) (No. 38841/05) (October 3, 2011) (jury selection was scheduled for one week and trial was scheduled to begin on the following week); Affirmation in Support for *McCord v. Teseo*, 2009 WL 10664249 (N.Y. Sup.) (No. 1144712005) (Nov. 9, 2009) (two days of *voir dire*).
72 *Zgrodek v. McInerney*, 61 A.D.3d 1106, 1108, 876 N.Y.S.2d 227, 228 (2009).
73 *Id*. at 1108, 876 N.Y.S.2d at 229.
74 22 N.Y.C.R.R. § 202.33(d).
75 Hon. Ann Pfau, *Implementing New York's Civil Voir dire Law and Rules, N.Y. St. Unified Ct. Sys.*, at 6 (2009) http://www.nycourts.gov/publications/pdfs/ImplementingVoirDire2009.pdf.

However, if a judge allocates a fixed period for questioning at the outset, the allocation "should be appropriate to the circumstances of the case."[76] Usually relevant considerations would include:

(1) the number of jurors and alternate jurors to be selected and the number of peremptory challenges available to the parties;

(2) the number, nature and seriousness of the pending charges;

(3) any notoriety the case may have received in the media or local community;

(4) special considerations arising from legal issues raised, including anticipated defenses such as justification or a plea of not responsible by reason of mental disease or defect;

(5) any unique concerns emanating from the identity or characteristics of the defendant, the victim, witnesses or counsel; and

(6) the extent to which the court will examine prospective jurors on relevant topics.[77]

"Because *voir dire* is a fluid process and it is not always possible to anticipate the issues that may arise during examination of the venire, it is also incumbent on counsel to advise the court if any temporal limitation imposed relating to juror questioning is proving, in practice, to be unduly restrictive and prejudicial."[78]

D. *Voir dire* in California

Rules governing jury selection in California are found in the Trial Jury Selection and Management Act.[79] The statute describes the essential purpose of *voir dire*, methods of

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[76] *People v. Steward*, 17 N.Y.3d 104, 110, 950 N.E.2d 480, 484 (2011).
[77] *Id.* at 110–11, 950 N.E.2d at 484.
[78] *Id.* at 111, 950 N.E.2d at 484.
[79] *See* Cal. Civ. Pro. Code §§ 190-237 (hereinafter "C.C.P.").

questioning by the judge and counsel, the basis for challenges for cause, and the number of peremptory challenges available to the litigants in different cases. With the different social science literature and variations in *voir dire* practices nationally in mind, California has employed comprehensive efforts to develop jury system management and trial procedures, including enhancements to the procedures for jury selection.

Trial judges in California are guided by the overriding principle that the purpose of *voir dire* is "[t]o select a fair and impartial jury."[80] Another purpose of jury selection is to support counsel in the intelligent exercise of both peremptory challenges and challenges for cause.[81] The trial court may place "reasonable limits" on questioning "that allow counsel liberal and probing examination to discover bias and prejudice within the circumstances of each case."[82]

The trial judge initiates *voir dire* with a preliminary examination to disclose grounds for excuses for cause.[83] Once the judge completes the initial examination, counsel for both parties may probe the panel to ensure the fitness of prospective jurors.[84] Throughout *voir dire*, counsel may challenge the jury panel or any individual juror for cause. Any party to the action may challenge a prospective juror for cause for general disqualification or for implied or actual bias.[85] A party must challenge an individual juror for cause before the jury is sworn, generally exerted before exercising peremptory challenges.[86] After *voir dire* concludes and prospective jurors pass for cause, each side may exercise peremptory challenges.[87] Each party may have six peremptory

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80 *See* C.C.P. § 222.5(a).
81 C.C.P. § 222.5(b)(1).
82 *Bly-Magee v. Budget Rent-A-Car Corp.*, 24 Cal. App. 4th 318, 324, 29 Cal. Rptr. 2d 330, 333 (1994).
83 C.C.P. § 222.5(a).
84 C.C.P. § 222.5(b)(1).
85 C.C.P. § 225(b)(1); C.C.P. § 227.
86 C.C.P. §§ 226(a) and (c).
87 C.C.P. § 22.5(b)(1); C.C.P. § 231.

challenges, except in cases involving over two parties.[88] In those cases, the court divides the parties into two or more sides according to their respective interests and each side may have eight peremptory challenges.[89] The court may grant additional peremptory challenges to each side in a civil case as the interests of justice require.[90]

Time Restrictions. A trial judge may not impose specific unreasonable or arbitrary time limits on, or establish an inflexible time limit policy for *voir dire*.[91] On January 1, 2017, the statute governing civil jury selection was amended to prohibit trial judges from imposing "an inflexible time limit policy," and the California Judiciary Committee, in justifying the change, reasoned:

> The selection of an unbiased jury serves all parties and is crucial to maintaining the integrity of our courts. Currently judges are setting blanket, arbitrary, and unreasonable time limits for *voir dire*. Judges use their discretion to set these limits even though CCP §222.5 specifically states not to set blanket time limits.[92]

In exercising discretion, the judge must consider the following:[93]

(a) The amount of time the attorneys have requested.

(b) Any unique or complex elements in the case, whether legal or factual.

(c) The number of parties and witnesses.

(d) Whether the case is designated as complex or a long cause.

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88 C.C.P. 231.
89 *Id.*
90 C.C.P. § 231(c).
91 C.C.P. § 222.5(b)(2).
92 2017 Cal. Senate Bill No. 658, California 2017-2018 Regular Session (Aug. 31, 2017).
93 C.C.P. § 222.5(c)(1).

As *voir dire* proceeds, the judge must permit supplemental time for questioning based on the following:[94]

> (a) Individual responses or conduct of a prospective juror that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the case.
> (b) Composition of the jury panel.
> (c) An unusual number of challenges for cause.

Cal. Civ. Pro. Code § 222.5(b)(2) expressly requires that judges determine the reasonable time allotted for *voir dire* on a case-by-case basis by banning the use of time limit policies. The trial courts "shall not impose specific unreasonable or arbitrary time limits" on *voir dire* examination, nor shall the trial courts "establish an inflexible time limit policy."[95] Fixing arbitrary time limits is "dangerous" and "could lead to a reversal on appeal."[96]

E. Rehabilitation in *Voir dire* in Florida

Florida allows significant *voir dire*, like Missouri, New York, and California. But Florida is useful for examining a relatively conservative use of rehabilitation—one that tends to err on the side of exclusion. For example, in a criminal case, a police officer was a potential juror. When questioned by defense counsel, he suggested he would try to be fair, suggested he wanted to listen to the evidence, and that he could "reject" his preexisting opinion that the

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94 C.C.P. § 222.5(c)(2).
95 C.C.P. § 222.5(b)(2).
96 *People v. Hernandez*, 94 Cal.App.3d 715, 719, 156 Cal.Rptr. 572, 574 (Ct. App. 1979).

defendant might be guilty.[97] When questioned by the prosecution, he was asked if he "could set aside the conversations he had previously had with his friends, view the evidence on the facts, apply the law to the facts, and not prejudge the defendant."[98] He responded he could, and the court sat him as a juror, over objection of the defense, who argued he should be struck for cause.[99]

On appeal, the Florida Court of Appeals neatly summarized Florida law on rehabilitation, stating:

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97 *Carratelli v. State*, 832 So.2d 850, 852-53 (Fla. Dist. Ct. App. 2002)
(The dialog between counsel and the prospective juror is instructive, which states, in part:

> He stated that he had talked about this case with his law enforcement friends; they specifically discussed the speed of appellant's vehicle and appellant's diabetic condition. In addition, the following colloquy took place regarding any preconceived opinions Nesbitt may have had:
> Defense: In terms of your police officer relationships and the discussion and the publicity, is it a fair statement to say that the defense is not starting on an equal playing field?
> Nesbitt: As far as me?
> Defense: Yeah.
> Nesbitt: I would hope to say that you would be. But it's a little hard for me to answer that question, because I don't know if I really formed an opinion or not. I try not to. But if I had-
> Defense: If you have, what is it?
> State: I object to him giving his opinion.
> Court: Overruled.
> Nesbitt: There could be a matter of guilt there, but that's my opinion, but I can't say for sure that I can't be convinced with evidence.
> Defense: In other words, you are saying I might be able to talk you out of that?
> Nesbitt: With evidence, I've got to see the evidence. I have to see the evidence and if the evidence is there, beyond a reasonable doubt, I believe I can make the right decision but-reject my opinion, whatever it may be, but I have to go strictly by the evidence.
> Defense: You are saying the evidence could convince you to reject the opinion that you have?
> Nesbitt: Yeah, yeah. If there is a-guilty beyond a reasonable doubt, okay, I would have to go one way.
> Defense: What way?
> Nesbitt: Guilty, but if it is not there, I can't, in all honesty, vote guilty for somebody that it wasn't proven against.
> Defense: It happens. The last question for you: Is it a concern in your mind, though, that it might take more of a defense or more evidence to help convince you to find Mr. Carratelli not guilty than it might otherwise take if you weren't who you are, having discussed this case and having read what you read?
> Nesbitt: I don't think it would take more. Whatever evidence is presented in the case, I am going to have to go with that evidence and I don't think I would be coming back and say, I need more.
> Defense: Now, would you suggest might it be more difficult for Mr. Carratelli to be acquitted with you as a juror than with a juror that didn't have the preconceived opinion as it were, as you described it?
> Nesbitt: The way you put that, in all fairness to him probably it would, but that's-I don't want to sit here and say, you know, no, but-.)

98 *Id.* at 53.
99 *Id.*

> An appellate court reviews a trial judge's decision on a for-cause challenge for an abuse of discretion. The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. A juror should be excused for cause if there is any reasonable doubt about the juror's ability to render an impartial verdict. Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.[100]

The court went further, expressing genuine confusion as to how one could express bias, but then quickly set it aside as a result of rehabilitation. It quoted the Florida Supreme Court, writing in 1929:

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?[101]

F. *Voir dire* in Federal Courts

Voir dire in federal courts is governed by Rule 47 of the Federal Rules of Civil Procedure. The Rule states that a court

> may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper or must itself ask any of their additional questions it considers proper.[102]

Rule 47 is general enough to allow a judge to prohibit *voir dire,* to conduct it alone, or to involve the attorneys. Some courts have held that "the policy behind *voir dire* favors a thorough

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[100] *Id.* at 54.
[101] *Id.* (*citing Johnson v. Reynolds,* 97 Fla. 591, 599, 121 So. 793, 796 (1929)).
[102] Fed. R. Civ. P. 47(a).

examination, and the district court is therefore given wide latitude to conduct examination reasonably sufficient to test the jury for bias or partiality."[103] However, other courts have affirmed prohibiting attorney-conducted *voir dire* entirely.[104]

Federal district courts have wide discretion over both the conduct and the content of *voir dire* examination, and it is exceedingly rare that a decision is reversed on the grounds of a district court's limitation on *voir dire*.[105] In most federal courts, the presiding judge conducts *voir dire*.[106]

Among courts that allow attorney involvement, the amount of such involvement varies. For example, judges may allow each side to do all or some of the following:

- Offer a concise introductory remark to the venire;[107]
- Openly question prospective jurors following the conclusion of the court's initial *voir dire*;[108]
- Supply written questions for the judge to ask prospective jurors before *voir dire*;[109] or

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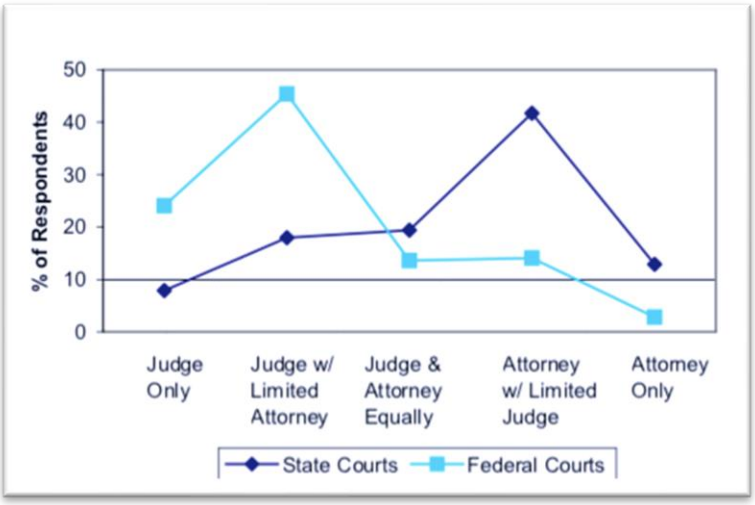
[103] *Reihanifam v. Fresenius Med. Care N. Am.*, 660 F. App'x 513, 514 (9th Cir. 2016) (internal quotation marks and citations omitted).
[104] *See* Anthony C. Vance, *Voir dire Examination of Jurors in Federal Civil Cases*, 8 Vill. L. Rev. 76 (1962). ("Those in favor of abolishing interrogation by counsel argue that the interests of fairness and trial expediency require that the court, and not counsel, propound questions to the entire panel, deviating only on occasion to query an individual panelist where the exigencies of clarification so demand.").
[105] *Sasaki v. Class*, 92 F.3d 232, 239 (4th Cir. 1996) (discussing that though a trial court's discretion is "not without limits," it is a rare case in which a reviewing court will find error in the trial court's conduct of *voir dire*). *See also U.S. v. Morris*, 623 F.2d 145, 151 (10th Cir. 1980); *James v. Cont'l Ins. Co*., 424 F.2d 1064, 1065 (3d Cir. 1970).
[106] *See Voir dire Examination—Permissible Questioning*, 2 Fed. Prac. & Proc. Crim. § 381 (4th ed.) (2019); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179, 1185 (2003) (discussing a survey conducted in the 1990s that determined that only "9% of the judges allowed counsel to conduct most or all of the voir dire.").
[107] Directory of Fed. Ct. Guidelines, *DISTRICT OF OR.*, 9C-546 (2019-3 Supp.) ("Counsel are requested to give a brief 'mini opening statement' to entire venire called to the courtroom to tell the jury what the case is about—usually two to three minutes.").
[108] Fed. R. Civ. P. 47(a). *See also Csiszer v. Wren*, 614 F.3d 866 (8th Cir. 2010).
[109] *Id*.

- Submit written questions for the court's screening and approval before the attorney-conducted *voir dire* begins.[110]

Some report that federal judges believe that examination of prospective jurors by the court, rather than the attorneys, is the preferable practice to ensure an impartial jury. "There can be no doubt that simplicity, fairness and speed result from the judge's examination of prospective jurors."[111]

In a survey relating to jury improvements, the National Center for State Courts revealed data showing "judge-conducted *voir dire* is the norm in federal courts."[112] The following figure was included in the study to demonstrate the statistics relating to judge- and lawyer-conducted *voir dire* in both state and federal courts.[113]



[110] *See Norman v. Textron Inc.*, No. 15-4108-CV-C-WJE, 2018 WL 3199496, at *1 (W.D. Mo. May 17, 2018).
[111] Hon. Louis E. Goodman, *The New Spirit in Federal Court Procedure*, 7 F.R.D. 449, 451 (1948).
[112] Mize, *supra* note 7, at 27.
[113] *Id.* ("Figure 1 illustrates the continuum of *voir dire* questioning from an exclusively judge-conducted *voir dire* on the left to an exclusively attorney-conducted *voir dire* on the right.").

G. *Voir dire* in Colorado

Colorado is a state with potentially paradoxical jury selection rules. On the one hand, as described below, Colorado law suggests *voir dire* is important to obtain a fair jury, yet on the other, it remains a common practice to limit *voir dire* in Colorado to 20 minutes per side in civil cases, a fact that guarantees that in a panel of 40 jurors, an attorney will have on average 30 seconds to talk to each juror.

Colorado case law instructs that *voir dire* is the vital and indispensable component to achieving a fair and impartial jury, which sets the foundation to a fair and impartial trial.[114] "The purpose of *voir dire* is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial."[115] In Colorado, Rule 47 of the Colorado Rules of Civil Procedure governs the selection of jurors in civil cases and allows for a *voir dire* examination.

When prospective jurors report to the courthouse, "an orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about them to facilitate an intelligent exercise of challenges for cause and peremptory challenges."[116] The summoned prospective jurors are brought into the courtroom where the judge shall explain to them in plain language:

(1) the grounds for challenge for cause;

(2) each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause:

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114 *See People v. Collins*, 730 P.2d 293, 300 (Colo. 1986).
115 *Vititoe v. Rocky Mountain Pavement Maint., Inc*., 2015 COA 82, ¶ 20, 412 P.3d 767, 774.
116 C.R.C.P. 47(a).

(3) the identities of the parties and their counsel;

(4) the nature of the case (alternatively, the judge may allow counsel to make non-argumentative statements); and

(5) general legal principles applicable to the case.[117]

To acquire the suitable number of jurors based on the needs of the case, "[t]he clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted."[118] In order to obtain a six-person jury for a civil trial, after strikes for cause, 14 prospective jurors may be called forward to the jury box.[119]

The jury venire panel sent to the jury box are then subject to *voir dire* examination where the court "shall ask prospective jurors questions concerning their qualifications to serve as jurors," and "the parties or their counsel shall be permitted to ask the prospective jurors additional questions."[120] The judge has discretion over the questions asked and the methods employed to deliver such questions, like juror questionnaires.[121]

The *voir dire* examination facilitates an "intelligent exercise of challenges for cause and peremptory challenges."[122] Challenges for cause are to be made during or immediately following the *voir dire* examination and must be made before peremptory challenges are exercised.[123] C.R.C.P. 47(e) provides seven acceptable grounds for making a challenge for cause:

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117 C.R.C.P. 47(a)(2).
118 C.R.C.P. 47(g).
119 *Safeway Stores, Inc. v. Langdon*, 532 P.2d 337, 338 (Colo. 1975), *overruled on other grounds by Laura A. Newman*, 365 P.3d 972. *See also* C.R.C.P. 47(h) (each party is allowed four peremptory challenges).
120 C.R.C.P. 47(a)(3).
121 *Id*.
122 C.R.C.P. 47(a).
123 C.R.C.P. 47(g).

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;

(2) Consanguinity or affinity within the third degree to any party;

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation;

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

One of the seven grounds of challenges for cause does not automatically disqualify a prospective juror from serving on the jury. Colorado courts have held that a decision to sustain or deny a challenge for cause is left to the trial judge's discretion and that result is not to be disturbed on appeal, absent an abuse of discretion.[124]

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[124] *People v. Wright*, 672 P.2d 518 (Colo. 1983); *Pyles-Knutzen v. Bd. of Cty. Comm'rs*, 781 P.2d 164 (Colo. App. 1989); *Kaltenbach v. Julesburg Sch. Dist. RE-1*, 603 P.2d 955 (Colo. App. 1979).

C.R.C.P. 47(h) provides that after the *voir dire* examination and the challenges for cause are finished, the parties may exercise peremptory challenges. "Each side shall be entitled to four peremptory challenges, and if there is more than one party to a side they must join in such challenges."[125] An additional peremptory challenge is allowed to each party for each alternate juror seated, "which may be exercised as to any prospective jurors."[126] A peremptory challenge "may be exercised without a reason stated, without inquiry and without being subject to the court's control" and "its purpose is to permit the rejection of a juror for a real or imagined partiality that would be difficult to designate or demonstrate."[127] If the trial judge erroneously denies a challenge for cause and forces a side to use a peremptory challenge to remove the juror, there will not be a reversal on appeal unless the error substantially influenced the outcome.[128] Once the jury selection concludes, an oath or affirmation is administered to the jurors.

Trial Court Discretion in Colorado. Voir dire examination is a vehicle through which the parties use to uncover certain biases that may cloud a juror's ability to consider evidence and render a verdict in fair and impartial manner. In evaluating whether a potential juror retains "a state of mind . . . evincing enmity against or bias to either party" within the meaning of C.R.C.P. 47(e)(7), "the trial court must consider the juror's statements during *voir dire* as a whole."[129] To intelligently apply and use both challenges for cause or peremptory challenges, the parties must

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125 C.R.C.P. 47(h).
126 Colo. Rev. Stat. § 13-71-142; *cf.* C.R.C.P. 47(b) (giving each side one additional peremptory challenge when one or two alternatives are called).
127 *People v. Fink*, 41 Colo. App. 47, 49, 579 P.2d 659, 661 (1978).
128 *Laura A. Newman*, 365 P.3d at 977-78.
129 *People v. Greenwell*, 830 P.2d 1116, 1118 (Colo. App. 1992).

extract any statements of bias or enmity that lives in the mind of each prospective juror. The parties are entitled to "considerable latitude" during good faith questioning of potential jurors.[130]

Despite the "considerable latitude" given to the parties, the *voir dire* scope and procedures are matters that fall within the trial court's discretion, and, in exercising its afforded discretion, the court may impose limits on attorney-conducted *voir dire*. The court is empowered to "limit or terminate" a *voir dire* examination if questioning is "repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper."[131] In addition, a judge has the discretion to "limit the time available to the parties or their counsel for juror examination based on the needs of the case."[132] The use of these processes is within the discretion of each judge and seems to take different forms from one courtroom to another. Any restrictions placed on *voir dire* will not be reversed on appeal absent an abuse of discretion with a prejudicial result.[133]

Time Limitations in Colorado. C.R.C.P. 47(a) empowers the court to limit the time each side has to examine the potential jurors. Because no explicit instructions for time limitations are enforced, the trial judge has wide discretion in imposing time constraints on *voir dire* examination. In Colorado, trial judges commonly impose time limits of about twenty minutes per side at the outset of the trial.

Table 1 below shows the model language that trial courts use in their respective orders distributed to the parties before trial begins.

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130 *Oglesby v. Conger*, 507 P.2d 883, 885 (Colo. App. 1972).
131 C.R.C.P. 47(a)(3).
132 *Id*.
133 *Kaltenbach*, 43 Colo. App. at 154, 603 P.2d at 958 (trial court did not commit prejudicial error in granting a protective order to restrict plaintiff's further reference to defendant's insurance company, which prevented questioning of two jurors added thereafter).

Table 1. Standard Language for *Voir dire* Time Restrictions in Pre-Trial Orders

Language from Order Issued Before *Voir dire*	**Trial Court**	**Citation(s)**
Each side will have a maximum of 20 minutes for *voir dire*, unless additional time is requested and permitted in advance of the first day of trial. In multi-party cases, time must be divided between all parties on one side of the case.	Denver County	*Navarro v. City & Cty. of Denver*, 2018 Colo. Dist. LEXIS 5, *7 (Colo. Dist. Ct. March 6, 2018)
		Blair v. Buckey, 2017 Colo. Dist. LEXIS 57, *16 (Colo. Dist. Ct. March 29, 2017)
		Wright v. Limon, 2011 Colo. Dist. LEXIS 1820, *5 (Colo. Dist. Ct. August 31, 2011)
		Wainscott v. Centura Health Corp., 2015 Colo. Dist. LEXIS 718, *14 (Colo. Dist. Ct. August 5, 2015)
Counsel will normally be limited to 20 minutes on *voir dire* unless otherwise ordered by the Court.	Denver County	*Wright v. Limon*, 2012 Colo. Dist. LEXIS 1897, *10 (Colo. Dist. Ct. May 23, 2012)
After the court's *voir dire*, each side will be allowed twenty minutes for *voir dire*. The time limits will be strictly enforced.	Arapahoe County	*Dortch v. Reynolds*, 2017 Colo. Dist. LEXIS 1479, *1-2 (Colo. Dist. Ct. April 6, 2017)
Voir dire will be 20-30 minutes per side. Additional time will be considered on request.	Adams County	*Benson v. Molar*, 2018 Colo. Dist. LEXIS 1748, *3 (Colo. Dist. Ct. June 6, 2018)
Voir dire will be thirty minutes for each party.	Arapahoe County	*Martra Dev. Co. v. Curran*, 2018 Colo. Dist. LEXIS 3465, *1 (Colo. Dist. Ct. June 10, 2018)
Time limitations will be as follows: i. *Voir dire* - 20 minutes per side…	Jefferson County	*Haste v. Scl Front Range*, 2017 Colo. Dist. LEXIS 524, *3 (Colo. Dist. Ct. March 23, 2017)

Trial courts have discretion to implement these blanket time restrictions out of concern for judicial economy and wasting time. If twenty-four prospective jurors are initially are called to the jury box to seat a panel of 12 jurors and a twenty-minute restriction is imposed, then each

side has 50 seconds (0.833 minutes) to examine each juror to make informed challenges.[134] Likewise, if forty potential jurors are called to the jury box and each side is restricted to twenty minutes for *voir dire*, then each side has 30 seconds (0.5 minutes) to question each seated juror to elicit potential biases. In addition to information from *voir dire*, jurors provide basic demographic information in a questionnaire.[135] The topics listed include: name, sex, date of birth, age, residence, and marital status; the number and ages of children; educational level and occupation; whether the juror is regularly employed, self-employed, or unemployed; spouse's occupation; previous juror service; present or past involvement as a party or witness in a civil or criminal proceeding.[136]

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134 *See Dortch v. Reynolds*, 2017 Colo. Dist. LEXIS 1479, *1 (Colo. Dist. Ct. April 6, 2017).
135 *See* Colo. Rev. Stat. § 13-71-115 (providing that jurors shall be given questionnaires for completion and that, unless otherwise ordered by the court, counsel shall be supplied with copies of the "appropriate completed questionnaires").
136 *Id*.

III. EXISTING RESEARCH ON BIAS AND JURY SELECTION

This section summarizes the existing literature regarding bias, and more specifically, bias and jury selection.

A. Bias and Judgment

Cognitive and social psychologists have spent decades exploring various forms of cognitive, motivational, and social biases[137]. However, the term "bias," which has become a buzz word in current social discourse, is now used to refer to many different things, almost always accompanied with negative connotations. Most broadly, bias has been defined as a systematic source of influence that detracts from accuracy or truth in a non-random manner.[138]

A full list of the contributions to the literature on biases of potential interest to legal scholars would number in the thousands. Some of the most notable of these contributions would include early work on rationalization, cognitive dissonance reduction, and attributional biases, More recent contributions would include Daniel Kahneman's and Amos Tversky's work on biases in judgment and decision making (which was recognized with the 2002 Nobel Prize in Economics), Jonathan Haidt's exploration of the influence of religious and ideological influences on moral judgment. A consistent topic over many decades has been the existence and consequences of prejudice and in-group favoritism.[139][140]

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[137] Citation
[138] West, T. V., & Kenny, D. A. (2011). "The truth and bias model of judgment." *Psychol. Rev., 118*(2), 357.
[139] Brewer, M. B. (2007). "The social psychology of intergroup relations: Social categorization, ingroup bias, and outgroup prejudice"; Dovidio, J. F., Glick, P., & Rudman, L. "On the nature of prejudice: 50 years after Allport." *Maiden, MA: Blackwell*.
[140] Citation

An analysis of 83 studies revealed a consistent relationship between attitudes and behaviors, such that attitudes predicts behavior 69% of the time.[141] In fact, several studies have demonstrated that individuals' attitudes can bias how a legal case is judged. For example, participants who expressed high levels of benevolent sexism preferred male attorneys who expressed anger (relative to neutral male attorneys) and neutral female attorneys (relative to angry female attorneys)[142]; they were also more likely to blame the victim of a rape case than those who expressed low levels of benevolent sexism.[143] Indeed, analysis of 272 studies of juror decision-making in criminal cases showed that jurors' level of authoritarian attitudes and their trust in the legal system are strongly related to their decisions whether to acquit or convict.[144] Unfortunately, there is little research on the degree to which jurors' pre-existing attitudes predict their judgments in civil cases—a gap in the literature we hope to remedy with this project.

The biases of concern in this paper are systematic inclinations, preconceptions, mindsets, or beliefs (whether conscious or unconscious) that could bias jurors in a direction favorable or unfavorable to one of the litigants, to their attorneys, or to witnesses providing evidence in a civil trial. In our present research on *voir dire* procedures, the focus is on the usefulness of standard, minimal *voir dire* versus more extended and case-specific *voir dire* for attorneys, and for presiding judges, to identify jurors whose consideration of evidence, verdicts, and awarded damages might in large measure reflect their biases rather than the court's instructions and the

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141 Kraus, S. J., (1995). "Attitudes and the prediction of behavior: A meta-analysis of the empirical literature." *Personality & Soc. Psychol. Bull., 21*(1), 58-75.
142 Salerno, J. & Phalen, H. (forthcoming). "Traditional gender roles and backlash against female attorneys expressing anger in court." *J. Empirical Legal Stud*.
143 Abrams, D., et al., (2003). "Perceptions of stranger and acquaintance rape: The role of benevolent and hostile sexism in victim blame and rape proclivity." *J. Personality & Soc. Psychol., 84*(1), 111.
144 Devine, P. G., et al., (2012). "Long-term reduction in implicit race bias: A prejudice habit-breaking intervention." *J. Experimental Soc. Psychol., 48*(6), 1267-1278.

preponderance of evidence standard. We also explore the distinct possibility, given the evidence martialed by social and cognitive psychologists, that these distortions might occur despite the jurors' best intentions, and even their pledge to the court in response to "judicial rehabilitation" that they will put those biases aside as they consider the evidence presented in the case.

Our working assumption in the present research is that attitudes and views discoverable through reasonable *voir dire* procedures can bias jurors' verdicts and damages awards via confirmation bias and motivated reasoning whereby they attend to, recall, and give disproportionate weight to information that is congruent with such attitudes and beliefs.[145] For example, a juror who reveals in *voir dire* that he or she considers evidence with a pre-existing belief that plaintiffs commonly make false claims out of greed, would be inclined to accept, at face value, evidence and arguments in the specific case they are considering that seems congruent with that belief, while responding with skepticism and openness to rebuttal to evidence and arguments that are incongruent with those pre-existing beliefs. This possibility suggests that it is crucial for attorneys to be able to identify jurors who hold extreme beliefs that might influence how they process and interpret the evidence of a case and, ultimately, their verdict and damages award judgments.

B. Regulating Bias

Identifying jurors who hold pre-existing attitudes that might bias their judgment would be less necessary, however, if it were possible to break the link between jurors' pre-existing attitudes and their ultimate legal judgments. In other words, if jurors were able to control the biasing impact of their attitudes on their decision-making processes, the legal system wouldn't

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[145] Kunda, Z. (1990). "The Case for Motivated Reasoning." *Psychol. Bull.*, 108, 480-498.

have to worry about excluding them from juries. Some psychological scientists have argued that people can manage their biases if they are (1) aware of their potential biases and (2) motivated to change their biases.[146] Interestingly, these two requirements loosely delineate two aspects of the *voir dire* process. First, by questioning jurors about their potential biases before they hear evidence and evaluate the case, attorneys might call jurors' attention to their biases, which might enable them to better control their impact. Second, judges often try to call jurors' attention to their biases and motivate them to try to control them through judicial rehabilitation. It is possible that these two aspects of the *voir dire* process might negate the need for identifying and excluding biased jurors during extended *voir dire*. There is some support from basic social psychological research that these two factors hold promise for breaking the link between jurors' pre-existing attitudes and biased legal judgments (reviewed briefly next). The causal impact of questioning biases before evaluating a case and judicial rehabilitation has not been tested, however, in a civil jury context.

C. Bias awareness

There is some psychological evidence to support the idea that calling jurors' awareness to their biases during *voir dire* might prevent biases from shading their evaluation of the case. In the legal context, there is some evidence that drawing jurors' attention to potential racial bias can reduce the impact that a defendant's race has on jurors when they consider verdicts.[147] More specifically both White and Black jurors are more likely to make racially unbiased decisions

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146 Devine, *supra* note 142.
147 Sommers, S. R., & Ellsworth, P. C. (2000). "Race in the courtroom: Perceptions of guilt and dispositional attributions." *Personality & Soc. Psychol. Bull., 26*(11), 1367.

when race is salient relative to when race is not salient.[148] That is, when judging the same case, jurors were more likely to vote guilty for a Black versus White defendant when race was not salient, but when an aspect of the case had to do with race, this racial bias was eliminated. Further, both White and Black jurors were more punitive toward other-race defendants when race was not salient, but this racial difference was smaller when race was made salient.[149] A common interpretation of these finding determines that calling jurors' awareness to this potential bias helps them regulate their bias.

It is possible that *voir dire* might have a similar impact in civil cases by calling jurors' awareness to their biases. However, there is no research, to our knowledge, testing this proposition directly in the realm of civil juries. One goal of the present research is to test whether being questioned about relative pre-existing attitudes before judging a case might help jurors regulate the potential biasing impact of those attitudes on their case judgments, relative to those who are questioned about them after the case.

D. Judicial rehabilitation

Social psychological research has demonstrated that both an awareness of the bias and a motivation to reduce bias are necessary (but not always sufficient) steps to reducing bias. Critics of extended *voir dire* argue that judges can effectively prevent juror bias through rehabilitative questioning. Rehabilitative questioning includes the judge informing the juror of the law that requires them to set aside their biases and then asking if the juror is able to do so. Although

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148 Sommers, *supra* note 147, at 1367-1379; Sommers, S. R., & Ellsworth, P. C. (2001). "White juror bias: An investigation of prejudice against Black defendants in the American courtroom." *Psychol., Pub. Pol'y, & L.*, 7(1), 201.

149 Sommers, *supra* note 148 (2001).

some basic social psychology suggests that rehabilitative questioning would be effective because biases can be reduced by calling attention to the biases and providing motivation to change,[150] other research would suggest it to be a less promising intervention.[151]

Attitudes are notoriously difficult to change, and people's biases can affect their judgments and behavior outside of their awareness.[152]

Encouraging people to regulate their biases is not always effective. Attempts to make people self-regulate their biases against unattractive job candidates by expressing a desire to remain neutral and to be fair reduced, but did not eliminate, biases in hiring decisions.[153] Participants who were told *not* to rely on stereotypes wrote more stereotypic narratives than those who were not given such an instruction.[154] Similarly, participants who were told to pay attention to race *and* those who were told to suppress race made more race-based errors than those who were given no instructions.[155] Further, asking jurors to express impartiality and awareness of their potential biases might have a "credentialing" effect, or a false sense of security that they have taken care of their biases. Research has demonstrated when people are given the opportunity to act in a way that is not prejudiced, they are actually more likely to subsequently act in a prejudiced way relative to those people who are not given the

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150 Devine, *supra* note 142; Sommers, *supra* note 145 (2000); Sommers, *supra* note 146 (2001).
151 *See* Crocker, *supra* note 10, at 212-13 (discussing dishonesty arising when jurors waver between their reluctance to divulge an unwillingness to respect the law to a judge and their need to align with their beliefs and values); Arthur H. Patterson & Nancy L. Neufer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 Cornell J.L. & Pub. Pol'y 97 (1997).
152 Nisbett, R. & Wilson, T. (1977). "Telling more than we can know: Verbal reports on mental processes." *Psychol. Rev.*, 231-259.
153 Axt, J. R., Nguyen, H., & Nosek, B. A. (2018). "The Judgment Bias Task: A flexible method for assessing individual differences in social judgment biases." *J. Experimental Soc. Psychol.*, 76, at 337-355.
154 Macrae, C. N., et al., (1994). "Out of mind but back in sight: Stereotypes on the rebound." *J. Personality & Soc. Psychol., 67*(5), at 808.
155 Payne, B. K., et al., (2002). "Best laid plans: Effects of goals on accessibility bias and cognitive control in race-based misperceptions of weapons." *J. Experimental Soc. Psychol., 38*(4), 384-396.

"credentialing" opportunity because that first act of impartiality provided moral cover to express prejudice later on.[156] For example, participants who were given the opportunity to endorse Barack Obama publicly were more likely to later endorse pro-White policies than those who were given the opportunity to support John Kerry.[157] Although these effects have never been tested in a civil jury setting, the studies suggest that rather than encouraging jurors to act unbiased, the awareness-motivation method of bias reduction could be ineffective (or even backfire and make jurors more biased).

Further, the rare research specific to the legal context is less than promising. Research on rehabilitative questioning by judges is mixed and entirely limited to criminal cases. One study indicated that jurors subjected to rehabilitative questioning about their attitudes toward the insanity defense are less likely to vote guilty than jurors who receive standard questioning.[158] Crocker and Kovera suggest this might be because jurors subjected to rehabilitation feel more pressure to answer the judge's questions in a socially desirable way than jurors not subjected to rehabilitation. They point out that jurors are unlikely to admit to biases when they know (and are told) they should not be biased, and people want to believe they can be fair. Although the study concluded that rehabilitation in a criminal setting caused jurors to be more receptive to insanity defense, the authors could not conclude whether jurors were actually more lenient or because the judge signaled to them that they should be more lenient—particularly given that rehabilitation reduced guilty verdicts among jurors who expressed bias, but also those who did not.[159]

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156 Effron, D. A., et al., (2009). "Endorsing Obama Licenses Favoring Whites." *J. Experimental Soc. Psychol., 45*(3), 590-93.
157 *Id*.
158 Crocker, *supra* note 10.
159 Crocker, *supra* note 10, at 225.

Further (and perhaps even more concerning) research indicates that instructing jurors to ignore their biases can ironically backfire and result in jurors relying more on biases.[160] This is consistent with classic social psychological research demonstrating that telling people to ignore something often just draws more attention to it and makes it difficult to ignore (i.e., the White Bear Effect).[161] Indeed, a specific examination of 48 studies on judicial instructions suggests that jurors cannot effectively follow instructions to disregard certain evidence.[162] A second goal of the present research is to test whether experiencing judicial rehabilitation before judging a case might help jurors regulate the potential biasing impact of those attitudes on their case judgments, relative to those who do not experience judicial rehabilitation.

In summary, vast literature in psychology strongly suggests that pre-existing attitudes will, if not eliminated or corrected, bias how jurors review evidence and render verdicts, often confirming those pre-existing attitudes. The literature on whether bias can be mitigated or corrected generally is mixed, leaving open the question of whether experiencing extensive *voir dire* questioning and/or rehabilitative instructions from a judge are likely to mitigate or eliminate juror bias. Further, even if these interventions reduce bias, those reductions might be short-lived. Lai and colleagues (2016), for example, found that nine different interventions did not reduce bias in the long-term, even when participants were motivated to reduce their bias. An analysis of 492 studies found that implicit biases can be changed, but the size of that change is relatively

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160 *See, e.g.,* Macrae, C. N., et al., (1994). "Out of mind but back in sight: Stereotypes on the rebound." *J. Personality & Soc. Psychol.*, 67(5), 808; Payne, B. K., et al., (2002). "Best laid plans: Effects of goals on accessibility bias and cognitive control in race-based misperceptions of weapons." *J. Experimental Soc. Psychol.*, 38(4), 384-96; Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 754 (1959) (instructions to discount evidence of insurance tends to "sensitize the jurors to fact that defendant is insured and thereby increase the award.").

161 Wegner, D. M., & Schneider, D. J. (2003). "The white bear story." *Psychol. Inquiry, 14*(3-4), 326-29.

162 Steblay, N. et al., (2006). "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis." *L. & Hum. Behav.*, *30*(4), 469-492.

small.[163] In many jurisdictions, the legal system places a lot of faith on the assumption that judicial rehabilitation will eliminate juror bias—to the degree that they use it as a justification to cut attorneys' ability to question, identify, and exclude biased jurors. We aim to test this assumption directly in the realm of civil juries.

E. Can *voir dire* help attorneys identify jurors with biases?

If judicial rehabilitation does not eliminate juror biases, extended *voir dire* is even more necessary for attorneys to use to identify biased jurors and exclude them from the jury. Unfortunately, and as prior noted, the small experimental literature is relevant to criminal, rather than civil, juries.[164] A rare study focusing on the impact of extended civil *voir dire* (relative to minimum *voir dire*) demonstrated that extended *voir dire* increased accuracy of predicting individual verdicts.[165] Case-specific attitude research has shown that jurors' attitudes toward civil litigation can, in fact, be modest predictors of their case-related decisions.[166]

Although conducted in the criminal setting, one study demonstrated that a non-directive *voir dire* held promise for eliciting more self-disclosing *voir dire* responses more likely to

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163 Forscher, P. et al., (2019). "A Meta-Analysis of Procedures to Change Implicit Measures." *J. Personality & Soc. Psychol., 117*(3), 522-559.

164 Cutler, B. L., Moran, G., & Narby, D. J. (1992). "Jury selection in insanity defense cases." *J. of Res. in Personality, 26*(2), 165-182; Johnson, C., & Haney, C. (1994). "Felony *voir dire*." *L. & Hum. Behav., 18*(5), 487-506; Lecci, L., & Myers, B. (2002). "Examining the construct validity of the original and revised JBS: A cross-validation of sample and method." *L. & Hum. Behav., 26*(4), 455-463; Middendorf, K., & Luginbuhl, J. (1995). "The value of a nondirective *voir dire* style in jury selection." *Crim. Just. & Behav.*, 22, 129-51; Nietzel, M. T., et al. (1999). "Juries." *Psychol. & L.*, at 23-52; Zeisel, H., & Diamond, S. S. (1978). "The effect of peremptory challenges on jury and verdict: An experiment in a federal district court." *Stan. L. Rev*., 491-531 (discussing a rare exception investigated whether jurors' personality traits made them more or less likely to be excused in criminal and civil trials); John Clark et al., (2007). "Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases." 34 *Crim. Just. & Behav.* 641.

165 Moran, G., et al., (1990). "Jury selection in major controlled substance trials: The need for extended *voir dire*." *Forensic Rep.*

166 Robbennolt, J.K., et al. (2006). "Evaluating and assisting jury competence in civil cases." In I. B. Weiner & A. K. Hess (Eds.), *The handbook of forensic psychology* (3rd ed., p. 392-425).

include an admission in their inability to adhere to due process guarantees, relative to a more directive *voir dire* style.[167] Further, the nondirective style of *voir dire* was more effective in uncovering grounds for challenging a juror for cause than directive style of *voir dire* because the nondirective *voir dire* established an atmosphere in which the juror felt less bound to give a socially desirable response to questions from the attorney or judge. It is important, however, to test the effectiveness of extended *voir dire* in eliciting honest admissions of potentially biasing pre-existing attitudes among civil jurors.

Further, some studies have compared the impact of judges versus attorneys conducting *voir dire* and highlighted the importance of allowing attorneys to question the potential jurors. Attorneys are more effective than judges in eliciting candid answers from potential jurors and mock jurors change their minds more often when questioned by judges than attorneys.[168] Further, jurors were more likely to change their answers on important attitude and belief measures when interviewed by a judge than an attorney during *voir dire*. A third goal of this research is to assess the degree to which jurors will admit to pre-existing biases and unwillingness to follow the law during extended *voir dire* and the degree to which those attitudes will predict their verdicts and damages award decisions.

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167 Middendorf, K., & Luginbuhl, J. (1995). "The value of a nondirective *voir dire* style in jury selection." *Crim. Just. & Behav.*, *22*, 129–51.
168 Jones, S. E. (1987). "Judge-versus attorney-conducted *voir dire*: An empirical investigation of juror candor." *L. & Hum. Behav.*, *11*(2), 131-146. https://doi.org/10.1007/BF01040446.

IV. METHOD

A. Overview of Experimental Design and Procedure

All potential participants in the study completed a pre-screening which included basic demographic information (i.e., gender, age, ethnicity, income, education level) and attention checks. Those who failed initial attention checks were routed out of the study. Participants who passed the pre-screening were asked to assume the role of "juror" and were given an overview of the case, which included brief information about the plaintiff and defendant.

Jurors in all experimental conditions read a detailed summary of evidence and arguments presented in one of three real cases, and then indicated the verdict they favored and what financial damages, if any, they would award to the plaintiff. Before offering these judgments, jurors randomly assigned to the extended *voir dire* condition completed a questionnaire containing both generic items about sources of bias that might influence jurors in any tort case and additional items pertaining to potential biases pertaining to the specific case they were considering. Jurors assigned to the minimal *voir dire* answered only the generic items before offering their judgments but answered the case-specific *voir dire* questions after offering those judgments. Jurors in the no *voir dire* condition answered both the generic and case specific bias questions only after offering their judgments. Jurors in the three experimental condition further were randomly assigned to either view or not view a "judicial rehabilitation video" before they considered the case material that essentially asked whether they could set aside their biases.

Participants in all experimental conditions also completed various attention checks and were tested about their memory about case details and their agreement or disagreement with various statements about the facts of the case and the parties to the lawsuit.

B. Participants and Data Cleansing

The three cases were considered by 2,567 participants we accessed from Amazon's Mechanical Turk, which is an online source commonly used for recruiting participants into psychological studies. Mechanical Turk samples are more demographically diverse than traditional "convenience" samples (e.g., college students or online community member samples), and are considered to be a legitimate source of quality data.[169] Data from 523 participants (20% of the sample) was excluded from the study because the participant failed at least one of the following data quality checks: (This rate, it should be noted, is typical for Mturk samples[170]),

(1) Participants failed any of four attention checks in which we requested participants choose a specific answer if they are paying attention (attention check 1: *n* = 159, 6%; attention check 2: *n* = 48, 2%; attention check 3: *n* = 166, 6.5%; attention check 4: *n* = 32, 1.2%).

(2) Participants failed to report the same gender (*n* = 25, 1%), age (*n* = 24, 1%), ethnicity (*n* = 33, 1%) or education level (*n* = 37, 1.5%) the second time the question was asked.

(3) Participants failed to correctly report whether they saw a video of the judge (*n* = 66, 2.6%)

(4) Participants failed to correctly answer at least one of the three comprehension checks after reading the trial materials (*n* = 181, 7%).

(5) Damages: we made sure that the numeric version matched the written-out version and deleted one damage award outlier (31 billion).

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169 Buhrmester, M., Kwang, T., & Gosling, S. D. (2011). "Amazon's Mechanical Turk: A new source of inexpensive, yet high-quality, data?." *Perspectives on Psych. Sci*, *6*, 3-5; Paolacci, G., Chandler, J., & Ipeirotis, P. G. (2010). "Running experiments on amazon mechanical turk." *Judgment & Decision Making, 5*(5), 411-419.
170 Goodman, J. K., Cryder, C. E., & Cheema, A. (2013). "Data collection in a flat world: The strengths and weaknesses of Mechanical Turk samples." *J. Behav. Decision Making*, *26*, 213-224. doi: 10.1002/bdm.1753

The sample remaining following these exclusions included 2,041 participants (62% white, 77% female). Detailed demographic information for the overall sample, the Colorado sample, and the samples assigned to each of the three separate cases is provided in Table 2.

Participants took, on average, 54 minutes (*SD* = 20 minutes) to complete the study (Wrongful birth *M* = 61, *SD* = 21; Aortic dissection *M* = 49, *SD* = 17; Bad Faith *M* = 54, *SD* = 18). All participants were compensated $2, along with a potential bonus of $2.50 if they correctly answered 50% of the comprehension questions (some of which were quite difficult).[171]

[171] The later comprehension questions were used for bonuses, not for exclusion. Only early attention checks were used to exclude jurors.

V. MATERIALS

A. Trial Materials

The trial stimuli in our study were based on three actual cases: (1) a bad faith case involving an insurer and claims that the insured acted improperly, (2) a tort claim asserting a doctor failed to diagnose an *en utero* defect, and (3) a medical malpractice case involving a failure to diagnose in an emergency room. The material presented for each case included a summary of factual background, opening statements, the direct questioning of witnesses, and closing statements. The length and the amount of detail and complexity of these materials allowed us both to capture some of the nuance of the relevant cases and to make the salience of the *voir dire* relative to the salience of the case materials better approximate the circumstances of an actual trial.

Bad Faith Case Summary: The plaintiff alleged that, after a car accident, her insurance company did not pay her the amount owed and acted in bad faith. The defense argued that her attorney failed to cooperate in order to create a bad faith claim. Extended *voir dire* in this case focused on jurors' personal beliefs and experiences with insurance companies.

Wrongful Birth Cystic Fibrosis Case Summary: The plaintiff alleged that a genetic testing company was liable for her son's wrongful birth after they failed to identify the risk that her child would have cystic fibrosis. She alleged that if she received the information from these tests, she would have terminated the pregnancy. Extended *voir dire* in this case focused on jurors' opinions on abortion, their attitudes towards women and motherhood, and their trust in science.

Medical Malpractice/Aortic Dissection Case Summary: The plaintiff alleged that the defendant misdiagnosed and improperly dismissed her husband's medical emergency, causing him to die at home. The plaintiff also alleged that the hospital was negligent by allowing the doctor to change and update notes in the medical charts weeks after seeing the patient. Extended *voir dire* in this case focused on jurors' trust in science.

B. *Voir dire* Questions

No Voir dire Condition: Jurors in this condition answered only basic demographic question posed in a pre-screening prior to their consideration of case materials and decisions regarding liability and any financial damages.[172]

Minimal Voir dire Condition: Before considering case materials, jurors in this condition were asked generic questions dealing primarily with their experiences with the legal system and any broad biases or prejudices they might possess. In particular, they were asked if they had served as a juror or grand juror, if they had studied law, if they or a close family member had sued or been sued, if they had testified in a lawsuit before, and also their ability to come to verdict and any beliefs that could keep them from doing so impartially. The jurors were, in essence, asked to identify any experiences or attitudes that might bias them toward a party in the case and to volunteer that information.

Extended Voir dire: The *extended voir dire* included an additional set of questions that related to several specific aspects of the case participants were to consider. The relevant items comprised four general categories, as described below.

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[172] See Appendix ?? for full wording of instructions and questions for jurors in each *voir dire* condition.

1) Pre-existing attitudes about trial participants

Burden of Proof: Jurors were asked, "In a case like this, do you think the plaintiff or defense is going to have a harder time convincing you?" on a 5-point scale ranging from (1) *The defense will have a much harder time* to (2) *The plaintiff will have a much harder time*.

Trust: Jurors were asked to indicate the degree to which they trusted doctors, lawyers, people who sue others (i.e., plaintiffs), and insurance companies, for each item using 4-point scales anchored at 1-*None* and 4-*A great deal*.

Impetus for Plaintiff's Action: Jurors were asked to respond to the following three items assessing the degree to which they thought the claims were due to the plaintiff's actions, in each case using a 7-point scale ranging from 1-*Strongly Disagree* to 7- *Strongly Agree*: (i) "If there is a trial like this it is much more likely that the plaintiffs are out for money than the doctor making a mistake;" (ii) "Most people who sue others are just trying to blame someone else for their problems;" (iii) "Most people who sue others in court have legitimate grievances" (this item was reverse scored). Averaging responses to these three items yielded a reliable scale for the Wrongful Birth Cystic Fibrosis Case, $\alpha = .65$ and for the Aortic Dissection Case, $\alpha = .72$, but not for the Bad Faith Case, $\alpha = .29$, for which we had substituted the insurance company for the doctor. Accordingly, we did not utilize this scale in our analyses.

Likelihood of Fraudulent Claims: Jurors were asked to judge the likelihood of three scenarios. Depending on whether they judged one of the medical malpractice cases (Wrongful Birth, Aortic Dissection) or the insurance case (Bad Faith), they were asked about medical professionals or insurance companies, respectively. *First*, they were asked which they thought was more likely: 1 = [medical professionals/insurance companies] deny a valid claim, 2 = both are equally likely, or 3 = a person makes a fraudulent claim against a [medical professional/

insurance company]. *Second*, they were told to suppose that a [medical professional/insurance company] denied a claim for making a mistake that caused a patient harm, and to choose which they thought was more likely: 1 = the [medical professional/insurance company] is trying to save money and avoid getting in trouble by not paying, 2 = both are equally likely, and 3 = the claim is not valid. *Third*, they were told to suppose a [medical professional/insurance company] does deny a valid claim and to choose which they thought is more likely: 1 = the [medical professional/insurance company] is denying a claim they know is valid to avoid having to pay money is more likely, 2 = both are equally likely, 3 = the [medical professional/insurance company] is making an honest mistake is more likely. Averaging responses to these three questions provided a reliable scale in all three cases (Wrongful Birth Case $\alpha = .68$; Aortic Dissection Case: $\alpha = .64$; Bad Faith Case: $\alpha = .68$).

Likelihood of Defendant Dishonesty: Jurors were asked to rate the likelihood of the following two scenarios on 6-point scales ranging from *Always* to *Never*. Depending on whether they judged one of the medical malpractice cases (Wrongful Birth, Aortic Dissection) or the insurance case (Bad Faith), they were asked about medical professionals or insurance companies, respectively. They were asked "How often do you think the following things happen? [Medical professionals/insurance companies] decline valid claims for minor injuries because they think the person making the claim will drop it rather than pursue the issue and sue for the claim. [Medical professionals/insurance companies] deny causing major injuries because they are trying to hold on to the money for as long as they can before they have to pay it." Averaging responses to these two items created a reliable scale for all three cases (Wrongful Birth Cystic Fibrosis Case $\alpha = .76$, Aortic Dissection Case: $\alpha = .75$; Bad Faith Case: $\alpha = .73$)

2) Support for litigation.

Belief that the Burden of Proof is Too Low: Jurors were given a detailed explanation (*see* Appendix for wording) of the burden of proof criterion in civil cases, and the implication of the burden of proof (e.g., "even if a plaintiff proves something is only 51% likely to be true, and it is 49% possible it is not true, the plaintiff has met their burden of proof and should win their case"). Then, they were asked to complete a sentence using a 5- point scale (anchored at 1-*Way too low* and 5- *Way too high* with a midpoint of 3-*Neither too low nor too high*) to indicate their view of that criterion.

Discomfort Relating to Non-Economic Damages: Jurors were given a detailed explanation of the difference between economic and non-economic damages and asked to indicate whether they were either "comfortable" (coded 0) or "not comfortable" (coded 1) awarding non-economic damages.

Scale of Negative Attitudes Toward Lawsuits: Jurors were asked the degree to which they thought (1) the number of personal injury lawsuits and (2) the amount of money awarded in such lawsuits has been "too low" versus "too high" using 5-point scales anchored (1-*Way too low* and 5-*Way too high*, with the midpoint of 3-*Just right*). Averaging responses to these two items provided a reliable scale in all three cases (Wrongful Birth Cystic Fibrosis Case: $\alpha = .74$; Aortic Dissection Case: $\alpha = .74$; Bad Faith Case: $\alpha = .68$).

Limit Litigation Scale: Jurors were asked the degree to which they supported three efforts to curb litigations on 4-point scales ranging from *Strongly Oppose* to *Strongly Support*: (1) Making it harder to sue any person, business, or organization that injures another person either through carelessness or intentionally; (2) Placing a limit on how much an attorney who represents an injured person in a lawsuit can charge for his or her services; and (3) Placing a

limit on how much a judge or a jury can award in a lawsuit resulting from a person being injured. We averaged these three items together, which formed a relatively reliable scale in the medical malpractice cases (Wrongful Birth Cystic Fibrosis Case: α = .58; Aortic Dissection Case: α = .57). The reliability analysis for the Bad Faith Case revealed that deleting one of the items ("Placing a limit on how much an attorney who represents an injured person in a lawsuit can charge for his or her services") allowed us to increase the reliability of the relevant scale from α =.54 to α =.64.

3) Issue-specific attitudes.

Pro-Life Abortion: Jurors considering the Wrongful Birth Case were asked to indicate their agreement with five statements concerning their attitudes about abortion, (e.g., "I am pro-life," "I believe that women have the right to decide whether or not to be pregnant") using 6-point scales (1-*Strongly Disagree*, 6-*Strongly Agree*). Averaging responses to these five items (employing reverse coding where appropriate) provided a reliable scale (α = .90).

Traditional Attitudes toward Women and Motherhood: Jurors considering the Wrongful Birth Case were also asked to report their agreement with 12 statements about gender and motherhood (e.g. "Whatever career a woman may have, her most important role in life is still that of being a mother," and "It is OK for a woman to have a career and her partner to care for their children") using 7-point scales (1-*Strongly Disagree*, *7-Strongly Agree*). Averaging responses to these five items (employing reverse coding where appropriate) provided a reliable scale, α = .84.

Trust in Science: Jurors in the Aortic Dissection Case and in the Wrongful Birth were asked to indicate their agreement with five statements concerning science (e.g. "Science and

technology are making our lives healthier, easier, and more comfortable." and "Science makes our way of life change too fast.") using 7-point scales (1-*Strongly Disagree,* 7-*Strongly Agree*). Averaging responses, with reverse coding where appropriate, provided reliable scales both for the Aortic Dissection Case, α = .78, and the Wrongful Birth Cystic Fibrosis Case, α = .75.

4) Political Ideology

Political Orientation: Jurors were asked to report their political orientation using a 7-point scale (1-*Extremely Conservative*, 7-*Extremely Liberal*).

Trump Approval Scale: Jurors were asked two yes/no questions regarding their support for President Trump (i.e., "Do you approve of the job President Trump is doing?" and "If the presidential election were today, would you vote for Trump?"). In each case we code the "yes" response as a 2 and the "no" response as a 1. Averaging responses to these two items provided a reliable scale for all three cases (Wrongful Birth Case: α =.93; Aortic Dissection Case: α = .92; Bad Faith Case: α =.96).

C. Judicial Rehabilitation Manipulation

Jurors in the rehabilitation condition saw a 24 second video of a judge in a courtroom asking that they "put aside any views or biases you might have and apply the law as written." Jurors in this condition were then asked, "Can you put aside any views or biases you might have and follow the law as it is given?" to which they replied "yes" or "no."[173] The very few jurors who responded *no* to this question (n = 11, 0.4%) were excluded from all analyses. This video

[173] *Walls v. Kim*, 250 Ga. App. 259, 260–61, 549 S.E.2d 797, 799–800 (2001), aff'd, 275 Ga. 177, 563 S.E.2d 847 (2002) ("After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, 'yes.' ").

was, of course, omitted in the No Rehabilitation Condition. Jurors viewed this manipulation after answering *voir dire* questions, or in the no *voir dire* scenario, after the initial consent pages of the study. All jurors who saw the rehabilitation manipulation viewed it before reviewing the case materials.

VI. DEPENDENT MEASURES

A. Judgment by Jurors

After reading the case materials, jurors were first asked for a verdict (defendant liable vs. non liable), and to indicate how certain they were about that verdict (using a scale anchored at 0% and 100%) and, if that verdict favored the plaintiff, to indicate the damage award they deemed appropriate, writing it first in numbers, and then, as a quality check, to do so in words.

Additional items followed that pertained to the jurors' beliefs about the extent to which they thought various factors might have influenced their verdicts about liability and any damages they had favored awarding to the plaintiff. These factors, which mirrored our extended *voir dire* items, included attitudes toward various actors (e.g., doctors, plaintiffs, defense and plaintiff attorneys), their views regarding the burden of proof standard and the amount of money awarded in lawsuits, and their views about science and technology, abortion, and women and motherhood using 5-point rating scales anchored at 1- *Not at all* and 5- *An extremely big impact*.

B. Data Quality Checks

At several points, as they responded to the questionnaire items, jurors in all cases and conditions were asked questions to ensure they were paying attention during the case presentation and carefully reading the survey questions. During the case presentation, jurors were given specific numbers or words they were later asked to recall during the survey to serve

as an attention check. At various points participants also read items instructing them to choose a particular answer if they were reading carefully. Additionally, jurors were asked certain demographic questions twice to confirm that they were attending and answering both consistently and correctly. Manipulation checks were employed to ensure that jurors had attended to the relevant experimental manipulations. For example, at the end of the survey they were asked to indicate whether they had viewed a video of a judge. Research participants who failed to respond correctly to one or more of these checks were excluded from the study.

VII. RESULTS

A. Sample Demographics

We collected a national sample and purposefully oversampled Colorado. Table 2 below presents basic demographic information for the participants responding to each of the three cases and for combined sample for all three cases, as well as the corresponding information separately for the Colorado sample (collapsed across all three cases).

Table 2. Percentage of Liability Judgments and Average Damage Awards

	Bad Faith (*n* = 651)	Aortic Dissection (*n* = 717)	Bad Faith (*n* = 676)	All three Cases (*n* = 2041)	Colorado (N=166)
Liable verdicts	497 (76%)	268 (38%)	479 (71%)	1244 (61%)	108 (65%)
Damage Awards	Med: $25,000,000 Mean: $20,540,364 SD: $17,112,811	Med = $0 Mean = $6,251,158 SD = $11,575,432	Med = $350,000 Mean = $464,985 SD = $2,881,534	Med = $450,000 Mean = $8,913,729 SD = $14,576,766	Med = $500,000 Mean = $9,959,783 SD = $14,596,404

B. Pervasiveness of Juror Bias

We begin our presentation of key findings by presenting some descriptive statistics regarding participants' responses to the questionnaire items pertaining to potential biases in the minimal *voir dire* and the extended *voir dire* conditions. Graphical representations of all descriptive statistics pertaining to the full set of extended *voir dire* questions, collapsed across all three cases, are presented for the entire sample in Appendix 1 and for Colorado participants in Appendix 2. We have included a few of these statistics in Figure 1 of this section to highlight a few examples of the prevalence of attitudes that are problematic to the law. We have also included means and standard deviations for all measures as a function of experimental condition

collapsed across the three cases (Table 3). Graphical representations of each extended *voir dire* measures are also presented separately for each case in Appendices 3a-3c.

As apparent in Figure 1, significant minorities of the population hold views regarding civil cases that are at odds with existing law. Within our national sample, fully 32.1% of jurors view the traditional civil burden of proof – preponderance of the evidence – as "a little too low" and an additional 14.4% view it as "way too low." The percentages are similar in Colorado with 33.9% and 9.7% respectively. Accordingly, in the case of a random jury seated without *voir dire*, one can expect 46.4% nationally and 43.6% in Colorado to have at least some resistance to the accepted burden of proof, as stipulated in the standard instructions to jury members. By contrast, only 4.2% of our national sample and 6.7% in Colorado think the burden on plaintiffs is overly difficult.

Furthermore, 15.1% nationally and 12.1% in Colorado overtly state they are opposed to awarding noneconomic damages. Yet, noneconomic damages account for roughly 50% (check stats) of the total award to plaintiffs in civil cases.[174] Thus, in terms of jurors who are inclined to disregard or at least give too little weight to burden of proof instructions and disinclined to award non-economic damages, a random jury is much more likely to skew in favor of the defense than in favor of the plaintiff.

Jurors' responses to the extended *voir dire* questions regarding caps on damages provide further evidence of a potentially distorting influence on civil tort trials. Nationally, 38.5% of jurors *somewhat* support caps and 10.8% *strongly* support them, a total of 49.3%. In Colorado,

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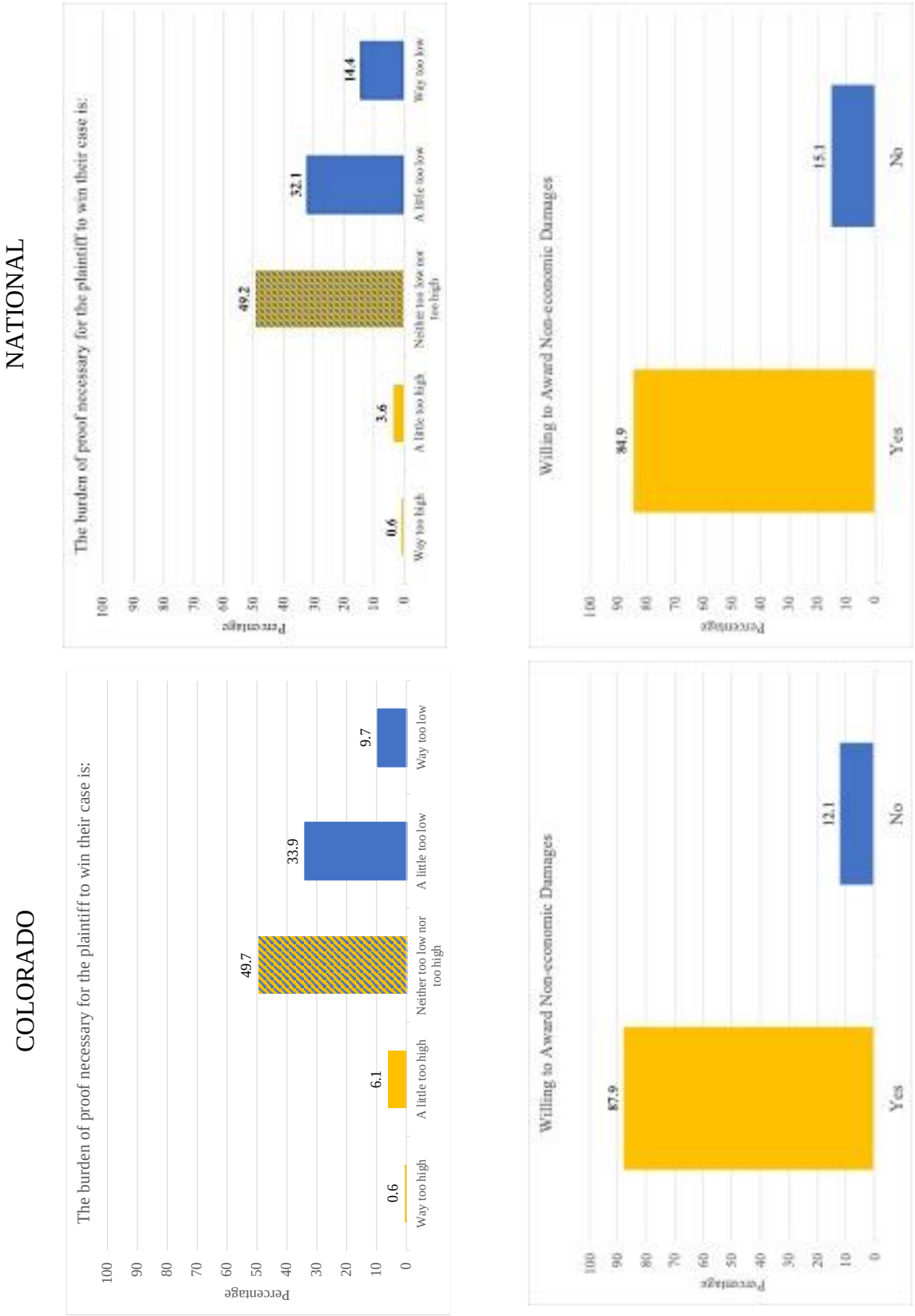
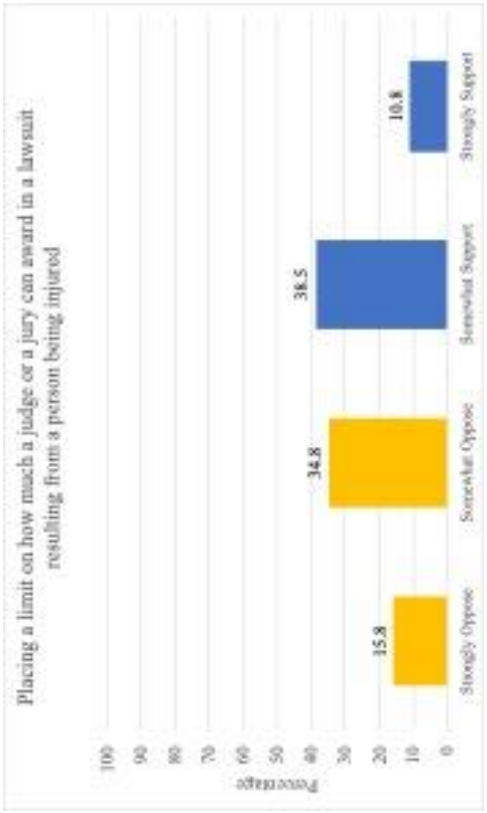
174 Neil Vidmar, Medical Malpractice and The American Jury: Confronting the Myth About Jury Incompetence, Deep Pockets and Outrageous Damage Awards, 200-01 (1995) (discussing noneconomic damages for pain and suffering constitutes more than 50% and as much as 80% of jury awards).

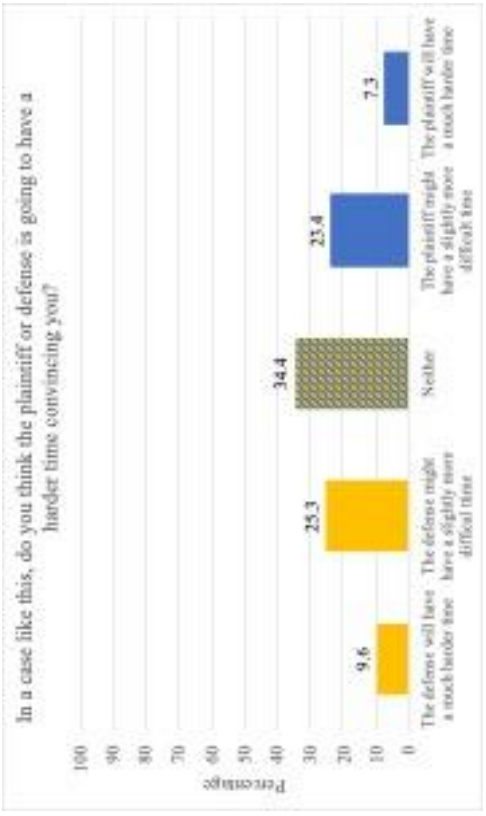
the corresponding statistics are 41.2%, 10.3% and 51.5% respectively. The prevalence of these beliefs is a further cause of concern insofar as such caps are generally to be imposed by the court rather than by jurors. At a minimum the inclusion of jurors who favor caps on awards is likely to reduce damage awards, again, to the disadvantage of the plaintiffs. This effect occurs whether or not a state actually has caps, as it is not based on knowledge about caps, but rather on a juror's views on the topic generally.

Figure 1. Selected descriptive statistics of extended *voir dire* questions in National & Colorado samples

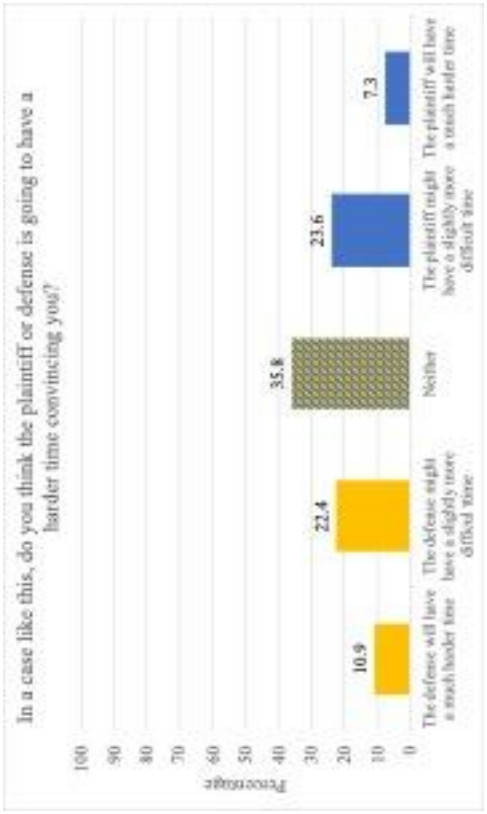


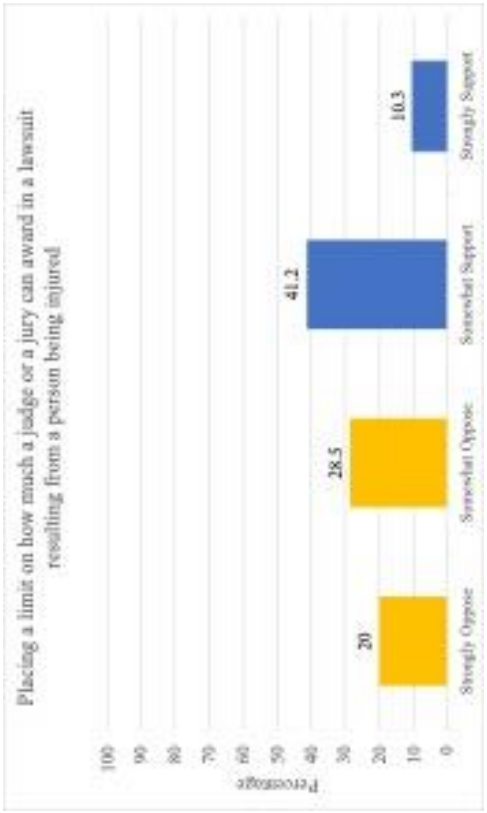
NATIONAL



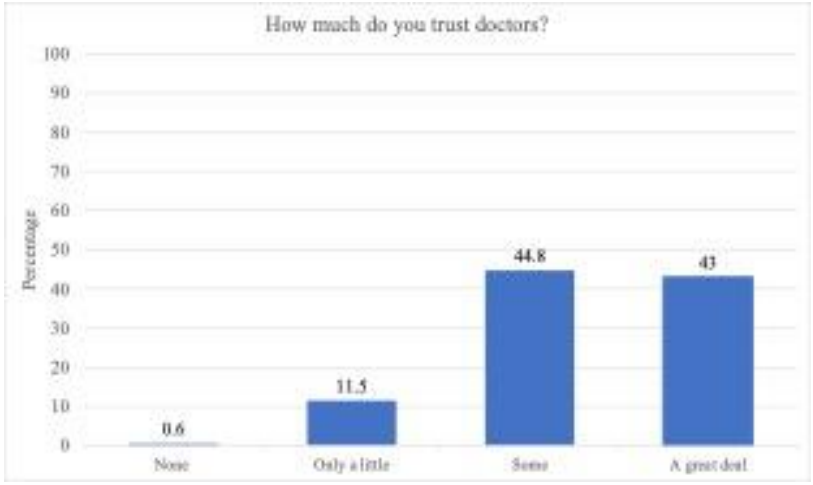


COLORADO

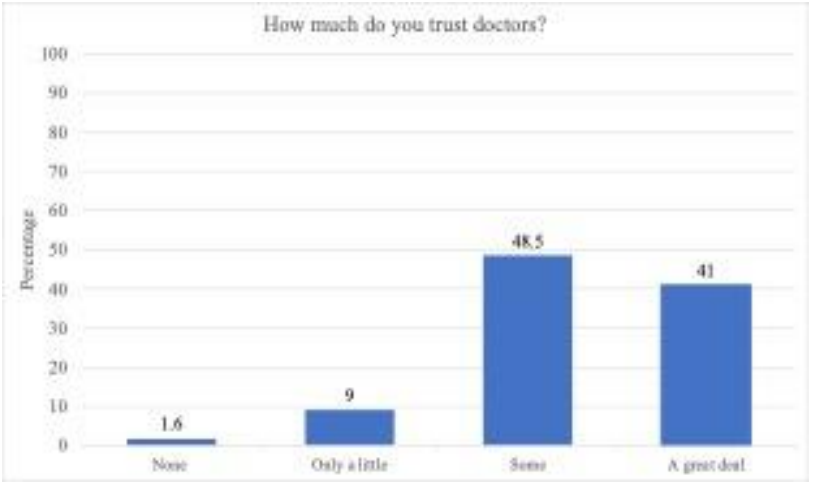


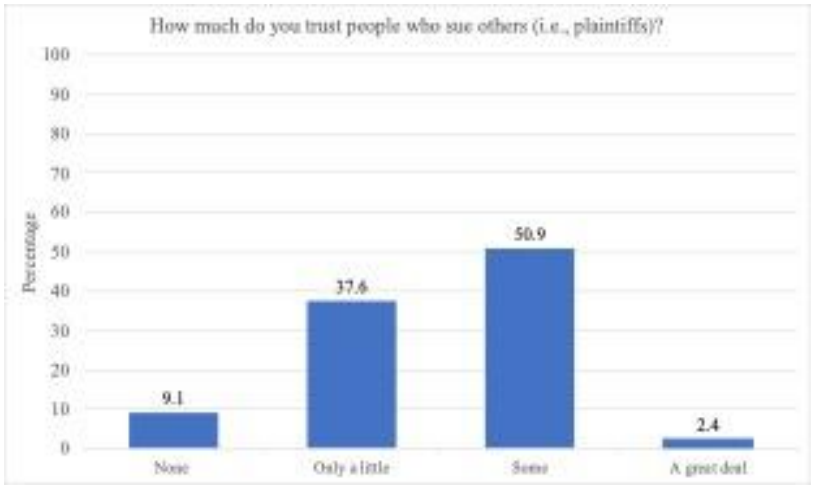


COLORADO



NATIONAL





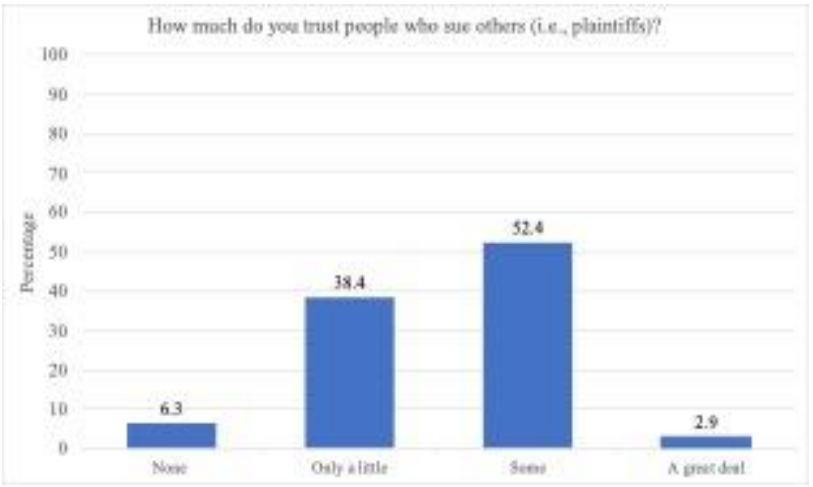


Table 3. Means and Standard Deviations for all Dependent Measures and Extended *Voir dire* Responses as a Function of Experimental Condition, Collapsed Across Cases[175]

	No Judicial Rehabilitation						Judicial Rehabilitation					
	No *Voir Dire*		Minimal *Voir Dire*		Extended *Voir Dire*		No *Voir Dire*		Minimal *Voir Dire*		Extended *Voir Dire*	
% Liable Verdicts	61%		63%		62%		62%		56%		63%	
	M	*SD*	*M*	*SD*	*M*	*SD*	*M*	*SD*	*M*	*SD*	*M*	*SD*
Damage Awards	$8,945,818	$14,849,456	$10,262,713	$15,729,423	$8,141,155	$14,004,916	$9,066,389	$14,405,445	$7,665,750	$12,936,043	$9,323,489	$15,246,563
Damage Awards (among those who voted liable; N = 1242)	$13,826,430	$16,778,627	$15,999,797	$17,266,173	$12,514,259	$15,805,467	$14,515,103	$16,079,010	$13,032,626	$14,852,001	$14,399,523	$17,045,340
Juror Predisposition	2.97	1.13	2.94	1.22	2.99	1.15	2.88	1.03	2.99	1.15	2.99	1.15
Trust in doctors	3.30	.64	3.27	.71	3.33	.66	3.28	.69	3.25	.73	3.31	.71
Trust in lawyers	2.52	.717	2.48	.75	2.57	.68	2.46	.77	2.50	.79	2.59	.76
Trust in plaintiffs	2.52	.64	2.45	.65	2.60	.62	2.52	.69	2.48	.68	2.55	.67
Trust in insurance companies	2.15	.76	2.11	.83	2.26	.75	2.07	.82	2.12	.79	2.25	.77
Impetus for Plaintiff's Actions Scale	3.25	1.06	3.25	1.20	3.18	.95	3.26	1.07	3.31	1.19	3.28	.94
Likelihood of Fraudulent Claims Scale	1.94	.51	1.97	.55	1.93	.46	1.95	.51	1.97	.56	1.98	.47
Likelihood of Defendant Dishonesty Scale	3.16	.917	3.17	1.03	3.21	.88	3.24	.99	3.28	.95	3.28	.93
Burden of proof	3.52	.82	3.53	.79	3.62	.78	3.48	.76	3.56	.85	3.61	.81
Unwillingness to give non-econ $	1.15	.35	1.19	.40	1.09	.29	1.16	.37	1.22	.41	1.10	.30
Negative Attitudes toward Lawsuits Scale	3.60	.75	3.6	.84	3.58	.77	3.62	.77	3.7	.76	3.63	.78
Limit Litigation Scale	2.34	.66	2.4	.71	2.30	.66	2.38	.69	2.40	.70	2.36	.67
Political Orientation (higher #s = liberal)	3.80	1.37	3.94	1.34	3.75	1.40	3.85	1.32	3.81	1.39	3.86	1.28
Trump Approval Scale (1 =pro, 2 = anti) (14)	1.69	.45	1.71	.44	1.66	.46	1.71	.44	1.70	.44	1.7	.45

[175] *Note*: The Impetus for Plaintiff's Actions Scale was not reliable in the Bad Faith Case—this analysis was limited to only the other two cases (n = 1364).

Beyond these responses, other self-reported biases are worth considering. For example, when asked to identify the party who would have a harder time convincing a juror of their case, only about 35% of jurors (nationally and locally in Colorado) indicate that neither side would have greater difficulty, with roughly equal percentages placing the greater weight on the plaintiff and the defendant. This distribution of views may seem relatively unproblematic, in that it does not systematically favor defendants over plaintiffs, or vice versa. But the distribution raises the possibility that, by chance, many juries will be disposed to expect more from one party or the other, rather than follow the instruction of the court that they are to weigh the evidence impartially. It may also interact with how jurors receive the burden of proof. It also bears directly on a question that is often asked in courts that allow *voir dire* relating to whether either party is starting, even a little bit, behind.

The critical question that must be addressed, therefore, is whether the biases discoverable through more extensive *voir dire* proceeding do, in fact, predict, and presumably influence, jurors' consideration and weighing of evidence, and as a result the verdicts and damage awards they favor. Furthermore, do the data we analyzed pertaining to the full range of potential biases that could be discovered by giving attorneys more time and latitude in conducting *voir dire* systematically tilt the playing field toward either the defendant or the plaintiff in tort cases?

C. Association between Juror Bias and Juror Decision-Making.

Statistical analyses were employed to test the extent to which jurors' responses to both minimal and extended *voir dire* questions predict their liability decisions and damage awards. These analyses further allowed us to determine the potentially mitigating impact of the judicial rehabilitation message we introduced for half of our participants. They also allowed us to determine whether the particular *voir dire* experience jurors had before considering evidence and

offering their judgments exerted a systematic and significant effect of their judgments. Because we conducted a very large number of statistical tests, we adopted a stringent significance level of $p = .01$[176] (i.e., the likelihood of such a chance finding to be less than 1%) in order for us to deem a finding to be statistically significant.

In the tables that follow regarding verdicts, *B* values indicated are regression coefficients. Positive values represent an increased likelihood of finding the defendant liable whereas negative *B* values represent a decreased likelihood of finding the defendant liable, the Odds Ratio (OR) values reported translate the *B* values into more readily interpretable Odds Ratios. An OR of 1.00 reflects equal likelihood. An OR of 2.00 means that jurors were twice as likely to find for the plaintiff for each step up the predictor scale (which will be different for each specific scale, e.g., going from a 2 to a 3 on a 7-point response scale, going from a 1 to a 2 on a 5-point response scale, going from a 0 to a 1 on a 2-point response scale). An OR of .5 would mean jurors are half as likely to find for the plaintiff for each step up the predictor scale.

1. *Do demographic factors or generic minimal voir dire questions predict case judgments?*

We first tested whether any basic demographic characteristics predicted mock jurors' verdicts or raw damage awards. For the damage award analyses, we excluded the one identified outlier participant's award (31 billion), as well as any participants whose numerical damage award spelled-out damage award that were a nonsensical combination.[177] As seen in Table 4, virtually none of the demographic factors we had included in our pre-screening questionnaire predicted verdicts or damage awards to a statistically significant degree. The only exception was

[176] Benjamin, D. J., et. al., (2018). "Redefine statistical significance." *Nature Human Behaviour, 2*, 6.
[177] Our damage award distribution had a skewness value of 1.76 (SD = .05) and kurtosis value of 3.61 (SD = .11).

that widowed status predicted higher damage award (*M* non-widowed = $8,633,787, SD = $14,440,852; *M* widowed = $16,313,042, SD =$16,210,191). When we considered demographic variables for each case separately, the only additional significant predictor proved to be parental status for jurors in the Bad Faith Case. Being a parent made participants significantly more likely (76%) to find the defendant liable than nonparents (66%) , *B* = .58, *SE* = .22, Wald = 7.05, *p* =.008, *OR* = 1.78. No other demographic variables predicted verdicts or damages in any of the three individual cases. This lack of predictive power, which some might find surprising, is consistent with findings from previous research.[178]

When we sought to determine whether any responses to generic, minimal *voir dire* questions predicted jurors' decisions, we found that only very small percentages of mock jurors acknowledged biases that might prevent them from being impartial. Moreover, the few participants who said yes to the relevant questionnaire items offered liability verdict rates and damage awards that did not differ significantly from the judgments offered by the large numbers who claimed to be free of any such biases (*see* Table 5). In short, the information provided by generic minimal *voir dire* questions did not prove useful in predicting jurors' judgments, and thus is of no value in informing decisions about whether to exclude such individuals from a jury.

[178] Norton, M. I., (2007). "Bias in Jury Selection: Justifying Prohibited Peremptory Challenges." *J. Behav. Decision Making*, *20*:467–479.

Table 4. Association between demographic factor[179]

	Effect on Verdicts					Effect on Damages			
	B	*SE*	Wald	*p*	*OR*	*B*	*SE*	*t*	*p*
Age	.01	.004	1.94	.164	1.01	-24.22	29162.78	.01	.999
Gender	-.17	.10	3.14	.076	.84	-1,183,875.00	690251.99	-1.71	.086
Hispanic	.13	.20	.46	.499	1.14	-837,812.99	1399774.50	-.599	.550
Asian	.02	.19	.01	.913	1.02	1,260,577.46	1381413.52	.91	.362
Black	.30	.17	3.26	.071	1.36	-254,507.18	1157479.76	-.22	.826
Parent	.004	.10	.002	.969	1.00	13,451.87	731279.42	.018	.985
Married	.08	.10	.55	.458	1.08	-509,814.90	746129.09	-.68	.495
Divorced/ Separated	.07	.16	.17	.676	1.07	490,568.59	1154629.30	.42	.671
Widowed	.49	.28	3.09	.079	1.63	6,752,224.71	1830624.81	3.69	<.0001
Partnered	.002	.24	<.001	.994	1.00	-3,887,148.90	1681938.19	-2.31	.021
Yearly Income	<.001	< .001	.07	.798	1.00	-9.95	8.21	1.21	.226
Education	-.02	.03	.76	.383	.97	-319,415.95	201809.64	-1.58	.114

[179] Note: The racial minority variables (Hispanic, Asian, Black) are all dummy codes relative to the White reference group, and all marital status variables (Married, Divorced/Separated, Widowed, Partnered) are dummy codes relative to people who have never been married.

Table 5. Predictive power of answers to generic minimal *voir dire* questions with respect to verdicts and damage awards

		Effect on Verdicts		Effect on Damages	
	Yes	χ^2	*p*	*t*	*p*
Have you previously served as a juror either in a criminal or civil case?	316 (15.5%)	.16	.687	-.05	.957
Have you served as either a state or federal grand juror?	66 (3%)	.92	.338	-.17	.863
Do you know of any reason you may be prejudiced for or against the plaintiffs or defendants because of the nature of the case, or otherwise?	40 (2%)	.72	.395	-.77	.443
Are you a lawyer, married to a lawyer, or in a substantial relationship with a lawyer?	37 (2%)	.23	.628	-1.76	.079
Have you studied law or worked in a law office?	129 (6%)	.18	.668	-1.18	.238
Have you or a close family member sued or been sued by someone?	316 (15.5%)	.36	.548	-1.55	.120
Have you or a close family member ever testified in a lawsuit?	184 (9%)	.46	.500	-.80	.422
You may be called upon in this case to decide liability and/or award money damages. Do any of you have any religious, philosophical, or other belief that prevents you from acting as an impartial juror in this case?	23 (1%)	1.70	.192	-.57	.571
Do you have any qualms about attempting to come to a verdict at the end of the case?	36 (2%)	1.10	.295	1.62	.106
Have you, any member of your family, or any very close personal friend ever engaged in investigating or otherwise acting upon claims for damages?	82 (4%)	.49	.484	-1.18	.236
Do you know of any reason that would prevent you from sitting in this case with complete fairness and impartiality and decide the case based only on the evidence presented in court and the law as given at the conclusion of the trial?	28 (1.4%)	3.93	.047	-1.25	.213

2. *Do extended voir dire questions predict verdicts?*

In contrast to our findings regarding generic minimal *voir dire* questions, we found that responses to the nine extended *voir dire* questions below significantly predicted jurors' verdicts (*see* Table 6). That is, such responses predicted a statistically significant decrease in the likelihood of the juror finding the defendant liable:

- being more pro-life [collected only in the wrongful birth case]
- supporting limiting litigation
- thinking lawsuit rates and awards are too high
- being unwilling to award non-economic damages
- thinking the plaintiff's burden of proof is too low
- thinking fraudulent claims are more likely
- thinking plaintiffs are more likely to be dishonest than medical professionals in the medical malpractice cases or insurance companies in the bad faith case
- trusting doctors more than plaintiffs
- thinking the plaintiff needs to work harder than the defense does to convince them

Two responses significantly predicted *increased* likelihood of finding the defendant liable:

- being more liberal
- trusting plaintiffs more than defendants

When we separately examined responses for the Colorado sample (column 7 in Table 6), we found that the direction and magnitude of the effects for these items in the extended *voir dire* questionnaire were generally similar for Colorado and for the national sample. For some items, the relevant *B* values and *OR* values were somewhat higher for the Colorado sample than for the national sample, while for some items those values were lower (and, given the smaller sample size for Colorado, we also found that similar *B* values sometimes yielded less significant *p* values).

Furthermore, when we considered the predictive value of these items for the three cases separately, although again the relevant B values varied somewhat, we generally see a similar pattern of results across cases. Unfortunately, when we consider cases separately, we no longer had sufficient statistical power to compare Colorado jurors with the national sample.

To determine what percentage of variation in jurors' verdicts could be explained by the minimal versus extended *voir dire* questions, we conducted a stepwise regression analysis. This

analysis revealed that the first step of the model that included all basic demographic information (Table 4) explained only 0.7% of the variation in verdicts, an amount that was not statistically significant, χ^2 (df = 12, N = 2038) = 14.74, p = .256. The second step of the model which added the generic minimal *voir dire* variables (Table 5) explained only 1% of the variation in verdicts, which was still not statistically significant, χ^2 (df = 23, N = 2038) = 11.75, p = .382. However, the third step of the model, which included the extended *voir dire* questions (Table 6) and now explained 28% of the variance in verdicts, was significant χ^2 (35, N = 2038) = 646.18, p < .0001.[180]

This stepwise regression analysis includes all predictors at once, predicting verdicts simultaneously, which controls for overlapping variance among all of the questions. In other words, it takes into account the degree to which all of the questions are correlated and reports how much *unique* variance each one explains in verdicts, above and beyond what all the others can explain. That is, we could identify how many questions explained verdicts in a way that is not redundant with the other questions. This allowed us to determine which *voir dire* items predicted a significant amount of unique variance in verdicts, above and beyond what all of the other *voir dire* questions could explain:

(1) Plaintiffs must work harder [or something like that], B = -.72, SE = .06, p <.0001, OR = .49;
(2) Trust in plaintiffs, B = .29, SE = .10, p = .004, OR = 1.34;
(3) Likelihood of Fraudulent Claims Scale, B = -.88, SE = .14, p < .0001, OR = .41;
(4) Likelihood of Defendant Dishonesty Scale, B = -.39, SE = .07, p < .0001, OR = .68;
(5) Negative Attitudes toward Lawsuits Scale, B = -.37, SE = .09, p < .0001, OR = .69;

[180] The only extended *voir dire* response not included in the model was the Claims are due to plaintiff's actions Scale, because it was not reliable in the Bad Faith case.

(6) Unwillingness to award non-economic damages, $B = -.71$, $SE = .16$, $p < .0001$, $OR = .49$.

This suggests that attorneys cannot just ask one of these questions to be able to explain jurors' likelihood of choosing a given verdict. Instead, each of these factors uniquely explained verdicts to a statistically significant degree even when controlling for all of the other questions. Therefore, this is not a set of redundant questions such that an attorney could pick one of these questions and be able to predict who might be biased against his or her side. This is further evidence that attorneys need time to ask many questions (noting that several of these six predictors are scales that encompass several questions) to effectively identify those who might be biased against their side.

Put simply, how jurors respond to *voir dire* questions that get at general biases (views of lawsuits, the parties, noneconomic damages, burden of proof, etc.) and questions that get at specific biases (views of doctors or abortion or whatever issues exist in the case) predict how jurors will vote. The general bias questions are predictive across the case types, meaning that in any civil case, these predispositions are likely to impact verdicts. The specific biases are unique to the case and can and will alter outcomes.

Table 6. Extended *voir dire* questions predicting verdicts (0 = not liable; 1 = liable).

	B	*SE*	Wald	*p*	Odds Ratio	Colorado Results
Attitudes Towards Parties						
Juror Predisposition (who must work harder)	-.86	.05	272.48	<.0001	.42	*B* = -.81, *SE* = .18, *p* < .0001, *OR* = .44.
Trust in doctors	-.27	.07	16.06	<.0001	.76	*B* = -.76, *SE* = .26, *p* = .004, *OR* = .47,
Trust in lawyers	.002	.06	.001	.978	1.00	*B* = -.03, *SE* = .22, *p* = .886, *OR* = 1.03.
Trust in plaintiffs	.47	.07	45.74	<.0001	1.61	,*B* =.68, *SE* = .24, *p* = .005, *OR* = 1.97
Trust in insurance companies	-.09	.06	2.24	.135	.92	*B* = -.14, *SE* = .21, *p* = .481, *OR* = .86.
Claims Due to Plaintiff's Actions Scale (lower #s = due to doctor's actions)[181]	-.81	.06	168.21	<.0001	.44	*B* = -.59, *SE* = .21, *p* = .005, *OR* = .55,
Likelihood of Fraudulent Claims Scale	-1.71	.11	242.74	<.0001	.18	*B* = -1.04, *SE* = .72, *p* = .003, *OR* = .35, but suggests the effect might be somewhat weaker in Colorado.
Likelihood of Defendant Dishonesty Scale (Medical Professionals or Insurance Companies, depending on the case) (higher #s = never)	-.73	.05	178.89	<.0001	.48	*B* = -.63, *SE* = .19, *p* = .001, *OR* = .53.

[181] This scale was not reliable in the Bad Faith Case, so this analysis was limited to only the other two cases (*n* = 1364)

Burden of proof (higher #s = BOP too low)	-.52	.22	77.85	<.0001	.59	*B* = -.61, *SE* = .22, *p* = .006, *OR* = .54.
Unwillingness to give non-econ $	-1.19	.13	85.27	<.0001	.30	*B* = -.93, *SE* = .48, *p* = .053
Negative Attitudes toward Lawsuits Scale	-.72	.06	127.45	<.0001	.49	*B* = -.46, *SE* = .80, *p* = .033, *OR* = .63,
Limit Litigation Scale	-.68	.07	91.28	<.0001	.51	*B* = -.48, *SE* = .23, *p* = .034, *OR* = .62
Political Orientation (higher #s = liberal)	.11	.03	10.02	.002	1.11	.522, *OR* = .92.
Trump Approval Scale (1 =pro, 2 = anti)	.25	.18	6.27	.012	1.29	*B*= -.31, *SE* = .38, *p* = .414, *OR* = .73.
Pro-Life Abortion Attitudes Scale (Wrongful birth case only)	-.20	.06	9.92	.002	.82	Individual case samples too small to test statistical significance.
Traditional Attitudes toward Women & Motherhood Scale (Wrongful birth case only)	-.05	.11	.20	.652	.95	Individual case samples in Colorado are too small to test statistical significance.
Trust in Science Scale (Wrongful birth and Aortic case)	-.03	.05	.37	.543	.97	Individual case samples in Colorado are too small to test statistical significance.

3. *Do extended voir dire questions predict damage awards?*

Eight of the responses to extended *voir dire* questions significantly predicted jurors' damage awards. The *B*s value indicated in Table 5 (which reflect the slope of the relevant regression line) again indicate the increase in damages that can be expected for every increase in a scale point on the relevant self-rating scale (e.g., for each point on the burden of proof scale,

suggesting the feeling that the plaintiff needs to work harder than the defendant to prevail, the prediction is a mean decrease in the damage award of $3,158,168). All but the first of these items, it is worth recalling, also predicted the jurors' verdicts:

- thinking lawsuit rates and awards are too high (all three cases)
- being unwilling to give non-economic damages (all three cases)
- thinking the plaintiff's burden of proof is too low (all three cases)
- thinking fraudulent claims are more likely (all three cases)
- thinking defendants likely to be dishonest than medical providers(the two medical cases)
- trusting insurance companies more (the insurance case)
- trusting doctors more (the two medical cases),
- Plaintiff having to work harder

Only trust in the plaintiff was a significant predictor of *increased* damage awards in all three cases.

In summary, the extended *voir dire* questions were helpful, whereas the minimal *voir dire* questions were unhelpful, in predicting jurors' verdicts and damage awards. (See Appendix 6 for more detailed comparisons of verdict and damage awards in the separate cases). With respect to damage awards it is particularly noteworthy that jurors who were opposed to noneconomic damages were more than twice as likely to also offer a verdict favoring the defendant, even though views relating to the appropriateness of such damages logically should not impact verdicts on liability.

Table 7. Extended *voir dire* questions predicting raw damage awards.

	B	*SE*	*T*	*p*	Colorado Results
Jurors Attitudes					
Who needs to work harder to convince you? (higher #s = plaintiff has to work harder)	-3,158,168	291,856	-10.82	<.0001	*B* = -1,975,160, *SE* = 1,037,758, *p* = .059,
Trust in doctors	-1,520,709	466,741	-3.26	.001	*B* = -5,281,068, *SE* = 1,599,823, *p* = .059,
Trust in lawyers	-21,722	433,494	-.05	.960	*B* = -1,529,134, *SE* = 1,570,618, *p* = .332.
Trust in plaintiffs	2,914,687	485,703	6.00	<.0001	*B* = 3,269,740, *SE* = 1,632,406, *p* = .047.
Trust in Insurance companies	-1,688,333	409,082	-4.13	<.0001	, *B* = -3,009,302, *SE* = 1,450,319, *p* = .040.
Claims Due to Plaintiff's Actions Scale (Lower #s = to doctor's actions)[182]	-5,515,988	380,305	-14.50	<.0001	*B* = -5,218,342, *SE* = 1,338,859, *p* < .0001.
Likelihood Fraudulent Claims Scale	-3,628,494	624,689	-5.82	<.0001	*B* = -4,151,538, *SE* = 2,220,583, *p* = .063
Likelihood of Dishonest Defendants Scale (Referring to medical professionals or insurance companies, depending on the case)	-1,342,581	338,654	-3.96	<.0001	*B* = -1,210,623, *SE* = 1,200,226,
Burden of proof (higher #s = BOP too low)	-1.813,380	400,382	10.52	<.0001	Highly similar effect size to national sample, *B* = -2,510,341, *SE* = 1,462,516, but the effect did not reach statistical significance, *p* = .088 (likely due to the sample size being much smaller).
Willingness to give non-econ $	-5,406,949	892,691	-6.06	<.0001	Highly similar effect size to national sample, *B* = -3,584,596, *SE* = 3,488,712, but the effect did not reach statistical significance, *p* = .306 (likely due to the

[182] This scale was not reliable in the Bad Faith Case, so this analysis was limited to only the other two cases (*n* = 1358)

					sample size being much smaller).
Negative Attitudes toward Lawsuits Scale	-3,481,875	408,022	-8.53	<.0001	Highly similar to national sample, *B* = -3,547,514, *SE* = 1,378,281, *p* = .011.
Limit Litigation Scale	479,621	472,856	1.01	.311	The effect was stronger in the Colorado sample, *B* = -3,641,505, *SE* = 1,519,965, *p* = .018, but it did not reach our conservative threshold for statistical significance.
Political Orientation (higher #s = liberal)	221,094	239,197	.92	.355	Highly similar to national sample, *B* = -747,759, *SE* = 867,582, *p* = .390.
Trump Approval Scale (1 =pro, 2 = anti)	150,125	723,959	.21	.836	*B* = -1,709,161, *SE* = 2,610,197, *p* = .514.
Pro-Life Abortion Attitudes Scale (Wrongful Birth Case Only)	-1,222,280	484,295	-2.52	.012	
Traditional Attitudes toward Women & Motherhood Scale (Wrongful Birth Case Only)	-1,881,333	825,094	-2.28	.023	
Trust in Science Scale (Wrongful Birth and Aortic Dissection Case Only)	308453.741	421480.282	.73	.464	

We again conducted regression analyses to determine what percentage of variation in jurors' damage awards could be explained by the minimal and extended *voir dire* questions. A stepwise regression revealed that the first step of the model that included all basic demographic variables explained only 1.7% of variation in damage awards, which proved to be a significant amount, F (12, 1964) = 2.82, p = .001, due to one significant predictor, widow status. The addition of the minimal *voir dire* variables as predictors in the second step of the model increased the percentage of variance in damages explained only 2%, a non-significant increase, R^2_{change} = .005, F_{change} = .82, p = .618. Adding the *voir dire* questions in the third step of the model, by contrast, increased 15% of variance in damage awards explained to 15%, a highly significant increase , R^2_{change} = .13, F_{change} = 22.73, p < .0001. As in the case of verdicts, the inclusion of the extended *voir dire* questions proved to be the key to a more accurate prediction of juror decision making.

This analysis again revealed which responses to extended *voir dire* items, seven in number, predicted unique variance in damage awards, above and beyond what the other predictors accounted for. The list of variables, along with the relevant *B* values, appears below:

(1) Being widowed, (vs. never having been married), *B* = 5,563,230, *SE* = 1,726,649, *p* = .001;
(2) Burden of proof on plaintiff, *B* = -2,598,641, *SE* = 307,444. *p* <.0001;
(3) Trust in insurance companies, *B* = -2,269,851, *SE* = 464,279, *p* < .0001;
(4) Trust in plaintiffs, *B* = 2,952,046. *SE* = 556,074, *p* < .0001;
(5) Unwillingness to award non-economic damages, *B* = -3,675,298, *SE* = 900,118, *p* < .0001;
(6) Negative Attitudes toward Lawsuits Scale, *B* = -3,474,585, *SE* = 486,082, *p* < .0001;
(7) Support for Limiting Litigation Scale, *B* = 3,931,814 *SE* = 517,319, *p* < .0001.

These findings add weight to our contention that allowing attorneys to ask a series of case-relevant questions instead of relying on the information provided by minimal standard *voir*

dire would allow them to better exclude jurors likely to be biased in favor of the other party in the lawsuit.

4. *Does experiencing voir dire and/or judicial rehabilitation affect verdicts or damage awards overall?*

Given our experimental design, it is worth examining whether the verdicts and damages awards offered by jurors differed depending on the experimental condition to which they had originally been assigned in our study (See Table 3 for Means and *SD*). That is, did it make a difference whether jurors were exposed to minimal *voir dire* or extended *voir dire* questions before, or only after rendering their judgments? Also, did it matter whether or not they heard and responded to a judge attempt judicial rehabilitation? The answer to both questions is clear. Neither factor, nor any combination of them, significantly influenced mock jurors' verdicts, all *B*s < | .08|, *p*s > .495, or their damage awards, all *F*s < 3.05, all *p*s > .048.

5. *Does voir dire and/or judicial rehabilitation alter the degree to which jurors' predispositions bias their judgments?*

The legal system assumes that, even if jurors are biased, their pre-dispositions will not bias their ultimate judgments if they go through *voir dire* and judicial rehabilitation. That is, that having their awareness drawn to their potential biases during *voir dire* and/or having a judge motivate them to try and control their biases might diminish the link between their predispositions and final judgments. Some would predict that, for example, even if a juror has a pro-defense pre-disposition that normally predicts fewer liability verdicts and lower damage awards, this relationship would be reduced or eliminated if they experience *voir dire* and judicial rehabilitation. We predicted, however, that judicial rehabilitation and *voir dire* would be

insufficient in successfully reducing the relationship between jurors' pre-dispositions and ultimate legal judgments.

More specifically, we tested whether the relationship that we saw between the responses to our set of extended *voir dire* questions and mock jurors' legal decisions could be reduced either by (a) having their awareness drawn to their biases during *voir dire*, and/or (b) being motivated by the judicial rehabilitation video and asking them to commit to putting their biases aside and follow the law. We tested this by conducting analyses to determine whether there was a statistically significant ($p<.01$) "interaction" between our extended *voir dire* response predictors and our *voir dire* and judicial rehabilitation manipulations. A statistical interaction would indicate that the effect of the predictor (e.g., trust in plaintiffs) on verdicts/damage awards was different or "depends" on what condition they were in regarding the other variable (e.g., whether they got judicial rehab or not). If we found a statistically significant interaction between mock jurors' level of trust in plaintiffs and the judicial rehabilitation variable on verdicts, that would mean that the effect of trusting plaintiffs on verdicts is somehow different for mock jurors in the no judicial rehabilitation condition compared to the effect of trusting plaintiffs on verdicts among mock jurors who were exposed to the judicial rehabilitation. For example, perhaps the mock jurors' trust in plaintiffs increases their likelihood of a liable verdict—but only for those in the control condition, whereas that relationship is reduced when they tell the judge they will set their biases aside.

A set of regression analyses each included one of the extended *voir dire* questions, a set of dummy codes representing the *voir dire* condition, a dummy code representing the judicial rehabilitation condition, and all interactions predicting verdicts, and another set predicting damage awards. Neither experiencing *voir dire* condition, nor judicial rehabilitation prior to

offering verdict and damage award decisions had an effect on jurors' decisions. Further, there were no significant interactions with the extended *voir dire* questions—except for one, described next. This means that for all but one of the extended *voir dire* questions, the degree to which their extended *voir dire* responses predicted verdicts and damages was not reduced by experiencing *voir dire* or judicial rehabilitation. There was only one interaction effect involving whether they answered extended *voir dire* questions before or after their judgments (*see* Tables 5 and 6) was revealed. The strength of the association between jurors' predisposition to make the plaintiff work harder and liability verdicts depended on whether they got extended voir dire before judging the case, $B = .56$, SE = .19, $p = .003$. More specifically, the relationship between this predisposition and verdicts was significantly reduced when this extended *voir dire* item was answered prior to the jurors' verdict and damage award decisions relative to when it was answered after judging the case (Appendices 4-5 provide more detailed information regarding these analyses).

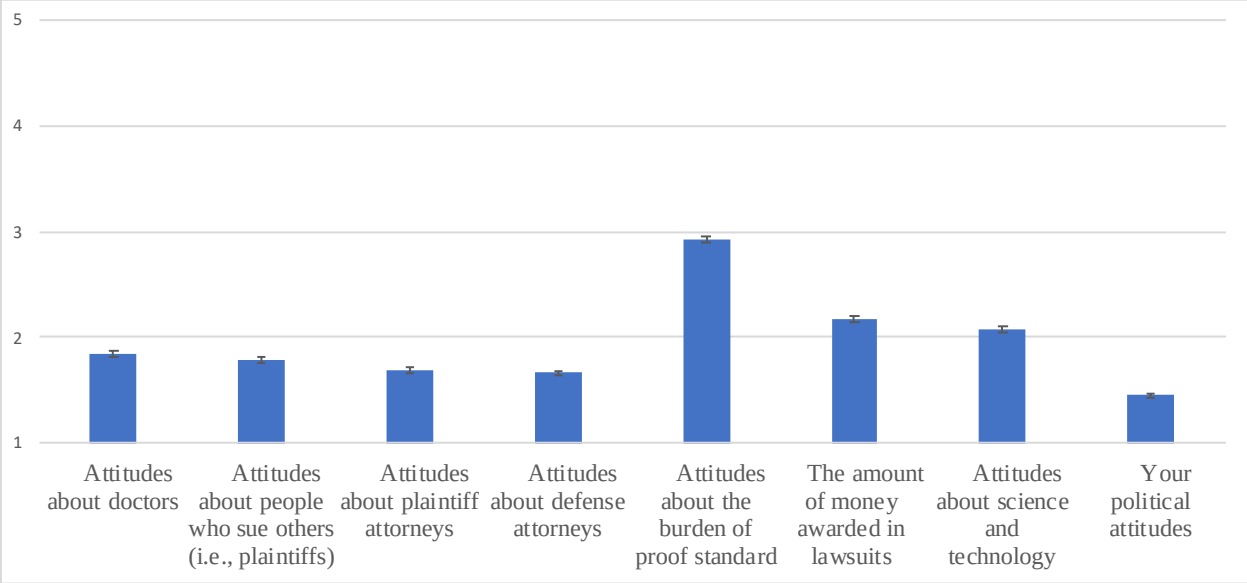
6. *How aware are jurors of the influence of their voir dire views on the judgments?*

Final items on our questionnaire in all experimental conditions probed the participants' beliefs regarding the influence of the views they revealed in *voir dire* on the judgments they offered. In other words, we assessed their degree of "bias awareness." Our findings (Figure 2) suggest that for the most part, and regardless of experimental condition, jurors claimed that no such link between those views and the judgments they had rendered. Only one extended *voir dire* item produced a level of acknowledgment that even approached the midpoint of the relevant rating scale. That item pertained to burden of proof.

Paradoxically, jurors who were exposed to judicial rehabilitation reported significantly *less* bias awareness when they were exposed to judicial rehabilitation ($M = 1.50$, $SD = .96$) than

when they were not subjected to such rehabilitation procedures (*M* =1.41, *SD* = .85), *F*(1, 2035) = 8.33, *p* =.004, *d* =.10. This relatively small effect suggests that if rehabilitation has any impact at all, it blinds jurors further to the role that their biases are playing in their decision-making. This may occur because the rehabilitation procedure provides jurors with a false sense that whatever biases they acknowledged and promised to put aside is no longer tainting their considerations of the merits of the case before them. In other words, this procedure might have a "false credentialing" effect.

Figure 2. How much participants thought their decisions were influenced by each factor.



1 = Not at all, 5 = extremely

D. Comparing the Full Sample to a Subsample that Excluded Biased Jurors

Next, we tested how the liability verdict rate and average damage awards would change if we excluded jurors whose responses to extended *voir dire* questions revealed biased attitudes that would have given either the plaintiff's or defense attorney cause to strike them from serving on the jury. The "excludable" criteria for exclusion were as follows:

(a) Juror predisposition: jurors who reported that the defense would have a much harder time convincing them (9.6%) or that the plaintiff would have a much harder time convincing them (7.3%).

(b) Attitudes toward burden of proof: Reporting that they thought that they burden of proof was either way too low (14.4%) or way to high (0.6%).

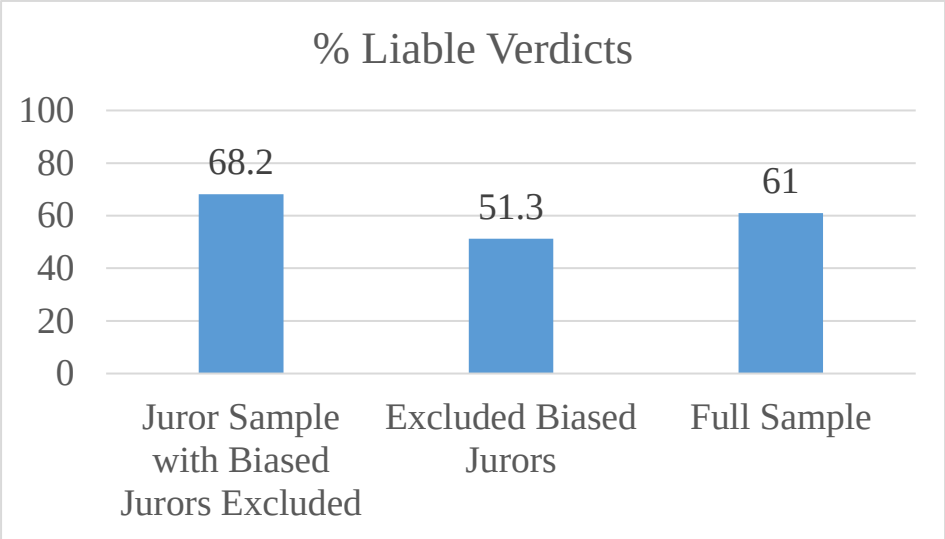
(c) Support for limiting litigation: Reporting that they strongly support making it harder to sue any person, business, or organization that injures another person either through carelessness or intentionally (3.6%) and/or placing a limit on how much a judge or jury can award in a lawsuit (10.8%).

(d) Willingness to award non-economic damages: Juror who reported that they were not (15.1%).

We compared the full sample to a subsample of jurors who did not meet any of the above exclusion criteria. In other words, any juror who fell into at least one of the above criteria were considered jurors that either the plaintiff or defense could have argued to exclude based on their extended *voir dire* responses. There were a surprisingly high number of jurors whose responses revealed that they might have trouble following the law (n = 860, 42%). These are jurors who would not have been identified and struck from the jury based only on the minimal *voir dire* questions that required jurors to self-identify biases.

Verdicts: We found that liability verdicts for the full-sample jury pool were higher than for the jury that excluded jurors whose extended *voir dire* responses revealed that they were less likely to follow the law (*see* Figure 3). If the attorneys were not able to ask the questions that identified the high percentage of jurors who expressed problematic views about the law, this would result in roughly 7% fewer liability verdicts relatively to what the jury pool would have been when both plaintiff and defense attorneys were able to strike problematic jurors.

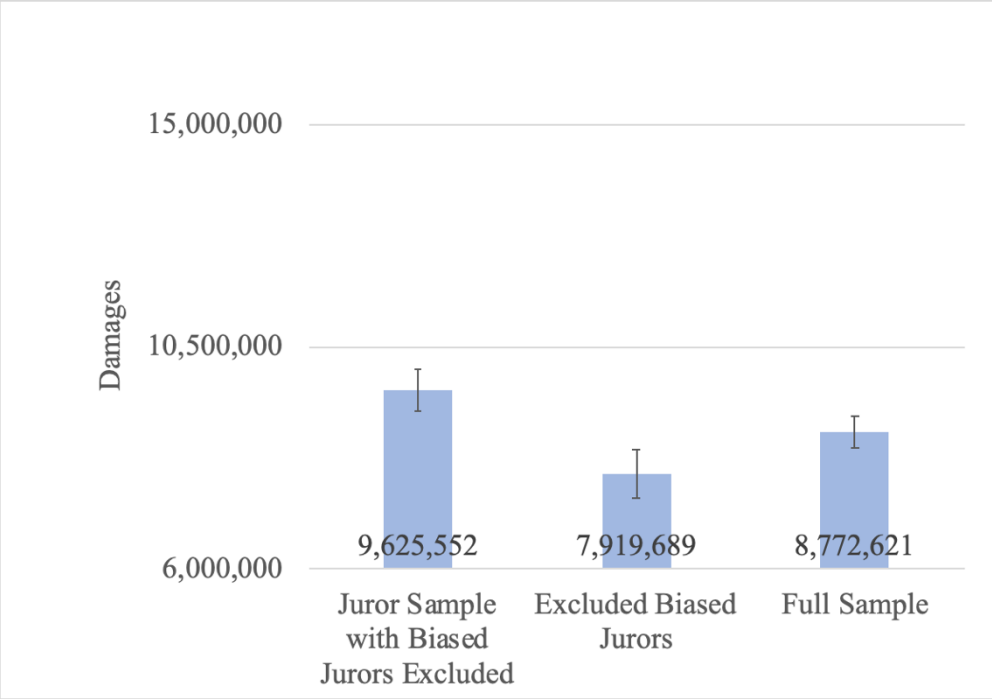
Figure 3. Liable verdict rates for the full sample, a subsample that excluded biased jurors, and a subsample of the biased jurors who were excluded.



Damage awards: We found that the average damage award for the full-sample jury pool were higher than for the jury that excluded jurors whose extended *voir dire* responses revealed that they were less likely to follow the law (*see* Figure 4). If the attorneys were not able to ask the questions that identified the high percentage of jurors who expressed problematic views about the law, this would result in an award that is estimated to be $852,931 lower than what the jury pool would have awarded when both plaintiff and defense attorneys were able to strike problematic jurors. The excludable biased jurors had the lowest award: they awarded $1,705,863 less than those who did not express problematic views during extended *voir dire*, and they awarded $852,932 less than the full sample, on average. The differences between the full sample and the subsample that excluded problematic jurors, $t(1175) = 1.97$, $p = .05$, and the subsample of excludable problematic jurors, $t(858) = -1.76$, $p = .08$, were not statistically significant. [183]

[183] The differences were also not statistically significant when we limited the sample to only jurors who chose a liable verdict.

Figure 4. Average damage awards for the full sample, a subsample that excluded biased jurors, and a subsample of the biased jurors who were excluded.



VIII. CONCLUSION

Here, based on the results, existing literature, and the variety of processes that exist in United States courts, we offer a set of conclusion and guidelines that, if implemented, would balance the very real time constraints of jury trials with the best practices necessary to guarantee a fair jury to both sides.

1. The generic minimal *voir dire* questions had very little utility. It was rare for jurors to answer the biases questions in the affirmative and the questions had almost no explanatory power in predicting their verdicts or their damage awards. As a group, these questions only explained 0.6% of variation in verdicts and only 2% of the variation in damage awards. As such, the limited *voir dire* used in many courts does almost nothing to predict jury behavior, nor does it provide information to the court or the parties about which jurors can/should remain.

2. The majority of the extended *voir dire* questions consistently predicted jurors' verdicts and damage awards in meaningful and consistent directions. As a group, these questions explained 20% of the variance in verdicts and 19% of the variance in damage awards. Attorneys and courts will do a much better job picking jurors based on these questions.

3. Relatedly, extended *voir dire* using open-ended questions that address the specific features of civil cases, like how they function, and address the specific issues in the case is necessary. Jurors do not reveal bias in response to questions that ask them if they "have any biases." Indeed, the questions used by many courts do nothing to predict bias and do nothing to cure it. Jurors can't identify their own biases or predict how they would impact decision-making. Instead, jurors will only reveal potential biases when asked questions that are more specific, and that then allow the juror to respond. It is also reasonable to expect that revealing

bias requires some time and familiarity, and as such, requires enough time for jurors to feel comfortable.

4. Inferentially, *voir dire* requires time. Relatedly, time limits like those common in many Colorado courts and federal courts almost certainly guarantee that jurors with biases are seated on the jury. Each juror should be examined at some length, whether as part of a group or individually. The scope of possible biases is wide, jurors are resistant to revealing bias if it makes them sound like they could not be fair, and it will take time to explore the issues with jurors.

5. Questionnaires could expedite jury selection. One possible way to expedite review would be to allow detailed questionnaires, as jurors could answer the questions without having to speak in front of others, and providing questionnaires would be an efficient way to ask a number of questions of the entire panel, all at once.

6. Courts must allow for identification of both (a) general bias and (b) specific biases. Many general biases about civil lawsuits are relatively prevalent, including views on the propriety of lawsuits, damage caps, preferences for either side, concerns about the burden of proof, and the like. Specific biases also abound. These vary from case to case. Both general and specific biases will influence jury decision-making—and at least some of this influence is improper, as the data shows that some views will prevent jurors from following existing law.

7. Once a juror identifies a general or specific bias, they should be excluded. Rehabilitation does not work. If anything, the jurors who say they can set aside bias are more likely to be blind to the role that bias plays in their future fact-finding.

8. A practical implication of the data is that there should be more jurors struck for cause, and as a result, a larger panel may be needed at times. More fundamentally, the view that jurors should be "saved" in some way, or that the fewest number of total jurors possible should be used to seat a jury is not necessary, nor wise. Because jurors are abundant, rather than attempting to keep jurors, courts should be willing to cull a significant number of jurors in order to obtain a final jury that consists of jurors without either strong general or specific biases.

9. On net, of the biases measured, more of them hurt plaintiffs. Yet, both sides face biases that, if allowed, could result in jury nullification. It is essential and possible to seat a jury free of these intense biases.

10. Juries are often criticized as too prone to produce results inconsistent with the evidence. Similarly, the Constitution, case law, and statutes typically guarantee a fair trial by a fair jury. Existing practices that prohibit or drastically limit *voir dire* and that support and allow jury rehabilitation encourage jury nullification because of bias and also threaten the right of both sides to a fair trial.

11. With a random draw, given the prevalence of some biases, it is possible to seat a jury in which the majority of jurors hold biases that will make processing the evidence difficult. And given that biases seem to skew against plaintiffs, these biases could all favor the defense in some cases. Deliberation is unlikely to cure this.

427 P.3d 434
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Brian K. WILLIAMS, Appellant.

No. 20160625-CA
|
Filed May 24, 2018

Synopsis

Background: Defendant was convicted in the First District Court, Logan Department, Kevin K. Allen, J., of aggravated sexual abuse and forcible sexual abuse of his daughters. Defendant appealed.

Holdings: As matter of first impression, the Court of Appeals, Mortensen, J., held that:

[1] prosecutor's bolstering of victims' credibility during juror examination amounted to obvious error under plain error rule, and

[2] reasonable likelihood existed that defendant would have had a more favorable outcome, if not for the improper bolstering.

Reversed and remanded.

West Headnotes (11)

[1] Criminal Law Construction of Evidence

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(2.1) In general

In reviewing a jury verdict, the Court of Appeals views the evidence in a light most favorable to the verdict.

[2] Criminal Law Deficient representation and prejudice in general

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 Deficient representation and prejudice in general

To demonstrate ineffective assistance of counsel, a defendant must: (1) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (2) demonstrate that counsel's error prejudiced the defendant, i.e., that, but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant. U.S. Const. Amend. 6.

[3] **Criminal Law** Necessity of Objections in General

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) In general

To demonstrate plain error, a defendant must show the following: (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or, phrased differently, the reviewing court's confidence in the verdict is undermined.

[4] **Jury** Examination of Juror

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) In general

Purpose of juror examination is to determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.

[5] **Jury** Rights and privileges of jurors

Jury Mode of examination

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(12) Rights and privileges of jurors
230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) Mode of examination

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record.

[6] **Criminal Law** Summoning and impaneling jury

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(6) Summoning and impaneling jury

Court of Appeals would review for plain error whether the trial court properly balanced the privacy interests of the jurors with defendant's constitutional right to present his case before an impartial jury, in prosecution for aggravated sexual abuse of a child and forcible sexual abuse, in which defendant did not raise before the trial court his contentions regarding purported improprieties during juror examination.

[7] **Criminal Law** Particular statements, arguments, and comments

Criminal Law Credibility of victim

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) Particular statements, arguments, and comments
110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(3) Credibility of victim

Prosecutor's improper bolstering of victims' credibility during juror examination amounted to obvious error under the plain error rule, in prosecution of defendant on charges of aggravated sexual abuse and forcible sexual abuse of his daughters; prosecutor posed hypothetical questions closely approximating the facts of the case, prosecutor devoted much of her examination to making statements and posing rhetorical questions rather than inquiring into the prospective jurors' thoughts and attitudes, and prosecutor used the examination to preview and argue her case, explaining how child sex abuse cases were reported, investigated, and proven at trial and coaching the potential jury members on how they were to evaluate the evidence if selected for the jury.

1 Cases that cite this headnote

[8] **Jury** Mode of examination

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) Mode of examination

Proof of a prospective juror’s impartiality should come from him and not be based on his mere assent to persuasive suggestions.

[9] **Jury** Examination of Juror

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(1) In general
A party is not permitted to argue a case under the auspices of jury selection.

1 Cases that cite this headnote

[10] Jury Mode of examination

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) Mode of examination
Using juror examination as a tool to indoctrinate the jury on a party's argument or bolster anticipated witness testimony is improper.

1 Cases that cite this headnote

[11] Criminal Law Summoning and impaneling jury

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(6) Summoning and impaneling jury
Reasonable likelihood existed that defendant would have had a more favorable outcome, if not for prosecutor's improper bolstering of victims' credibility during juror examination, thus warranting reversal, on plain error review, of defendant's convictions for sexual abuse and forcible sexual abuse of his daughters; prosecutor's attempts to bolster the victims' credibility were not isolated incidents, but permeated the entire examination, the case turned on the credibility of the victims, and the improper examination predisposed the jury to believe the victims' testimony, despite evidence of inconsistency.

***435** First District Court, Logan Department, The Honorable Kevin K. Allen, No. 141100362

Attorneys and Law Firms

Elizabeth Hunt, Attorney for Appellant

Sean D. Reyes and Aaron G. Murphy, Salt Lake City, Attorneys for Appellee

Judge David N. Mortensen authored this Opinion, in which Judges Kate A. Toomey and Diana Hagen concurred.

Opinion

MORTENSEN, Judge:

¶1 Although he testified that the events underlying this case never happened, a jury convicted Defendant Brian K. Williams of sexually abusing his three daughters. After Defendant was convicted, the district court sentenced him to multiple prison terms, several of which are potentially for the remainder of his life. Because we conclude that irregularities occurred in the State's juror examination, [1] we reverse his convictions and remand for a new trial.

1 Juror examination is often referred to as "voir dire." Because both terms describe the same "tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it," *see* *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984), we use the terms interchangeably.

BACKGROUND

¶2 Defendant's three daughters, Oldest, Middle, and Youngest, accused Defendant of sexually abusing them repeatedly over a five-year period. During this time, the alleged abuse included, but was not limited to, touching his daughters' breasts and pubic areas; showering with them; and on one occasion, forcing his daughters to undress and smear body paint on each other as Defendant watched.

¶3 The State charged Defendant with six counts of aggravated sexual abuse of a child and six counts of forcible sexual abuse. During juror examination, the trial court asked potential jurors about their personal and professional lives before allowing counsel for the State and Defendant to conduct additional juror examination. [2]

2 The specific content of the State's juror examination is set forth in more detail below. *Infra* ¶¶ 15–23.

***436** **[1]** ¶4 During trial, the jury heard testimony from Defendant's daughters, who detailed the abuse. [3] The jury also heard testimony regarding the daughters' difficulties in school, their depression, Oldest's habit of cutting herself, and Oldest and Middle's joint overdose on antidepressants and subsequent hospitalizations. The State's expert testified that these behaviors were consistent with symptoms exhibited by sexual abuse victims.

3 As we explain, *infra* ¶¶ 5–8, some of the daughters' trial testimony conflicted with their testimony at the preliminary hearing. Other pieces of information were contradicted at trial. "In reviewing a jury verdict, we view the evidence ... in a light most favorable to the verdict." *State v. Maestas*, 2012 UT 46, ¶ 36, 299 P.3d 892 (cleaned up). However, we also present conflicting evidence where it is necessary to understand the issues raised on appeal. *See* *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346.

¶5 Oldest's trial testimony conflicted with her testimony at Defendant's preliminary hearing in some respects. She initially testified that Defendant showered with her once or twice a month before the family moved, but at trial she said it happened only once, total, in the family's first house. At the preliminary hearing, she testified that she could not recall Defendant touching her in the shower, but at trial she said he "cupped" her breasts and buttocks and washed her body. Oldest testified at the preliminary hearing that Defendant touched her breasts and vaginal area five to ten times at the first house; but at trial she could not recall him touching any of her body parts at the first house. Shortly after her assertion at trial that Defendant had not touched her in the first house, she testified regarding an incident in the first house during which Defendant had touched her inappropriately while wrestling.

¶6 Middle originally testified at length at the preliminary hearing about Defendant's abuse of her sisters, but later admitted at trial that she had never seen him inappropriately touching Oldest or Youngest. When Middle initially reported Defendant's abuse, she denied that he had ever inserted his finger into her vagina. But at trial, she testified that he did so on multiple occasions, explaining that she originally denied this behavior because she wanted to minimize the trouble Defendant would be in.

¶7 Youngest's testimony that Defendant left "white gooey stuff" on her legs after a back rub was a detail reported for the first time at trial. Youngest explained that she only recalled that fact as she was testifying. At trial, on cross-examination, Youngest frequently answered that she could not recall the information she was asked to provide.

¶8 All three daughters' stories regarding the body-painting incident differed from one another. Oldest testified that she and Middle had been painting a picture when the sisters started painting each other. Defendant then instructed them to remove their clothing, and he stripped down to his underwear, before they all painted one another. When she was asked about this incident at the preliminary hearing, she denied that it occurred; only at trial did she allege that it took place. Middle testified that Defendant had told them he ordered the paints online. When he produced them, they all removed their clothes and started painting each other. Youngest also testified that Defendant bought the paints online and explained that he made them remove their clothing. Middle and Youngest testified that after they painted each other, all four showered together. Oldest made no such claim.

¶9 Defendant testified in his own defense and denied sexually abusing any of his daughters. The jury convicted Defendant as charged. He now appeals.

ISSUES AND STANDARDS OF REVIEW

¶10 Defendant argues that we should reverse his convictions for any one of five reasons. First, he asserts that the jury instructions given at trial were inadequate. Second, he asserts that during the State's closing argument, the prosecutor engaged in misconduct by (1) impermissibly bringing to the jury's attention facts not in evidence, (2) arguing that Defendant lied, (3) disparaging the integrity of defense counsel, and (4) appealing to the jury's fears by seeking a verdict to protect society. Third, he asserts that the State violated rule 608 of the Utah Rules of Evidence by improperly bolstering the credibility of its witnesses. Fourth, he asserts ***437** that the State offered inadmissible evidence of his invocation of his right to counsel. And fifth, he asserts that during his testimony, he was improperly asked to opine on the veracity of other witnesses.

[2] **[3]** ¶11 Defendant did not raise any of these arguments before the trial court. Instead, he brings his claims under the doctrines of ineffective assistance of counsel and plain error. To demonstrate ineffective assistance of counsel, Defendant must:

> (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant.

State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993). To demonstrate plain error, Defendant

> must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208–09.

ANALYSIS

¶12 Although Defendant raises many potential grounds for reversing his convictions, we are persuaded by his arguments regarding the irregularities and impropriety that occurred during juror examination. [4] Because we reverse on that ground and remand for a new trial, we need not consider the other issues raised. *See State v. Holm*, 2017 UT App 148, ¶ 8 n.2, 402 P.3d 193.

4 Defendant argues that the State used the voir dire process to improperly bolster the credibility of his daughters' testimony. Utah jurisprudence has long held that witnesses may not be bolstered by improper means. *See State v. Adams*, 955 P.2d 781, 786 (Utah Ct. App. 1998).

[4] **[5]** **[6]** ¶13 While the issue of determining when a juror examination has crossed the line into impermissible indoctrination is one of first impression, the true purpose of juror examination is well settled in our jurisprudence: to "determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it." *Salt Lake City v. Tuero*, 745 P.2d 1281, 1283 (Utah Ct. App. 1987) (cleaned up). But the privacy interests of prospective jurors "must be balanced against the historic values ... and the need for openness of the process." *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 512, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

Id. [5] In determining whether the trial court properly balanced the privacy interests of the jurors with Defendant's constitutional right ***438** to present the case before an impartial jury, we review the court's decision for plain error. [6]

5 Other jurisdictions have held similarly. *See People v. Knight*, 2013 IL App (4th) 111127-U, ¶ 45, 2013 WL 5962934 (holding that at a minimum, the court's responsibility includes "not permitting (1) courtroom proceedings to embarrass them and (2) trial court participants to engage in offensive conduct"); *State v. Roby*, 2017 ME 207, ¶ 12, 171 A.3d 1157 ("In order to select a qualified and impartial jury, the trial court has considerable discretion over the conduct and scope of juror voir dire, because it is the trial court that has the responsibility of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors." (cleaned up)); *People v. Mulroy*, 108 Misc.2d 907, 439 N.Y.S.2d 61, 65 (N.Y. Sup. Ct. 1979) ("[In conducting voir dire] ... this court conceives that it has the highest obligation, first, to the prospective juror that, if sworn, he may serve with a free mind, unfettered by personal discomfiture, embarrassment or subconscious restraint and, second, to all who stand before the bar of justice, to assure that such juror will be ultimately able to make his determination fairly and impartially, without fear, favor or sympathy.").

6 We would reach the same result if we instead reviewed Defendant's claim that his trial counsel was ineffective for failing to object to the juror examination process. This is because the same error that should have been plain to the trial court should have alerted trial counsel to act. There was no strategic reason not to object, and in choosing not to, trial

counsel's performance fell below an objective standard of reasonableness. Likewise, where we conclude that Defendant was harmed by the trial court's failure to intervene, we would conclude that trial counsel's performance prejudiced Defendant. *Cf.* *State v. Bruun*, 2017 UT App 182, ¶ 79, 405 P.3d 905 (explaining that "the prejudice standard under ineffective assistance of counsel and plain error is the same").

¶14 Defendant argues that "the prosecution began its campaign to bolster the alleged victims at the outset of the jury selection." After reviewing the transcript of juror examination, we agree. We conclude that an error occurred and that the error should have been obvious to the trial court. Because Defendant's challenge is best understood by experiencing the flow of the State's juror examination in its odd entirety, we quote at length from it. Any emphasis is our own.

¶15 The prosecutor began by sharing, "My experience has been that jurors want to do a good job. They want to do a good job. They just want to make sure they understand all the evidence, and they want to do a good job." She then assured the prospective jurors, "So as I talk to you right now, just understand there are not right or wrong answers. I'm just trying to find out how you view life, how you view your job as a juror, things of that nature, *and maybe what your thoughts are on child sex abuse* .... So please feel free to raise your hand."

¶16 After encouraging members of the venire to "just be honest," she initiated a discussion about child sex abuse:

> [Prosecutor]: How do you know children are sometimes sexually abused?
>
> ....
>
> [Prospective Juror]: Well, I can think of three friends that have either had someone in their family sexually abused or themselves.
>
> [Prosecutor]: Were these close friends?
>
> [Prospective Juror]: Well, they're friends. I—
>
> [Prosecutor]: Friends, okay. That you're aware—
>
> [Prospective Juror]: They're not my closest friends.
>
> [Prosecutor]: Yeah, but you—*they shared with you the fact that they've had children in their family abused and so on and so forth*. So how is it that society sort of proves or becomes aware of child sex abuse?

Prospective jurors provided answers, such as, "Well, the person that has done that to the child has said that they did," and "Or it is medically proven."

¶17 Apparently not hearing the answer she wanted, the prosecutor continued, "So let's say someone decides to be really brave and say, 'Okay, okay, okay, I've been touching a kid.' That may happen. *I've never seen it*, but—I'm only kidding. But how else?" An inaudible response was given, and then the prosecutor stated, without getting an answer from any member of the jury pool, "So a child may be acting weird or they may say something, and then an adult gets wind of that and then they report that. Is that generally what happens? In the end, what is it that causes it? *Isn't it* that the child says ... something is bothering me."[7]

[7] The official transcript ends this sentence with a period, rather than a question mark. Given the declaratory tone of most of this portion of the juror examination, we do not think that is a mistake.

¶18 Next, the prosecutor asked, "So you as jurors in a case like this, *are you going to* require anything more in terms of physical evidence or other corroboration necessarily?" After receiving an inaudible response, she began talking about "CSI or Law and Order or Boston Legal" regarding "physical evidence" and asserted, "I'm just going to tell you that I think you know this, but it's actually an important concept to realize that we are not required to do CSI investigations or work. We just have to prove

beyond a reasonable doubt." She asked, "*Would any of* ***439** *you* require that type of evidence in order to convict someone of this type of crime?" When she saw "some brow furrowing" she followed up with one of the prospective jurors:

> [Prosecutor]: What are you thinking up there, Ms. [K.]?
>
> [Ms. K.]: I'm thinking maybe so.
>
> [Prosecutor]: Okay, maybe so. Okay, tell me about that. That's fine.
>
> [Ms. K.]: I mean I don't know that it would need to be D—I don't know. I'm not sure what evidence[.]

Eventually the prosecutor elicited from Ms. K. that she would likely expect to see more evidence than solely "a child's report in and of itself."

¶19 With this understanding, the prosecutor switched course and began discussing "general rule[s]" about child sexual abuse. She asked, "[I]s a child abused in secret or somewhere where it is not secret?" Without pausing for an answer, she stated,

> *So that's kind of a no brainer, right*? *Everybody* understand[s] ... who is usually there? The perpetrator and the child, right? Okay.
>
> So who are the only two people in the world who really know what really happened? *Just those two*. If a child is touched, and it isn't reported immediately, is that something that we're necessarily going to have physical evidence of? Does that mean it didn't happen? *No. Okay.*

¶20 Next came a conversation about delayed reporting and why that might occur. Some prospective jurors provided answers —fear, guilt, and grooming. [8] When the answer "grooming" was given, the prosecutor replied, "Grooming, okay. Okay. Very good. Very good."

[8] The definition of grooming ranges from "testing the waters" and "breaking down boundaries so as to not get caught," *see Benedict v. State*, No. 05-15-00958-CR, 2016 WL 3742127, at *3 (Tex. App. July 7, 2016), to "less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact," *see* *People v. Steele*, 283 Mich.App. 472, 769 N.W.2d 256, 269–70 (2009). Given varying definitions of what grooming might mean, it can certainly be considered a loaded term and it is unclear from the record what the prospective juror was referring to.

¶21 Changing tack, the prosecutor engaged in the following exchange:

> [Prosecutor]: Now I sometimes do this, and it's really awful, but ... I sometimes say—who do I want to pick on? I wonder if you would turn to Ms. [M.] there and—is it [M.]?
>
> [Ms. M.]: Uh-huh.
>
> [Prosecutor]: Okay. If you would just *tell her about the very last sexual experience you had*, and if you could be very detailed, okay? Please make sure you don't (inaudible) the body parts and where everybody put everything and all of that. Would you mind just turning and just sharing that with her?

Meaning to use this as a demonstration of how the court system often asks victims in child sexual abuse cases to testify as to "some pretty embarrassing things," she ended the inquiry without actually requiring the venire to engage in such an intimate conversation. She said, "I'm not going to ask you do that. Why do I ask that? Why do I ask that?" And when someone gave the answer she was looking for, she replied, "There we go. There we go."

¶22 The discussion shifted to the topic of changed stories and why someone might give different accounts of the same story. The prosecutor frequently replied to prospective jurors' answers by saying things like, "Yeah, exactly," or, "That's exactly right." Then she discussed with the venire whether we can "tell who touches children by looking at them." Receiving no answers from individual members of the jury pool, the prosecutor presented a string of questions, the answers to which were implied:

> Can we tell by how much money they make? Can we tell by how old they are? Can we tell by how they look?
>
> What about their personality? What about if they're very charming? Does that tell us? *Do charming people touch children*? Do you think?[9]

9 This portion of the juror examination is important in light of the State's closing argument, when the prosecutor mirrored these words: "[Defendant] is very charming. He's likeable." This passage particularly informs our consideration of whether the juror examination process prejudiced Defendant. *See infra* ¶38–40.

***440** ¶23 Finally, the prosecutor ended with what we consider standard juror examination questions regarding prospective jurors' willingness to "sit in judgment of another person," whether they would feel "uneasy about having to hear about sexual abuse," whether anyone "just doesn't want to be here," and whether there was "anything that [they could] think of that makes [them] feel like" they should not sit on the jury.

¶24 Defendant now argues that the prosecutor's juror examination was "more of a Socratic lecture on why the jurors should believe the [victims], despite and even because of the inconsistencies in their claims." He complains that "rather than asking questions designed to skillfully cull [honest] attitudes from the jurors, the prosecutor asked the panel of prospective jurors a number of rhetorical questions designed to indoctrinate the jurors on the State's theor[ies]" of the case.

[7] ¶25 The State responds that the juror examination simply involved "friendly responses to juror answers," and suggests that because "none of these questions or comments related to any particular witness or testimony," juror examination was "merely designed to ferret out biases among the jurors that might predispose them to disbelieve children." For several reasons, we cannot agree that the prosecutor's juror examination was as innocuous as the State asserts.

¶26 First, the prosecutor posed "hypothetical questions closely approximating the facts of the case ... and delivered a lecture." *See State v. Martin*, 877 N.W.2d 859, 860 (Iowa 2016) (reviewing this and more concerning behavior in a prosecutor's juror examination but refusing to grant a new trial "[i]n part because [the defendant] did not object in the district court to all the statements he challenge[d] on appeal"). Such questions, and the relevant fact scenarios, included:

- "If a child is touched, and it isn't reported immediately, is that something that we're necessarily going to have physical evidence of? Does that mean it didn't happen? No. Okay." Defendant's daughters delayed reporting, and there was no physical evidence of their abuse.
- "Do charming people touch children?" The prosecutor later described Defendant as "charming."
- "So let's say someone decides to be really brave and say, 'Okay, okay, okay, I've been touching a kid.' That may happen. I've never seen it, but—I'm only kidding." Defendant never wavered on his position that he had never touched his daughters inappropriately, and by presenting denial as an inference of guilt during juror examination, the prosecutor improperly indoctrinated the jury to react favorably to the same argument at trial.

¶27 Additionally, the prosecutor devoted much of her juror examination to making statements and posing rhetorical questions rather than inquiring into the prospective jurors' thoughts and attitudes, including:

- Making proclamations about the general pattern of sexual abuse, such as, "[I]s a child abused in secret or somewhere where it is not secret? So that's kind of a no brainer, right?"

- Telling the venire its options for whom to believe at trial. "So who are the only two people in the world who really know what really happened? Just those two."

- Indicating when prospective jurors gave answers she liked and praising them, showing (despite her opening remarks to the contrary) that there were indeed right and wrong answers. "Okay. Very good. Very good." "There we go. There we go." "Yeah, exactly." "That's exactly right."

[8] ¶28 Finally, in many instances, the prosecutor posed questions without awaiting a response. "Isn't it that the child says ... something is bothering me." "Everybody understand[s] ... who is usually there? The perpetrator and the child, right? Okay." On this point, we consider persuasive a Virginia case discussing juror examination questions posed by a trial judge.

> Proof of a prospective juror's impartiality should come from him and not be based on ***441** his mere assent to persuasive suggestions. When asked by the court, a suggestive question produces an even more unreliable response. A juror's desire to say the right thing or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses.

Bradbury v. Commonwealth, 40 Va.App. 176, 578 S.E.2d 93, 95 (2003) (cleaned up). And like the judge's questions in *Bradbury*, the prosecutor's questions in the present case

> were leading, long, and complex. They suggested the answer that the [prosecutor] preferred to hear, compressed several issues into one phrase, and generally incorporated several legal concepts. These questions constituted persuasive suggestions more than an impartial inquiry and, as such, were an ineffective means [of conducting voir dire].

See id. at 96 (citation omitted).[10] While jurors ordinarily might place more weight on a judge's comments than those of the State, the State's representative commands similar respect, and with that respect the same inherent danger exists that, when improperly prompted, a juror will attempt to say the "right" thing or otherwise please the prosecutor with certain responses. This danger is heightened in a group setting where jurors may be inclined to make socially acceptable responses.

10 This is to say nothing of the concept of "commitment" or "stake out" questions. *See Haarhuis v. Cheek*, —— N.C.App. ——, 805 S.E.2d 720, 725 (2017) ("A stake out question asks a juror to pledge himself or herself to a future course of action by asking what verdict the prospective juror would render, or how they would be inclined to vote, under a given state of facts." (cleaned up)); *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) ("Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact."). Some states have prohibited these sorts of questions during juror examination altogether. *See, e.g.*, *Stewart v. State*, 399 Md. 146, 923 A.2d 44, 54 (2007); *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785, 787 (1989); *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 756 (Tex. 2006); *Standefer*, 59 S.W.3d at 183. And while we have encountered no Utah case addressing these sorts of questions, we note that the prosecutor's juror examination included questions that may offend the standards of those other states. *See supra* ¶18 ("[A]re you going to require

anything more in terms of physical evidence or other corroboration necessarily?"; "Would any of you require that type of evidence in order to convict someone of this type of crime?").

¶29 The process employed by the prosecutor in this case was not designed to find out what jurors' thoughts or attitudes were, but instead served as an attempt to influence the jury panel—in effect intentionally tainting it with a bias favorable to the State's case. And while the prosecutor never couched her questions or comments by reference to a specific victim, it is clear, given the context, that the prosecutor was essentially arguing the State's case and inappropriately bolstering the anticipated testimony of the alleged victims.

[9] ¶30 This is not the purpose of juror examination. *See supra* ¶13. A party is not permitted to argue a case under the auspices of jury selection. A majority of the cases we discovered that have ruled on this issue do not allow questions or statements that serve to "pre-educate and indoctrinate jurors as to the [party's] theory of the case." *People v. Boston*, 383 Ill.App.3d 352, 323 Ill.Dec. 405, 893 N.E.2d 677, 681 (2008); *see also, e.g.*, *People v. Landry,* 2 Cal.5th 52, 211 Cal.Rptr.3d 160, 385 P.3d 327, 354 (2016) (holding that it is not the purpose of juror examination to educate, compel, prejudice, indoctrinate, or instruct the jury); *Preston v. State*, 306 A.2d 712, 715 (Del. 1973) ("Too often we see the [v]oir dire process being misused to argue the case, to indoctrinate the jury, and to seek other undue advantage."); *People v. Bell*, 152 Ill.App.3d 1007, 106 Ill.Dec. 59, 505 N.E.2d 365, 373 (1987) (reversing where a juror examination "went beyond a probe for bias and sought to educate the jury and convert the panel to [the prosecutor's] beliefs" and other grounds); *Coy v. State*, 720 N.E.2d 370, 372 (Ind. 1999) (holding a party's "attempt to indoctrinate the jury during [juror examination] may require reversal if his or her questions amount to misconduct"); *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404, 425 (2011) (holding that "parties may not use [juror examination] to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a ***442** party's position"); *Khoury v. Seastrand*, —— Nev. ——, 377 P.3d 81, 86 (2016) (noting that "while counsel may inquire to determine prejudice, he cannot indoctrinate or persuade the jurors" (cleaned up)); *State v. Broyhill*, —— N.C.App. ——, 803 S.E.2d 832, 841 (2017) (holding that counsel may not attempt to cause jurors to "pledge themselves to a particular position in advance of the actual presentation of the evidence"(cleaned up)); *State v. Frederiksen*, 40 Wash.App. 749, 700 P.2d 369, 374 (1985) (noting that juror examination questions must be reasonably calculated to "discover an actual and likely source of prejudice" (cleaned up)).

¶31 Furthermore, a majority of the cases that we have discovered relevant to this issue have held that questions or statements about specific defenses, scenarios, or evidence—even presented as hypotheticals—should be excluded from juror examination.[11] *See, e.g.*, *Boston*, 323 Ill.Dec. 405, 893 N.E.2d at 681; *see also* *Steelman v. State*, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992) (holding that juror examination "should not be used to begin trying the case before evidence has been presented"); *State v. Holmes*, 5 So.3d 42, 56 (La. 2008) (holding that "Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical scenario which would demand a commitment or pre-judgment from the juror"); *Iromuanya*, 806 N.W.2d at 425 (holding that "counsel may not use [juror examination] to preview prospective jurors' opinions of the evidence that will be presented"); *State v. Johnson*, 209 N.C.App. 682, 706 S.E.2d 790, 793 (2011) (noting that "a defendant is not entitled to put on a mini-trial of his evidence during [juror examination] by using hypothetical questions [or] situations to determine whether a juror would cast a vote for his theory"); *Broyhill*, 803 S.E.2d at 841 (holding that "stakeout" questions were improper where counsel posed "hypothetical evidence or scenarios to attempt to 'stake-out' prospective jurors" (cleaned up)); *State v. Janis*, 2016 SD 43, ¶ 23, 880 N.W.2d 76 (holding that "questions regarding what the jurors considered to be signs of intoxication" were impermissible). Simply stated, these types of "stakeout" questions are improper.

11 While there are exceptions for "matters of intense controversy," those exceptions do not apply in the present case against Defendant. *See* *People v. Boston*, 383 Ill.App.3d 352, 323 Ill.Dec. 405, 893 N.E.2d 677, 681 (2008).

¶32 The issue of determining when a juror examination has crossed the line into impermissible indoctrination is one of first impression. While Utah case law does address situations in which the juror examination is too *restrictive*, we have not found any Utah case discussing when juror examination is too *permissive*. *See* *State v. Saunders*, 1999 UT 59, ¶¶ 38, 43, 992 P.2d 951 (reversing and remanding where defense counsel was prohibited from investigating possible bias regarding "specialized knowledge concerning child sexual abuse" during juror examination); *State v. Holm*, 2017 UT App 148, ¶ 18, 402 P.3d 193 (reversing and remanding where the trial court did not permit questions regarding "jurors' experiences and the experiences of persons close to them in serious car collisions"); *Alcazar v. University of Utah Hosps. & Clinics*, 2008 UT App 222, ¶ 1, 188 P.3d 490 (reversing and remanding where the trial court refused to allow questions regarding jurors' attitudes toward tort reform and medical malpractice).

¶33 Nevertheless, as pointed out above, the proper purpose of juror examination is well established in Utah law. The prosecutor's approach departed from this well-established purpose and the prosecutor's departure should have been obvious to the judge. Looking to other jurisdictions supports the conclusion that error occurred here. *People v. Knight*, 2013 IL App (4th) 111127-U, 2013 WL 5962934, is instructive in this case. There, the court reviewed a defendant's convictions for sexual assault and aggravated sexual abuse. *Id.* ¶ 2. During juror examination, the prosecutor asked prospective jurors, "Would somebody volunteer to tell all of us about your last sexual experience?" *Id.* ¶ 6. Presumably because no one volunteered, the prosecutor followed up with, "How about last year, experience from last year? Doesn't have to be the most recent." *Id.* Again, the prosecutor had no takers. So he asked a specific prospective juror, "Why didn't you raise your hand and tell everybody about ***443** that[?]" *Id.* This led to a discussion about "feelings of nervousness and embarrassment and that sort of thing involved and attached to that question," as well as how difficult it would be for a fifteen-year-old girl to share details about sexual abuse by her stepfather. *Id.*

¶34 The Illinois Appellate Court reviewed for plain error the defendant's claim that "the prosecutor improperly indoctrinated the jurors during [juror examination]." *Id.* ¶ 33. Noting that "[t]he threshold question, o[f] course, is whether any error occurred at all," the court concluded, "Here, an error occurred." *Id.* ¶¶ 35–36. It explained:

> [Juror examination] is not to be used as a means of indoctrinating a jury, or impaneling a jury with a particular predisposition. In this case, the prosecutor erroneously incorporated specific facts from his case into his [juror examination] inquiry, essentially attempting to bolster his star witness's credibility before the trial began[.]

Id. ¶ 36 (cleaned up). Ultimately, though, the Illinois court concluded that the defendant had not been prejudiced by this error and affirmed his convictions. *Id.* ¶¶ 37, 50. [12]

12 However, a member of the panel dissented, arguing "the error rises to the level of plain error." *People v. Knight*, 2013 IL App (4th) 111127-U, ¶ 53, 2013 WL 5962934 (Turner, J., dissenting). Because the case "hinged on credibility,"

> and the prosecutor's improper juror examination was "designed to bias the jurors in assessing credibility," the dissent concluded that the error was prejudicial. *Id.* ¶ 54.

¶35 The similarity between portions of the State's juror examination in the present case and that at issue in *Knight* allows us to easily and similarly conclude, "Here, an error occurred." *See id.* ¶ 36. Both cases involved a father figure allegedly sexually abusing his daughters. Both prosecutors asked inappropriately intimate questions about the jurors' sex lives. Both prosecutors used their examination questions to segue to a discussion regarding the difficulties of sharing intimate details in a public setting. And in doing so, both prosecutors improperly attempted to bolster the victim's credibility. We accordingly conclude, like the Illinois Appellate Court, that the "prosecutor should never have asked these questions, and once they were asked, the trial court should have emphatically stopped this line of inquiry." *See id.* ¶ 44. Because the trial court presiding over Defendant's case did not intervene, it erred.

¶36 We note that in the present case, the improper juror examination went far beyond the error identified in *Knight*. Additional problematic questions posed by the prosecutor in this case make it a clear call. Here, the prosecutor impermissibly used juror examination to preview and argue her case, explaining how child sex abuse cases are reported, investigated, and proven at trial and coaching the potential jury members on how they should evaluate the evidence. In *People v. Boston*, 383 Ill.App.3d 352, 323 Ill.Dec. 405, 893 N.E.2d 677 (2008), the Appellate Court of Illinois reversed and remanded the trial court's decision to allow counsel to ask similar questions, such as

> is there anyone that believes if a person or a woman gets an order of protection against someone and then invites that person over that she has the [order of protection] against, does anyone believe that the invitation itself equals consent to a later sexual act? ... [I]s there anyone that believes a person consents to a sexual act if they [do not] scream or fight or kick or yell or scratch or hit? Anyone require a victim to do any of those things while [she is] being assaulted?

Id. 323 Ill.Dec. 405, 893 N.E.2d at 681. The court held that these questions impermissibly "highlighted factual details about the case and asked prospective jurors to prejudge those facts." *Id.*

[10] ¶37 Again, we conclude that a similar error occurred in this case, which should have been obvious to the trial court. [13] When the prosecutor veered from acceptable juror ***444** examination territory, the trial court allowed it. Furthermore, the trial court allowed the prosecutor to improperly bolster the anticipated testimony of the daughters and invited the jury to prejudge the case. This process was disconnected with the true purpose of juror examination, which is to "determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it." *Salt Lake City v. Tuero*, 745 P.2d 1281, 1283 (Utah Ct. App. 1987). Using juror examination as a tool to indoctrinate the jury on a party's argument or bolster anticipated witness testimony is improper. [14]

13 Illinois's plain-error doctrine requires "a clear or obvious error," *id.* ¶34 (majority opinion), similar to our requirement that an appellant arguing plain error demonstrate that "the error should have been obvious to the trial court," *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). Thus, while the *Knight* court did not explicitly decide that the error was clear or obvious, its conclusion that there was an error implies that clear or obvious error occurred.

14 In Utah's trial courts, the days of perfunctory—and often insufficient—judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination, *see* Utah R. Crim. P. 18(b),

> and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire. But a free-for-all attorney-conducted juror examination in the presence of the entire venire carries with it a substantial risk of irreparably tainting the entire panel and effectively guaranteeing the resulting mistrial.

[11] ¶38 As stated, the multiplicity of the prosecutor's divergence from the established purpose of juror examination was error and should have been obvious to the trial court. We are thus tasked with considering whether "absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). We conclude that had error not occurred, there is a reasonable likelihood that Defendant would have had a more favorable outcome. Our reasoning is two-fold.

¶39 First, the prosecutor's attempts to bolster the victims' credibility were not isolated incidents, but permeated the State's entire juror examination. When she did ask questions, they were almost always premised on facts—presented as hypotheticals—that mirrored the actual facts of this case. *See supra* ¶¶ 27–28. Instead of asking open-ended questions, her questions resembled those one would expect to hear on cross-examination. *See supra* ¶¶ 27–28. In short, where the juror examination process was replete with suggestive questions and improper allusions to the actual facts of this case, and lacking in questions meant to root out biases, Defendant's trial was tainted before it began.

¶40 Second, the case turned on the credibility of the victims, and the improper juror examination predisposed the jury to believe the victims' testimony, despite evidence of inconsistency. We acknowledge that the State presented a large amount of evidence indicating Defendant's guilt. But that evidence was not without its problems, and ultimately the case turned entirely on the victims' testimony. The incongruities in the daughters' testimony, *see supra* ¶¶ 5–8, thus compound the concerns that began during juror examination and undermine our confidence in Defendant's convictions. *See* *Dunn*, 850 P.2d at 1209. We therefore reverse.

CONCLUSION

¶41 We reverse Defendant's convictions. Given the trial court's failure to intervene in the State's improper juror examination, the court plainly erred. Coupled with the inconsistencies in the evidence, our confidence in the jury's verdicts is undermined. We therefore remand for a new trial.

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