A Manual on Jury Trial Procedures

2013 Edition

Prepared by the
Jury Instructions Committee
of the Ninth Circuit

MANUAL ON
JURY TRIAL PROCEDURES

Prepared by
The Jury Instructions Committee of
the Ninth Circuit

Members:
Senior District Judge John W. Sedwick, Chair
Senior Circuit Judge A. Wallace Tashima
District Judge Cormac J. Carney
Chief District Judge Susan Oki Mollway
District Judge Benjamin Hale Settle
Senior District Judge Robert H. Whaley
Senior District Judge Thomas J. Whelan
Magistrate Judge Alicia G. Rosenberg

Reporter:
Joe Franaszek

Staff:
Debra Landis

FOREWORD

This is the fourth edition of *A Manual on Jury Trial Procedures*. It updates and replaces the 2004 edition. Like previous editions, this manual provides a reliable reference to issues that recur in the conduct of federal civil and criminal jury trials in the Ninth Circuit. While not exhaustive in its treatment, it does provide a starting point to help guide more detailed research. This edition reflects revisions made through November 2012.

As with previous editions, this manual focuses on the law, procedures and practices in the Ninth Circuit governing jury trials. Accordingly, it continues the previous practice of citing primarily Supreme Court and Ninth Circuit case law, when available. Consistent with the current practices in the Circuit, the manual provides practical suggestions to aid the conduct of such trials.

The Jury Instructions Committee of the Ninth Circuit expresses its appreciation to the Office of the Circuit Executive for its support and for publishing this new edition.

TABLE OF CONTENTS

TABLE OF CONTENTS

Chapter One: Pretrial Considerations

Description:

This chapter includes pretrial matters.

Topics:

1.1 Right to Jury Trial

A. Civil Actions

In General. The Seventh Amendment preserves the right to a jury trial in actions at common law. A jury trial is also available in actions to enforce statutory rights when the statute provides for a jury trial or the statutory right is analogous to a common law cause of action customarily heard in a court of law rather than an equity or admiralty court. *Feltner v. Columbia Pictures Television, Inc.* 523 U.S. 340, 346-55 (1998). To determine whether a jury trial is available in a statutory action that does not specifically address the topic, it is necessary to compare the nature of the statutory action with actions at common law, and to examine the nature of the remedy sought. The second inquiry is more important. *Id.*

Demand/Waiver. The Seventh Amendment and statutory rights to a jury trial in civil actions are recognized in Fed. R. Civ. P. 38(a). However, Rule 38(b) requires that a timely demand for a jury trial be made, and Rule 38(d) establishes that without a timely demand, the right to jury trial is waived. *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 954 (9th Cir. 2008). Rule 81(c) addresses demands for jury trial in cases removed from a state court to a federal court.

Examples–Jury Trial Available:

Money Damages Remedy. Generally speaking, there is a constitutional right to a jury trial in actions that seek relief in the form of money damages unless the money damages are incidental to or intertwined with a claim for equitable relief. *See Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990). Thus, a party seeking damages in an action brought pursuant to 42 U.S.C. § 1983 has a right to a trial by a jury. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1426-27 (9th Cir. 1996). Similarly, a party to an action presenting a claim for lost wages under the Age Discrimination in Employment Act has a right to a jury trial

(*Lorillard v. Pons*, 434 U.S. 575 (1978)), unless the claim is made against the United States (*Lehman v. Nakshian*, 453 U.S. 156, 165 (1981)). A claim for damages brought under Title VII entitles the plaintiff to a jury trial on such claim, even if the defendant is an agency of the United States. 42 U.S.C. § 1981a(c); *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th.Cir. 1997). So, too, in actions seeking statutory damages for copyright infringement, there is a right to a jury trial. *Feltner,* 523 U.S. at 342.

Actions to Recover Civil Penalty. There is a constitutional right to a jury trial in an action brought by the government to recover a civil penalty. *United States v. Nordbrock*, 941 F.2d 947, 949 (9th Cir. 1991) (government sought civil penalties for willful failure to provide tax information) (citing *Tull v. United States*, 481 U.S. 412, 417-25 (1987)).

Bivens Actions. A claim for money damages in an action brought pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), gives rise to a right to a jury trial. *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995).

Patent Cases. There is a right to a jury trial in patent validity and infringement cases, but particular issues arising in a case, such as construction of the patent, may be issues of law to be decided by the court. *See Markman v. Westview Instruments, Inc.,* 517 U.S. 370 (1996).

Examples–Jury Trial Not Available:

Equitable Remedies. Generally speaking, when the remedy sought is equitable in nature, there is no right to a jury trial. Thus, there is no right to a jury trial in an ERISA case, because the remedies are equitable in nature. *Thomas v. Or. Fruit Products Co.*, 228 F.3d 991, 997 (9th Cir. 2000).

Similarly, there is no right to a jury trial for a retaliation claim brought pursuant to the Americans with Disabilities Act, because such claims seek equitable relief. *Alvardo v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009). Nor is there a right to a jury trial on equitable defenses to trademark claims or counterclaims seeking a declaration of trademark invalidity and noninfringement. *Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1183-84 (9th Cir. 2010). Because an action for disgorgement of profits is equitable in nature, it does not give rise to a right to a jury trial even though it is a claim for payment of money. *SEC v. Rind*, 991 F.2d 1486, 1492-93 (9th Cir. 1993).

Claims Against the United States. The United States enjoys sovereign immunity and may be sued only when it has waived its immunity. However, a waiver alone is not enough to give rise to a jury trial right. In some instances, Congress has stated that the waiver of immunity from suit does not give rise to a right to a jury trial. 28 U.S.C. § 2402. Thus, there is no right to a jury trial in a federal tort claim lawsuit. *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000). Even when a statute does not say there is no right to a jury trial, there must be an explicit indication that the United States has consented to have its rights determined by a jury. *See Lehman*, 453 U.S. at 160.

B. Criminal Actions

In General. The Sixth Amendment guarantees the accused's right to a jury trial "in all criminal cases."

Joinder and Severance. Fed R. Crim. P. 8 allows joinder of two or more defendants and two or more offenses in the same indictment or information. Fed R. Crim. P. 14(a), in turn, permits a court to grant a severance if the joinder of offenses or defendants, or a consolidation for trial, "appears to prejudice a defendant or the government." To warrant severance, the defendant bears the heavy

burden of demonstrating that a joint trial is so manifestly prejudicial that the trial judge is required to exercise his or her discretion "in but one way, by ordering a separate trial." *United States v. Jenkins,* 633 F.3d 788, 807 (9th Cir. 2011). "There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). The "district court should grant a severance only when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence." *Id*. at 539.

Petty Offenses. There is no right to a jury trial for a petty offense. If the maximum punishment for a crime is incarceration for 6 months or less, "there is a very strong presumption that the offense is petty and defendant is not entitled to a jury trial." *United States v. Ballek*, 170 F.3d 871, 876 (9th Cir. 1999). Punishment other than incarceration, such as a very large fine, especially when it is added to a sentence of incarceration, may make a punishment so severe that the crime is not a petty offense. *Id.*

Misdemeanor Trials by Magistrate Judge. A magistrate judge may be specially designated by the district court to try misdemeanor charges. If the misdemeanor is a petty offense, the defendant's consent is not needed, but if the misdemeanor is not a petty offense, the defendant may elect to be tried by a district judge. 18 U.S.C. § 3401.

Waiver of Jury Trial by Defendant. Fed. R. Crim. P. 23(a) provides that, if the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves. In addition, the waiver must be made voluntarily, knowingly and intelligently. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). To ensure that the waiver meets this requirement, the judge may be required to engage in a colloquy with the defendant regarding the waiver. *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (in-depth colloquy required for waiver when court has reason

to suspect defendant may suffer from mental or emotional instability). In all cases, the district court "should inform the defendant that (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial [and the court] should question the defendant to be sure he understands the benefits and burdens of a jury trial and freely chooses to waive a jury." *Duarte-Higareda*, 113 F.3d at 1002. Because a defendant has no Sixth Amendment right to waive a jury trial, the government is not required to give reasons it refuses to consent to a waiver. *United States v. Reyes,* 8 F.3d 1379, 1390 (9th Cir. 1993) (citing *Singer v. United States*, 380 U.S. 24, 37 (1965)) ("We need not determine in this case whether there might be circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.").

Stipulations Regarding Elements of a Crime. A stipulation involving all of the elements of the offense is binding if the court determines that the defendant voluntarily and intelligently chose to enter into the stipulation. *Adams v. Peterson*, 968 F.2d 835 (9th Cir. 1992) (en banc). While a defendant's tactical decision not to contest an element of the crime charged does not relieve the government of its burden to prove that element, *Estelle v. McGuire*, 502 U.S. 62, 69 (1991), a defendant's stipulation to the existence of his prior felony conviction must be accepted to the exclusion of proof of the conviction by the government in a trial of a felon in possession of a firearm charge. *Old Chief v. United States*, 519 U.S. 172 (1997).

1.2 Double Jeopardy (Criminal)

A. Protections

The Fifth Amendment's Double Jeopardy Clause, which provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. amend. V, protects against a second prosecution for the same offense after acquittal or conviction as well as multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The Clause embodies the principle that "'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *Yeager v. United States*, 557 U.S. 110, 117-18 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

B. Attachment

Jeopardy attaches in a criminal jury trial when the jury is impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35 (1978). In a nonjury criminal trial, jeopardy attaches when the first witness is sworn. *Id.* at 37 n.15.

C. Termination

The most common jeopardy-terminating events are an acquittal or a final judgment of conviction. *United States v. Jose*, 425 F.3d 1237, 1240 (9th Cir. 2005). A conviction that is reversed on appeal is generally not a terminating event because the "criminal proceedings against [the] accused have not run their full course." *Price v. Georgia*, 398 U.S. 323, 326 (1970). In such cases, the accused faces "continuing jeopardy." *Id.*

A district court's decision to set aside a verdict convicting a

defendant because the government's evidence was insufficient to support a guilty verdict results in a judgment of acquittal that bars retrial for the same offense. *Burks v. United States*, 437 U.S. 1, 10-11 n.5 (1978) (citing *Fong Foo v. United States*, 369 U.S. 141 (1962)). The same rule applies when an appellate court overturns a verdict convicting a defendant and directs a judgment of acquittal because the government's evidence was insufficient to support a guilty verdict. *Id.* at 18 (holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient"). This is "an exception to the general rule that the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below." *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988).

If the jury acquits a defendant of an offense, the verdict functions as an implied acquittal that bars retrial of the defendant for any other offense that shares a required element of that offense. *Yeager*, 557 U.S. at 118-23 ("the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial").

Jeopardy does not terminate and a retrial of the defendant before a new jury does not violate the Double Jeopardy Clause when a district court, based on manifest necessity, declares a mistrial because the jury could not reach a verdict on a charged offense. *Renico v. Lett*, 559 U.S. 766, 130 S. Ct. 1855, 1862-63 (2010); *Richardson v. United States*, 468 U.S. 317, 323-24 (1984); *see also* § 5.5. But if there was no manifest necessity for the district court to declare the mistrial, the Double Jeopardy Clause bars retrial of the offense on which the district court improperly declared a mistrial. *See United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011) (permitting retrial on greater offense on which jury was hopelessly deadlocked and prohibiting retrial on lesser included offense on which district court refused to receive verdict).

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

A. Tolling of Speedy Trial Act

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

1. *The 30-Day Rule for Charging*

Under 18 U.S.C. § 3161(b), any information or indictment charging an individual with an offense must be filed within 30 days from arrest or service of summons.

Speedy trial calculations begin from the date of the original indictment if a subsequent indictment "contains charges which, under double-jeopardy principles, are required to be joined with the other charges." *United States v. King*, 483 F.3d 969, 972 (9th Cir. 2007).

In certain circumstances, the speedy trial clock resets upon the filing of a superseding indictment that adds a new defendant. *Id*. at 973. Factors to consider in determining whether the clock is restarted include the "reasonableness of the delay" and "absence of bad faith on the part of the government." *Id*. at 974 (concluding that if delay is reasonable and there is no bad faith, application of defendant-specific Speedy Trial Act timelines would frustrate efficiency rationale that underlies rules of joinder).

The issuance of a violation notice does not trigger the 30-day rule of § 3161(b). *United States v. Boyd*, 214 F.3d 1052, 1056 (9th Cir. 2000) (holding that issuance of violation notice for class A misdemeanor, even following brief detention, cannot be considered "complaint" issued at time of "arrest").

In determining the expiration of the 30 days, the day of the arrest

is excluded, but weekend and holidays are included. *United States v. Arellano-Rivera*, 244 F.3d 1119, 1123 (9th Cir. 2001).

2. *The 70-Day Rule for Trial*

A defendant must be brought to trial within 70 days after the indictment or arraignment, whichever occurs later. If the defendant consents to trial before a magistrate judge, trial must occur within 70 days from the date of consent. 18 U.S.C. § 3161(c)(1).

3. *Excludable Time*

Under 18 U.S.C. § 3161(h), there are several grounds for excluding time from preindictment periods (governed by § 3161(b)) as well as pretrial periods (governed by § 3161(c) and (e)). *United States v. Pete*, 525 F.3d 844, 852 (9th Cir. 2008). Subsections of § 3161 must be read together. *Bloate v. United States*, 559 U.S. 196 (2010) ("pretrial motion preparation time," when district court granted defendant's motion to extend deadline to file pretrial motions, is not automatically excludable under § 3161(h)(1) but may be excluded only when court grants continuance based on appropriate findings under § 3161(h)(7)).

The most common grounds for delay and exclusion are:

a. Motions and other proceedings concerning defendant. § 3161(h)(1). This exclusion typically encompasses mental competency proceedings, interlocutory appeals, and the pendency of pretrial motions.

The excludability under subsection (h)(1) is "automatic" in the sense that a district court must exclude such delay from a Speedy Trial Act calculation without any further analysis as to whether the benefit of the delay outweighs its costs. *Bloate*, 559 U.S. at 199 n.1. For delays resulting from proceedings under subsection (h)(1), Congress already has determined that the benefit of such delay outweighs its cost

to a speedy trial, regardless of the specifics of the case. *Id*

. The time a motion is pending is excludable even when the pendency of the motion causes no actual delay in the trial. *United States v. Tinklenberg,* 131 S. Ct. 2007, 2013-16 (2011); *United States v. Vo*, 413 F.3d 1010, 1015 (9th Cir. 2005). If a pretrial motion does not require a hearing, the period from the date the motion was taken under advisement until the court rules on the motion, but no more than 30 days, may be excluded. *Henderson v. United States*, 476 U.S. 321, 329 (1986); *United States v. Medina*, 524 F.3d 974, 978-79 (9th Cir. 2008).

If a pretrial motion requires a hearing, a district court must exclude the following periods of delay: (1) the period from the date the motion was filed to the conclusion of the hearing; (2) the period from the conclusion of the hearing until the date the district court "receives all the submissions by counsel it needs to decide that motion"; and (3) the period from the last day of the period described in (1) or (2), as applicable, until the court rules on the motion, but no more than 30 days. *Medina*, 524 F.3d at 978-79. The fact that a motion becomes moot before the district court rules on it or takes some other action does not affect the characterization for Speedy Trial Act purposes. *Id.* at 984.

An interlocutory appeal tolls the Speedy Trial Act, but does not restart the clock. *United States v. Pitner*, 307 F.3d 1178, 1183 (9th Cir. 2002). The time between the district court's order and the filing of an interlocutory appeal is not excludable. *Pete*, 525 F.3d at 849 n.5. The excludable time for interlocutory appeals ends when the mandate issues. *Id.*

To toll the Speedy Trial Act, a continuance of a pending discovery motion must be to a date certain or to the happening of an event certain, and the parties must have a real dispute or the possibility of a real dispute. *United States*

v. Sutter, 340 F.3d 1022, 1028, 1031-32 (9th Cir.), *opinion amended on denial of reh'g*, 348 F.3d 789 (9th Cir. 2003).

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

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

d. Joinder of defendant with an unsevered codefendant as to whom the Speedy Trial Act has not run. § 3161(h)(6). For a court to attribute a codefendant's excludable delay under § 3161(h)(7) to a defendant, the delay must meet the reasonableness requirement of § 3161(h)(6). *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010).

e. Ends of justice. § 3161(h)(7)(A). Upon motion of the judge or a party for continuance, any period of delay is excludable from the Speedy Trial Act, provided the continuance is based upon findings "that the ends of justice served by [the action taken] outweigh the best interests of the public and the defendant in a speedy trial."

Section 3161(h)(7)(B) lists four factors the judge shall consider, among others, in granting a continuance in the ends of justice:

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

ii. whether the case is so unusual or complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or trial within the time limits of the Speedy Trial Act;

iii. whether certain circumstances concerning the indictment

justify the continuance;

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

A district court must satisfy two requirements when it grants an "ends of justice" continuance under § 3161(h)(7): "(1) the continuance must be specifically limited in time; and (2) it must be justified on the record with reference to the facts as of the time the delay is ordered." *Lewis*, 611 F.3d at 1176 (quoting *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997)). The court must conduct an appropriate inquiry to determine:

> whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would "outweigh the best interest of the public and the defendants in a speedy trial."

Id. The "ends of justice" exclusion should be used sparingly and "may not be invoked in such a way as to circumvent" the purpose of the Speedy Trial Act. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000) (internal quotations omitted).

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

Time devoted to plea negotiations is not excluded, *see Ramirez-Cortez*, 213 F.3d at 1155, but when the defendant notifies the court

that negotiations have resulted in an agreement and the court sets a change of plea hearing, the time until the hearing is held may be excluded either under § 3161(h)(1)(G) because it is "delay resulting from consideration by the court of a proposed plea agreement" or under § 3161(h)(1)(D) as a "pretrial motion." *United States v. Alvarez-Perez*, 629 F.3d 1053, 1058 (9th Cir. 2010).

4. *Time Limits for New Trials*

If a defendant becomes entitled to a new trial (by an order of the trial court, remand by an appellate court, or after a successful collateral attack), the new trial must commence within 70 days from the date the action that occasions the retrial becomes final. 18 U.S.C. § 3161(e). Because long-delayed retrials can present logistical difficulties, the court may extend the period up to 180 days from that date if the retrial follows an appeal or collateral attack and circumstances, like the unavailability of witnesses, make trial within 70 days impractical. *Id.* The clock begins to run when the appellate court issues the mandate, not when the district court receives it. *Pete*, 525 F.3d at 853 (Speedy Trial Act's focus is on when district court obtains or regains jurisdiction).

B. Voir Dire

The voir dire of the jury is the beginning of trial and tolls the running of the Speedy Trial Act's time limits. *United States v. Nance*, 666 F.2d 353, 360 n.18 (9th Cir. 1982). The Ninth Circuit has yet to decide whether and under what circumstances a court may begin voir dire in order to stay the Act's time limits. Long delays between the jury selection and the swearing in can violate the Speedy Trial Act, even though the voir dire was begun within the time limits set by the Act. *See United States v. Stayton*, 791 F.2d 17, 19 (2d Cir. 1986); *United States v. Crane*, 776 F.2d 600, 603 (6th Cir. 1985); *United States v. Gonzalez*, 671 F.2d 441, 444 (11th Cir. 1982).

C. Dismissal

If trial does not begin within the requisite time period and the defendant moves for dismissal before trial, the court must dismiss the

indictment, either with or without prejudice. 18 U.S.C. § 3161(a)(2). In determining whether to dismiss the case with or without prejudice, the district court shall consider, among others, the following factors: the seriousness of the offense; the facts and circumstances of the case that led to the dismissal; and the impact of a reprosecution on the Speedy Trial Act and the administration of justice. *Id.*; *Alvarez-Perez*, 629 F.3d at 1062. In addition, the court should consider prejudice to the defendant from the delay as well as whether the government intentionally delayed the trial to harass the defendant or otherwise acted in bad faith. *Id.* at 1062-63.

D. No Waiver of Speedy Trial Act

A defendant may not opt out of the Act even if he believes it would be in his best interest to do so: "[a]llowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest." *Zedner v. United States*, 547 U.S. 489, 502 (2006).

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

1.4 Other Delays

"The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive preindictment delay." *United States v. Gilbert*, 266 F.3d 1180, 1187 (9th Cir. 2001) (citing *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1992)). The Fifth Amendment plays a limited role in protecting against oppressive preindictment delay because statutes of limitations provide a predictable, legislatively enacted limitation on prosecutorial delay. *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977).

The Ninth Circuit employs a two-part test to determine if preindictment delay violated the Fifth Amendment. *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007). The court asks: (1) whether the defendant suffered actual, nonspeculative prejudice from the delay; and (2) whether the delay, when balanced against the prosecution's reasons for it, "offends those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Gilbert*, 226 F.3d at 1187. A defendant must satisfy the first prong of the test before the court even considers the second prong. *United States v. Huntley*, 976 F.2d 1287, 1290-91 (9th Cir. 1992). Establishing prejudice is a "heavy burden" that is rarely met. *Id*.

Lengthy delays have been found to violate due process. *See, e.g., United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (48-day delay between close of evidence and closing arguments held to have violated defendant's due process rights); *United States v. Andrews*, 790 F.2d 803 (10th Cir. 1986) (two and one-half months); *United States v. Fox*, 788 F.2d 905 (2d Cir. 1986) (five and one-half months).

1.5 Sanctions and Assessment of Costs

The district court has the power pursuant to federal statutes, the Federal Rules of Civil Procedure and its own inherent power to impose sanctions against parties or attorneys for misconduct that occurs during pretrial proceedings and trial. The district court has discretion to decide whether sanctions are warranted and what type of sanctions should be imposed in light of the circumstances surrounding the misconduct. *See, e.g.*, *De Dios v. Int'l Realty & Inv.*, 641 F.3d 1071, 1076 (9th Cir. 2011).

A. Sources of Authority to Impose Sanctions

1. *Federal Statutes*

28 U.S.C. § 1927: The district court may require attorneys who have "multiplie[d] the proceedings in any case unreasonably and vexatiously" to pay "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

18 U.S.C. § 401: The district court may punish a person found to be in criminal contempt by fines, imprisonment, or both. Criminal contempt includes misbehavior of "any person" in the district court's presence or "so near thereto as to obstruct the administration of justice," misbehavior of any of the district court's officers "in their official transactions," and "disobedience or resistance" to the district court's lawful "writ, process, order, rule, decree, or command."

2. *Federal Rules of Civil Procedure*

Fed. R. Civ. P. 11: The district court may impose nonmonetary sanctions or monetary sanctions payable to either the district court or the opposing party on any attorney or unrepresented party who violates his or her certification that the pleading, written motion, or other paper presented to the district court is not being presented for any improper purpose, contains legal contentions that are nonfrivolous, and contains factual contentions or denials of factual contentions that are supported, or likely to be supported after reasonable investigation, by evidence.

Fed. R. Civ. P. 16(f): The district court may impose any sanction authorized by Fed. R. Civ. P 37(b)(2)(A)(ii)-(vii) as well as reasonable expenses, including attorneys' fees, if a party or its attorney fails to comply with pretrial conference procedures and orders.

Fed. R. Civ. P. 37: The district court must exclude information and witness testimony that a party fails to disclose during discovery as required under Fed. R. Civ. P 26(a) or (e), unless that failure was "substantially justified or is harmless." The district court may also impose other sanctions such as ordering the payment of reasonable expenses incurred by the failure, including attorneys' fees, or informing the jury of the party's failure to disclose, or any other sanction authorized by Rule 37. The district court may also impose any sanction authorized by Rule 37 against any party or witness that fails to obey the district court's discovery orders. The Rule 37 sanctions include directing that matters be taken as established, prohibiting the disobedient party from supporting or opposing certain claims or defenses, striking the disobedient party's pleadings, staying the proceedings, dismissing the action, entering default judgment against the disobedient party or treating the disobedient party as in contempt of court.

3. *Local Rules*

Many district courts have local rules authorizing monetary and other sanctions against parties or counsel for violations of the local rules or federal rules, including the payment of the opposing party's attorneys' fees if the misconduct rises to the level of "bad faith" or "willful disobedience" of a court order or rules.

4. *Court's Inherent Power*

District courts have inherent power to impose sanctions to manage their cases and courtrooms effectively and to enforce compliance with their lawful orders. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994); *Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 965 (9th Cir. 2004). The district court may impose fines or imprisonment on any person

through civil contempt proceedings in order to coerce compliance with the district court's orders or through criminal contempt proceedings in order to punish violations of its orders. *Bagwell*, 512 U.S. at 831-34 (noting that contempt proceeding is characterized as criminal or civil according to primary purpose and nature of sanction imposed). The court may also award attorneys' fees to the opposing party, or in extreme circumstances, dismiss the action, as a sanction for "bad faith conduct" in litigation or "willful disobedience of a court order." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46, 50 (1991); *Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001).

5. *Limited Authority to Award Sanctions Against the United States*

Monetary awards can be assessed against the United States only if there has been an express waiver of sovereign immunity. *United States v. Woodley*, 9 F.3d 774, 781 (9th Cir. 1993) (citing *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Provisions in the Federal Rules of Civil Procedure pertaining to monetary sanctions against litigants, such as Rules 11 and 37(b), can be viewed as an explicit congressional waiver of the government's sovereign immunity. *Id.* In contrast, Fed. R. Crim. P. 16(d), which provides that a district court may "enter any other order that is just under the circumstances" to remedy discovery order violations, is not an express waiver of sovereign immunity. *See* Fed. R. Crim. P. 16(d)(2)(D). Therefore, no monetary sanctions can be levied against the government in a criminal case under that rule. *Woodley*, 9 F.3d at 782. However, a district court may be able to assess monetary sanctions against the government pursuant to Fed. R. Crim. P. 57(b), which provides that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance." Fed. R. Crim. P. 57(b). The district court may also impose monetary sanctions pursuant to its inherent power, but only in the limited circumstances in which a recognized right has been violated and there is no other remedy provided by statute or federal rule. *Woodley*, 9 F.3d at 782.

B. Types of Sanctions

The type of sanction that may be imposed depends on the source of the district court's sanction power and the type of conduct involved. Certain types of sanctions have particular substantive or procedural limitations that the district court must consider before imposing those sanctions.

1. *Fines*

The district court may order a party, attorney or any other person before it that the district court finds in contempt to pay a fine. To hold a person in criminal contempt, the district court must find that there is a clear and definite district court order, that the contemnor knows of the order, and that the contemnor willfully violated the district court's order. *United States v. Doe*, 125 F.3d 1249, 1254 (9th Cir. 1997). Accidental, inadvertent or negligent violations of an order are not willful. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782 (9th Cir. 1983). Although a district court may summarily punish a person for contemptuous behavior that occurs in its presence during a jury trial, a criminal contempt proceeding generally requires the additional procedural protections and rights that are afforded to criminal defendants, including a jury trial for "serious" fines, or imprisonment. *See Bagwell*, 512 U.S. at 832-33; *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138-39 (9th Cir. 2001); *see also* Fed. R. Crim. P. 42. No finding of "willfulness" is required for the district court to hold a person in civil contempt. *Reno Air Racing Ass'n. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006). For issuance of a contempt order to be proper in a civil contempt proceeding, there must be clear and convincing evidence that the contemnor did not substantially comply with a court order and that the contemnor's conduct was not based on a good faith and reasonable interpretation of the order. *Labor/Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1123 (9th Cir. 2009). A coercive civil contempt sanction must contain a "purge condition," or an opportunity for the contemnor to avoid the fine by complying with the order. *Bagwell*, 512 U.S. at 828-29. A compensatory civil contempt sanction must "compensate the complainant for losses sustained." *Id.* at 834 (citing *United States v.*

United Mine Workers of Am., 330 U.S. 258, 303-04 (1947)). Simple notice and an opportunity to be heard are generally sufficient procedural protections for civil contempt. *Id.* at 833.

The district court may also order monetary sanctions paid into court for violations of Rule 11 or violations of the district's local rules. The district court should not impose monetary sanctions on its own motion without issuing an order to show cause and allowing the party or attorney that is to be sanctioned an opportunity to respond. *See* Fed. R. Civ. P. 11(c)(4), (5)(B). The district court may also impose monetary sanctions pursuant to its inherent power after making an explicit finding that the conduct was tantamount to "bad faith." *Mendez v. Cnty. of San Bernadino*, 540 F.3d 1109, 1131-32 (9th Cir. 2008). The district court must give the attorney or party notice and an opportunity to be heard before imposing sanctions pursuant to its inherent power. *Id.* at 1132.

2. *Attorneys' Fees*

The district court may order a party or an attorney to pay an opposing party's attorneys' fees pursuant to Rule 11 or the district court's inherent power. Although district courts frequently award attorneys' fees as sanctions because a party or attorney acted in "bad faith," no showing of subjective "bad faith" is required under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986), *overruled on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-400 (1990). The district court may also impose monetary sanctions under Rule 11 if a paper or position is objectively "legally unreasonable" or "without factual foundation." *Id.*; *see also* Fed. R. Civ. P. 11(b)(1)-(4). However, the district court may not assess attorneys' fees under its inherent authority without finding "bad faith" conduct or "willful disobedience" of a court order. *Chambers*, 501 U.S. at 45. "Bad faith" includes a broad range of "willful improper" conduct, *Fink*, 239 F.3d at 993-94, but there is a "high threshold" for misconduct to rise to the level of bad faith, *Mendez*, 540 F.3d at 1131-32.

The district court may also order a party or attorney that has been held in civil contempt to pay an opposing party's attorneys' fees to

compensate that party for actual losses sustained as a result of the contempt. *See United Mine Workers of Am.*, 330 U.S. at 303-04. No finding of "willfulness" is required for the district court to hold a person in civil contempt. *Reno Air Racing Ass'n*, 452 F.3d at 1130.

The district court may also order an attorney to pay an opposing party's attorneys' fees pursuant to 28 U.S.C. § 1927, which only applies to attorneys. *See Sneller v. City of Bainbridge Island*, 606 F.3d 636, 640 (9th Cir. 2010) (citing *FTC v. Ala. Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986)). A finding of recklessness is sufficient for the district court to impose sanctions pursuant to § 1927. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (citing *Fink*, 239 F.3d at 993).

3. *Evidence Sanctions*

The district court has discretion to preclude a party from contesting certain issues or introducing certain evidence at trial if that party fails to make its discovery disclosures as required by Rule 26, unless that failure was "substantially justified or harmless." Fed. R. Civ. P. 37(c)(1); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001). The district court may impose the same sanctions if a party fails to comply with the district court's discovery orders, or if a party or its attorney fails to appear or is substantially unprepared or does not participate in good faith at scheduling or pretrial conferences, or fails to comply with the district court's pretrial orders. Fed. R. Civ. P. 16(f)(1); Fed. R. Civ. P. 37(b)(2)(A)(ii).

4. *Terminating Sanctions or Dismissal*

The district court may, in extreme circumstances, enter terminating sanctions (such as striking a party's pleading and entering default judgment against the party or dismissing the action) against a party that repeatedly and willfully violates the district court's orders. Fed. R. Civ. P. 16(f)(1); Fed. R. Civ. P. 37(b)(2)(A)(iii), (v), (vi); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Drastic sanctions such as dismissal should not be ordered unless the district court makes an explicit finding that the party's conduct

demonstrates "willful disobedience" of the district court's order, bad faith or fault of the party. *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996); *see also Leon*, 464 F.3d at 958. To demonstrate "willful disobedience" the district court must find "disobedient conduct not shown to be outside the control of the litigant." *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993).

The district court must also consider five factors to determine whether a dismissal sanction is just: (1) the public's interest in expeditious resolution of litigation, (2) the district court's need to manage its dockets, (3) the risk of prejudice to the party seeking sanctions, (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007); *see also Leon*, 464 F.3d at 958 n.4 (applying same five-factor analysis from Rule 37 sanctions to sanctions imposed pursuant to court's inherent power); *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004). The test is not mechanical, and the district court need not make express findings regarding each factor in order to find that a case-dispositive sanction is just. *Conn. Gen. Life Ins. Co.,* 482 F.3d at 1096. However, when a party has violated a district court order, factors (3) and (5) are decisive. *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998*).* The fifth factor involves the consideration of three subparts: (1) whether the district court explicitly discussed alternative sanctions, (2) whether it tried them and (3) whether it warned the party about the possibility of dismissal. *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096 (citing *Valley Eng'rs Inc.,* 158 F.3d at 1057).

5. *Imprisonment*

The district court may imprison any attorney, party or other person before it as a sanction after holding that person in either criminal or civil contempt. *See* 18 U.S.C. § 401; *Bagwell*, 512 U.S. at 829. Before imprisoning a person for criminal contempt, the district court must afford the contemnor the full procedural protections and rights generally given to criminal defendants, including a jury trial, if the sentence to be imposed is "serious." *See F.J. Hanshaw Enters., Inc.*, 244 F.3d at 1139 n.10; *see also* Fed. R.

Crim. P. 42. The district court is not required to provide the same procedural protections before imprisoning a person for civil contempt. *See Bagwell*, 512 U.S. at 833. However, the district court should use imprisonment to coerce compliance with its orders sparingly. *Spallone v. United States*, 493 U.S. 265, 280 (1990) (finding that court should use the "least possible power adequate to the end proposed" when selecting contempt sanctions).

6. *Professional Sanctions*

The district court has discretion under Rule 11 and pursuant to its inherent authority to impose nonmonetary sanctions, such as a public reprimand, a directive to attend continuing legal education courses or suspension of the privilege to practice in the district, against attorneys who violate their Rule 11 certification or who otherwise abuse the litigation process or engage in bad faith conduct. *See* Fed. R. Civ. P. 11(c)(4); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198-99 (9th Cir. 1999); *Pony Express Courier Corp. of Am. v. Pony Express Delivery Serv.*, 872 F.2d 317, 319 (9th Cir. 1989). The sanctions must be "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). When the district court issues sanctions on its own initiative, the district court should issue an order to show cause why the conduct has not violated Rule 11(b). Fed. R. Civ. P. 11(c)(3). An attorney must be given notice and an opportunity to be heard before the district court imposes sanctions against that attorney. *Weissman*, 179 F.3d at 1198 (holding that district court abused its discretion by failing to give attorney notice and opportunity to be heard prior to restricting his right to file objections to class action settlement); *see also Cole v. U. S. Dist. Court for Dist. of Idaho*, 366 F.3d 813, 821-22 (9th Cir. 2004) (finding that revocation of attorney's *pro hac vice* status without giving attorney notice and opportunity to be heard was clear error but denying petition for writ of mandamus on other grounds).

C. Assessment of Costs

Many districts have local rules authorizing the imposition of jury costs upon litigants and/or their attorneys in civil cases for failure to

provide the court with timely notice of settlement or the need for a continuance. The non-Ninth Circuit case law upholding local rules of this type has done so both on the basis of the district court's rule-making power under 28 U.S.C. § 2071 and Fed. R. Civ. P. 83, and also on the basis of the court's "inherent authority" to control and protect the administration of court proceedings. *White v. Raymark Indus.*, 783 F.2d 1175, 1176-77 (4th Cir. 1986); *Martinez v. Thrifty Drug & Disc. Co.*, 593 F.2d 992, 993 (10th Cir. 1979).

In criminal cases, jury costs may not generally be assessed against the government under local rules because local rules do not constitute an explicit waiver of sovereign immunity. *Woodley*, 9 F.3d at 782. However, Rule 57(b) does authorize sanctions for noncompliance with local district rules if "the alleged violator was furnished with actual notice of the requirement before the noncompliance." Fed. R. Crim. P. 57(b). The district court may be able to assess jury costs against the government for failure to timely notify the court of a settlement or a continuance if it provides the government with actual advance notice that noncompliance may result in the imposition of costs.

1.6 Presence of Defendant (Criminal)

A. Defendant's Presence Generally

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 754 (1987). The right is both constitutional and statutory. The constitutional right is based on the Fifth Amendment Due Process Clause and the Sixth Amendment right to confrontation. Under the Constitution, the defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934)). A defendant need not be present "when presence would be useless, or the benefit but a shadow." *Snyder*, 291 U.S. at 106-07.

Fed. R. Crim. P. 43(a) provides in part that a defendant must be present at every trial stage, including the jury impanelment and the return of the verdict and sentencing, unless otherwise provided by Rule 5, 10 or 43.

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

Fed. R. Crim. P. 43(b)(4) provides that a defendant need not be present at a proceeding involving the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

Case law does not offer precise answers as to all circumstances under which a defendant is entitled to be present. *See United States v. Mitchell*, 502 F.3d 931, 972-73 (9th Cir. 2007) (*ex parte* meeting between judge and U.S. Marshals Service regarding security and transportation is not stage of trial for purpose of Rule 43); *United States v. Napier*, 463 F.3d 1040, 1042-43 (9th Cir. 2006) (right to be present at imposition of conditions of supervised release). The safer and better practice is to have the defendant present at all times unless

the defendant waives the right to be present. *See, e.g., Gagnon*, 470 U.S. at 528 (although district judge's *in camera* contact with juror constituted critical stage, waiver inferred from defendant's failure to request to be present after having been advised that judge intervened to talk to juror).

"If the denial of the right to be present rises to the level of a constitutional violation, then 'the burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt.'" *United States v. Marks*, 530 F.3d 799, 812 (9th Cir. 2008) (citation omitted) (failure to allow defendant to be present and speak on his own behalf when court issued restitution order is harmless error). If the communication constitutes only a statutory violation, "the defendant's absence is harmless error if 'there is no reasonable possibility that prejudice resulted from the absence.'" *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002); s*ee Egger v. United States*, 509 F.2d 745, 747-48 (9th Cir. 1975) (under circumstances presented, any error resulting from defendant's absence at sidebar conferences was harmless); *Stein v. United States*, 313 F.2d 518, 522 (9th Cir. 1962) (defendant's absence from conference between court and counsel regarding admissibility of recordings not reversible error on facts presented).

Denial of a defendant's request for a continuance to facilitate defendant's presence during trial does not rise to the level of constitutional error. *See United States v. Kloehn*, 620 F.3d 1122, 1130 n.4 (9th Cir. 2010) ("Our decision has nothing to do with [the defendant's] Due Process right to be present at trial."). Courts apply a four-factor inquiry in evaluating such a request: (1) whether the defendant was diligent in preparing his defense or whether the request for continuance appears to be a delaying tactic; (2) whether a continuance would be useful, considering how likely it is that the purpose of the continuance would have been achieved had it been granted; (3) the extent to which granting the continuance would have inconvenienced the court and opposing party and (4) whether the defendant suffers prejudice by the denial. *Id.* at 1127.

B. Pretrial Conference

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

C. Voir Dire—Sidebar Conferences with Prospective Juror

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

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

1. *Sidebar Conference During Voir Dire*

One option available to the trial judge is to speak with the prospective juror at a sidebar conference attended by respective counsel. Because of the close proximity of the defendant, this procedure has been upheld by other circuits. *See, e.g., United States v. Dioguardi*, 428 F.2d 1033, 1039-40 (2d Cir. 1970) (sidebar conference at which prospective juror was questioned and from which defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer with defendants). Some courts have found that any error in conducting a portion of voir dire at sidebar is harmless under certain circumstances. *See*, *e.g.*, *United States v. Feliciano*, 223 F.3d 102, 112 (2d Cir. 2000) (any error in conducting limited voir dire at sidebar was harmless when defendants were present in courtroom and could consult with counsel about what was revealed at sidebar); *United States v. Alessandrello,* 637 F.2d 131 (3d Cir. 1980) (questioning of prospective jurors concerning pretrial publicity in judge's anteroom from which

defendants were excluded permissible in light of close proximity of defendants and opportunity of counsel to confer); *United States v. Cuchet*, 197 F.3d 1318, 1321 (11th Cir. 1999) (error in conducting voir dire at sidebar was harmless when defendant was present during general voir dire, sidebar voir dire concerned only limited topics, and defense counsel could question each prospective juror and confer with defendant afterwards). The Ninth Circuit has stated that "[a]lthough a defendant charged with a felony has a fundamental right to be present during voir dire, this right may be waived." *See United States v. Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996); *see also United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009) (citing *Sherwood*). Waiver may be effected by the defendant's "failing to indicate to the district court that he wished to be present at sidebar." *Sherwood*, 98 F.3d at 407; *see also United States v. McClendon*, 782 F.2d 785, 788 (9th Cir. 1986) (defendant waived his right to be present when he knew of in-chambers voir dire but failed to object).

2. *Sidebar Conference with Interpreter Present*

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

3. *Sidebar Conference with Defendant*

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

4. *Other Options*

Problems associated with sidebar voir dire proceedings may be avoided if the court conducts examination in open court with the

panel excluded or obtains a waiver from the defendant of the right to be present at sidebar conferences.

D. Sidebar Conferences During Trial

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

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

E. Child Witness

The procedure by which a child victim or child witness can testify outside the physical presence of the defendant is set forth in 18 U.S.C. § 3509. The Ninth Circuit has held that § 3509 is constitutional. *United States v. Etimani*, 328 F.3d 493, 501 (9th Cir. 2003). Congress enacted the Child Victims' and Child Witnesses' Rights Act after the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) (testimony by closed circuit television permissible upon finding of necessity by trial judge). *See also Stincer*, 482 U.S. at 745-46 & nn.19-20 (defendant's due process rights were not violated by exclusion from child's competency hearing when no questions were asked about child's substantive testimony).

One alternative to live in-court testimony is testimony by two-way closed circuit television. The statute requires that the defendant's televised image be transmitted into the room in which the child is testifying. 18 U.S.C. § 3509(b)(1)(D). The Ninth Circuit has held that the television monitor does not have to be in the child's direct field of vision while he or she faces forward. "[I]t is sufficient (1) if the presence of the monitor has been called to the child's attention, (2) if the child can see the monitor, if she wishes, with little effort from where she is seated while testifying, and (3) if the jury is able to observe whether or not the child looks at the monitor during her testimony." *Etimani*, 328 F.3d at 501.

F. Jury Instruction Conferences

The court may conduct the jury instruction conference in the defendant's absence. *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987); *see United States v. Romero*, 282 F.3d 683, 689-90 (9th Cir. 2002) (defendant does not have constitutional or statutory right to attend conference on purely legal matter of determining jury instructions to be issued). The court may wish to determine if the defendant wishes to be present during jury instructions conferences.

G. Readbacks During Deliberations

See § 5.1.C.

The defendant has the right to be present during the replaying or reading back of testimony. *Fisher v. Roe*, 263 F.3d 906, 915 (9th Cir. 2001) (neither defendant nor defense counsel was present or aware of readback).

H. Waiver

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

> **(c) Waiving Continued Presence.**
>
> **(1) In General.** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
>
> > (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
> >
> > (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
> >
> > (C) when the court warns the defendant that it will

> remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
>
> **(2) Waiver's Effect.** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

In *Gagnon*, the Supreme Court held that "failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right." 470 U.S. at 529; *see also Smith v. Curry*, 580 F.3d 1071, 1085 (9th Cir. 2009); *United States v. Olano*, 62 F.3d 1180, 1190-91 (9th Cir. 1995).

A waiver of the right to be present may be found if the defendant has voluntarily absented himself after trial has begun. *See Taylor v. United States*, 414 U.S. 17, 18-20 (1973); *Mitchell*, 502 F.3d at 987-88; *cf. Crosby v. United States*, 506 U.S. 255, 256, 262 (1993) (Rule 43 does not permit trial *in absentia* of defendant who absconds before trial and is absent at its commencement; question of whether same result obtains under Constitution not reached).

A defendant may waive the right to be present if such waiver is knowing, intelligent and voluntary. *United States v. Berger*, 473 F.3d 1080, 1095 (9th Cir. 2007). The waiver is narrowly construed and includes only the matter within the scope of the waiver. *Id.* at 1094 (defendant's waiver of right to be present during judge's proposed discussion with jurors regarding scheduling future deliberation dates did not include judge's giving of informal *Allen* charge). A court may deny a defense motion to waive the defendant's presence at trial in order to avoid being identified. *United States v. Lumitap*, 111 F.3d 81, 84 (9th Cir. 1997).

The right to be present can be forfeited when a defendant's behavior is sufficiently disruptive. The judge has a duty to warn a defendant of the consequences of his or her disruptive behavior

before the judge removes the defendant from the courtroom. A trial judge may order the removal of a defendant from the courtroom and continue the trial in his absence until the defendant promises to conduct himself in an orderly way. *Illinois v. Allen*, 397 U.S. 337, 338, 345-46 (1970) (trial judge repeatedly warned defendant that he would be removed if he continued disruptive conduct and informed defendant that he could return to trial if he agreed to conduct himself in orderly manner); *United States v. Kizer*, 569 F.2d 504, 507 (9th Cir. 1978) (defendant interrupted prosecutor's argument, announced dissatisfaction with counsel, asked for new trial and continued to argue after trial judge's warning).

A disruptive defendant who also represents himself in a criminal proceeding raises additional considerations. Removing a *pro se* defendant and leaving that defendant without representation would constitute a structural error. *United States v. Mack*, 362 F.3d 597, 601-03 (9th Cir. 2004) ("A defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding.").

1.7 Delegation of District Judge's Trial Responsibilities to Magistrate Judge

A. Criminal Proceedings

1. *Caution Regarding Delegation to Magistrate Judge*

Any delegation to a magistrate judge of trial-related tasks in a criminal felony trial should be made only in those cases in which there is clear authority to do so. For an analytical approach to identifying additional duties a magistrate judge may perform under 28 U.S.C. § 636(b)(3) (Magistrate Judges Act) that are not inconsistent with the Constitution or laws of the United States, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1120-21(9th Cir. 2003) (en banc).

2. *Felony Jury Trials*

a. Voir dire. A magistrate judge may conduct voir dire, but only with the parties' consent. *Peretz v. United States*, 501 U.S. 923 (1991); *Gomez v. United States*, 490 U.S. 858 (1989). Consent from an attorney will suffice; the defendant's express consent is not required. *Gonzalez v. United States*, 553 U.S. 242, 253 (2008).

b. Presiding over closing argument. A magistrate judge may preside over closing arguments with counsel's consent: "Where the decision is one of trial tactics or legal strategy, defense counsel may waive the defendant's right to have an Article III judge preside over closing argument without the defendant's express, personal consent." *United States v. Gamba*, 541 F.3d 895, 903 (9th Cir. 2008).

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

permissible. *Allen v. United States*, 921 F.2d 78, 79-80 (6th Cir. 1990) (reading instructions to jury is a mere ministerial function).

d. Presiding over jury deliberations. Magistrate judges have been allowed to do the following:

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

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

(3) Answering jury's question. The Ninth Circuit has not ruled on whether a magistrate judge may answer a jury's question. *United States v. Foster*, 57 F.3d 727, 732 (9th Cir. 1995), *vacated in part on other grounds*, 133 F.3d 704 (9th Cir. 1998) (en banc). However, the Ninth Circuit has cited with approval an Eighth Circuit holding that a magistrate judge "may accept the jury's questions, communicate them to the absent district judge, and communicate the district judge's responses to the jury." *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994) (citation omitted).

e. Accepting jury's verdict. The trial judge should attempt to take the verdict in every case. However, accepting and filing a jury verdict without more is a ministerial subsidiary matter that does not require consent to a magistrate judge. *Foster*, 57 F.3d at 732. Nevertheless, "a jury poll that calls into question the jury's unanimity is . . . a critical stage of a criminal proceeding" and therefore requires the defendant's consent. *Gomez-Lepe*, 207 F.3d at 629-30. For that reason, the trial judge should attempt to obtain the consent of the parties in advance.

3. *Misdemeanor Trials*

A magistrate judge may preside over a class A misdemeanor trial only upon a defendant's express consent. 18 U.S.C. § 3401(b); *Peretz*, 501 U.S. at 933. Consent is not required in petty offense cases, i.e., class B misdemeanors, class C misdemeanors and infractions. 18 U.S.C. § 3401(b).

B. Civil Proceedings

In addition to the magistrate judge duties mentioned in § 1.7A, with the parties' consent, a magistrate judge may conduct a civil trial. *Gamba*, 541 F.3d at 902 (citing 28 U.S.C. § 636(a)); *see also Peretz,* 501 U.S. at 933.

1.8 Pretrial Order Governing Procedure at Trial (Civil)

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

Fed. R. Civ. P. 16 addresses pretrial orders, and many district courts have adopted local rules for the formation and use of pretrial orders. These rules often provide forms and spell out who has the responsibility for preparing the order. District courts have broad discretion to determine the preclusive effect of a final pretrial order regarding issues of law and fact at trial. *Miller v. Safeco Title Ins. Co.,* 758 F.2d 364, 369 (9th Cir. 1985).

1.9 Pretrial Order Governing Procedure at Trial (Criminal)

The use of pretrial orders in criminal cases is not addressed in the Federal Rules of Criminal Procedure, and they are not commonly used. While they can be useful in more complex cases, because of added constitutional considerations present in a criminal trial, such orders must typically be less rigid. Additionally, the Federal Rules of Criminal Procedure's discovery requirements are more limited than the broader scope of discovery permitted by the Federal Rules of Civil Procedure. Accordingly, the opportunity to restrict witnesses and documentary evidence through the use of a pretrial order is similarly limited.

1.10 Pre-Voir Dire Jury Panel Questionnaires

Case-specific prescreening and voir dire questionnaires are not routinely used. However, because "[t]he district judge has discretion in conducting voir dire," *United States v. Boise*, 916 F.2d 497, 504 (9th Cir. 1990), the use of a prescreening questionnaire may be considered when a lengthy trial is anticipated, certain biases may be at issue or there has been a great deal of pretrial publicity. *See Skilling v. United States*, 130 S. Ct. 2896, 2819-21 (2010) (holding that combination of pretrial questionnaires and voir dire "successfully secured" unbiased jurors). The questionnaire allows each prospective juror to state in writing, and under oath, any reason his or her service as a juror in a lengthy trial would cause undue hardship. Some questionnaires screen for prospective jurors who can be available for the anticipated length of the trial, others screen for the type of case, and others screen for a particular case. After a review of responses to the questionnaire, the court will excuse those prospective jurors whose responses are sufficient to show hardship or prejudice. *See United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007) (holding that district court did not abuse its discretion in dismissing prospective juror for cause based on prescreening questionnaire answers regarding juror's views of death penalty); *United States v. Candelaria-Silva*, 166 F.3d 19, 31 (1st Cir. 1999) (determining that district court did not abuse its discretion in dismissing jurors because their pretrial questionnaires indicated that jury service would have been undue hardship).

Prescreening should not exclude a discernible class of prospective jurors or result in a jury unrepresentative of a cross-section of the community. The main benefit of excusal based on the use of a prescreening questionnaire over excusal based on in-court voir dire is that the prospective juror is spared the inconvenience of coming to court. Even if prospective jurors who have completed prescreening questionnaires subsequently come to court, the questionnaires may allow a court to conduct voir dire more efficiently, having received answers to routine questions and/or case-specific questions relevant to challenges for cause.

Prejudice to the parties may be avoided by allowing counsel to

participate in drafting the questionnaire or to review the questionnaire before it is distributed to prospective jurors, and to review the answers to prescreening questionnaires and to object to the excusal of any particular juror or class of jurors. *See United States v. Layton*, 632 F. Supp. 176, 177 (N.D. Cal. 1986).

Confidentiality of the answers to questionnaires is not guaranteed. *See, e.g., Copley Press, Inc. v. San Diego Cnty. Superior Court*, 228 Cal. App. 3d 77, 84, 278 Cal. Rptr. 443 (1991) (press is constitutionally entitled to have access to at least some of the information contained in such questionnaires, although access is not absolute). *See also United States v. King*, 140 F. 3d 76, 81 (2d Cir. 1998) (stating that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest" (quoting *Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty.,* 464 U.S. 501, 510 (1984)). Public access to a potential juror's completed questionnaire may turn on whether the potential juror has been called to the jury box for oral voir dire. *See United States v. Bonds*, 2011 WL 902207, at *4 (N.D. Cal. 2011) (ruling that public only has legitimate interest in disclosure of questionnaires of potential jurors who have been called to jury box for oral voir dire). The court may redact certain information such as juror names in high profile cases, at least while trial is ongoing. *See id.* at *6. Even if not made available to the public, questionnaires should be retained for possible use by parties whose appeals include challenges to the manner in which the jury was selected.

Notes

Chapter Two: Jury Selection

Description:

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

Topics:

2.1 Qualifications of Federal Jurors

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

The determination of the qualifications of a juror, within the statutory limits, rests in the trial court and will not be overturned absent the showing of a clear abuse of discretion. *See United States v. Sferas*, 210 F.2d 69, 75 (7th Cir. 1954).

2.2 Voir Dire Regarding Pretrial Publicity

Due process guarantees a fair trial by a panel of impartial jurors. If pretrial publicity is so inflammatory and prejudicial that an impartial jury cannot be seated, due process requires that the district court transfer the action to another venue. *Hayes v. Ayers*, 632 F.3d 500, 507-08 (9th Cir. 2011); *see also* Fed. R. Crim. P. 21(a). There are two types of prejudice that require transfer: "presumed" or "actual." *Skilling v. United States*, 130 S. Ct. 2896, 2915, 2917 (2010) (holding that no presumption of prejudice arose and no actual prejudice infected jury that found defendant guilty of 19 counts and not guilty of 9 counts); *Hayes*, 632 F.3d at 508 (holding that negative pretrial publicity did not raise presumption of prejudice and jury was not actually prejudiced against defendant). Prejudice is "presumed" only in the most extreme circumstances, "'when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity'" about the case. *Id.* (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988)); *see also Skilling*, 130 S. Ct. at 2914-17 (distinguishing *Skilling* from prior cases in which Court found presumption of prejudice because of size and characteristics of community in which crime occurred, nature of information and images displayed in media and timing of trial). If the negative pretrial publicity is not extreme, the district court must still consider whether the pretrial publicity or community outrage results in a jury that is "actually prejudiced" against a defendant. *Id.* at 2917; *Hayes*, 632 F.3d at 510-11. To guard against actual prejudice, the district court must engage in extensive voir dire regarding the prospective jurors' exposure to pretrial publicity. *Skilling*, 130 S. Ct. at 2917-23 (discussing manner and extent of district court's voir dire examination); *Hayes*, 632 F.3d at 510-11 (noting that actual prejudice inquiry focuses on nature and extent of voir dire examination and prospective jurors' responses to it).

In cases involving little pretrial publicity, general questions about pretrial publicity addressed to the entire panel, followed by individual questioning of those who respond affirmatively to those inquiries, is sufficient when few prospective jurors have knowledge about the case. *United States v. Baker,* 10 F.3d 1374, 1403 (9th Cir. 1993),

overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000); *United States v. Giese*, 597 F.2d 1170, 1183 (9th Cir. 1979).

In cases involving a great deal of pretrial publicity, the district court should use a prescreening questionnaire to ascertain the extent to which prospective jurors have been exposed to that publicity. *See Skilling*, 130 S. Ct. at 2919-20 (finding that, as a whole, voir dire process that included initial screening questionnaire followed by individual voir dire of prospective jurors based on answers to questionnaire was sufficient to ensure defendant's jury was not infected with actual prejudice). For example, the questionnaire should allow each juror to state in writing, and under oath, which newspapers, television news shows or radio stations he or she regularly reads, watches or listens to, as well as to indicate whether he or she has heard anything about the case and whether that information came from television, radio, newspaper, magazines, the Internet or conversations with others. The district court should seek input from counsel to develop the questionnaire. *See id.* at 2909 & n.4 (describing how district court solicited questions from parties). After reviewing the prospective jurors' responses to the questionnaires and consulting with counsel for both sides, the district court may excuse certain jurors for cause based on their responses to the questionnaires. *See id.* at 2909. Counsel may agree to excuse certain jurors for cause based on their responses to the questionnaires. *See id.* (noting that parties agreed to exclude every prospective juror who said that preexisting opinion about Enron or defendants would prevent her from impartially considering evidence at trial).

The district court should conduct a careful individual voir dire of each remaining venireperson out of the presence of the other members of the panel. *See id*. at 2919; *Hayes*, 632 F.3d at 511-12 (affirming district court's finding that jury was not infected with actual prejudice after conducting individual voir dire regarding pretrial publicity). The district court should inquire about exposure to the publicity and the content of any stories that stood out in the prospective juror's mind, as well as make additional inquiries regarding questionnaire answers that suggest bias or cause for concern. *See Skilling*, 130 S. Ct. at 2910, 2919. Although the district

court has wide discretion to evaluate a prospective juror's impartiality, the district court may not simply take the jurors' subjective assessment of their impartiality at face value. *See id.* at 2918 (noting that trial court's appraisal of impartiality is "ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty"); *id.* at 2922-24 (rejecting defendant's argument that district court improperly accepted at face value jurors' promises of fairness); *Giese*, 597 F.2d at 1183.

At the time the district court examines each venireperson individually, the district court should caution that juror not to discuss the questions or responses given to the questions with any of the other prospective jurors in order to prevent the spread of any prejudicial information to other venirepersons.

2.3 Closed Proceedings Generally

Though criminal trials are presumptively open to the public, a court may order closure of a criminal proceeding if those excluded are afforded a reasonable opportunity to state their objections and the court articulates specific factual findings supporting closure. Such findings must establish the following: "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465-66 (9th Cir. 1990); *see United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007).

Regarding closed voir dire, *see* § 2.6.C.

2.4 Anonymous Juries

The provisions of 28 U.S.C. § 1863(b)(7) authorize the district court's plan for random jury selection to "permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names [of prospective jurors] confidential in any case where the interests of justice so require." The decision to use an anonymous jury is committed to the sound discretion of the judge. *See United States v. Thai*, 29 F.3d 785, 800-01 (2d Cir. 1994); s*ee also United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010) ("The right question is not *whether* names may be kept secret, or disclosure deferred, but *what justifies* such a decision.").

However, the First Amendment may confer a presumptive right to obtain the names of both jurors and prospective jurors prior to impanelment of the jury. *See United States v. Wecht,* 537 F.3d 222, 235 (3d Cir. 2008) (relying on *Press-Enter. Co. v. Superior Court of Cal., Riverside Cnty.*, 478 U.S. 1, 8-9 (1986)); s*ee also United States v. Bonds*, 2011 WL 902207, at *5-6 (N.D. Cal. Mar. 14, 2011). Therefore, a court that decides to keep the identity of jurors confidential should clearly state the interests it is protecting and its findings warranting confidentiality. *See Wecht,* 537 F.3d at 242 (concluding that district court had not sufficiently articulated how the presumptive right was overcome).

Although the judge must find that there is a strong reason to believe the jury needs protection to perform its factfinding function, *United States v. Fernandez*, 388 F.3d 1199, 1244 (9th Cir. 2004), or to safeguard the integrity of the justice system, *United States v. Shryock*, 342 F.3d 948, 971-72 (9th Cir. 2003), the judge need not conduct an evidentiary hearing on the subject. *United States v. Edmond*, 52 F.3d 1080, 1092 (D.C. Cir. 1995).

In determining whether to keep information from the public, a trial judge should consider not only First Amendment issues, but also a defendant's Sixth Amendment right to a public trial and the privacy interests of prospective jurors. *See Presley v. Georgia*, 558 U.S. 209 (2010); *Press-Enter. Co v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 510-13 (1984).

There are five nonexclusive factors to be considered to determine if the identity of jurors should be protected: (1) a party's involvement in organized crime; (2) a party's participation in a group with the capacity to harm jurors; (3) a party's past attempts to interfere with the judicial process; (4) the potential that, if convicted, a criminal defendant will suffer lengthy incarceration and substantial monetary penalties and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. *Fernandez,* 388 F.3d at 1244; *Shryock,* 342 F.3d at 971; *Edmond*, 52 F.3d at 1091; *see also United States v. Martinez*, 657 F.3d 811, 818 (9th Cir. 2011).

The court must take reasonable precautions to minimize prejudicial effects on a defendant in a criminal case and to ensure that his or her fundamental rights are protected. To minimize prejudicial effects, the court should provide the jurors with an explanation for the use of the anonymous jury. *United States v. Warman*, 578 F.3d 320, 344 (6th Cir. 2009). Examples of approved explanations include: protection from curiosity seekers, prevention of harassment from the media and insulation of the jury from party communication. *United States v. Talley*, 164 F.3d 989, 1002 (6th Cir. 1999) (finding proper court's explanation to jurors that their identities were being kept confidential to prevent media contact). Any explanation given should emphasize that it is not a reflection on the defendant. *See Shryock*, 342 F.3d at 972-73. In addition, the court should instruct the jurors that the reasons for having jurors remain anonymous have nothing to do with the guilt or innocence of the defendant. *See id.* To protect the defendant's fundamental rights, the court should ensure that voir dire is sufficient to identify fully any possible bias without requesting information that would identify the jurors. *See, e.g.*, *United States v. Childress*, 58 F.3d 693, 704 (D.C. Cir. 1995) (upholding anonymous jury given circumstances of case and precautions taken by court, including court's "searching voir dire" and extensive questionnaire).

The continuation of juror anonymity after the trial ends is not absolutely prohibited. "Ensuring that jurors are entitled to privacy and protection against harassment, even after their jury duty has ended, qualifies as [a strong governmental] interest in this circuit." *United States v. Brown*, 250 F.3d 907, 918 (5th Cir. 2001).

2.5 Attorney Participation in Voir Dire

Under both the criminal and civil rules (Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a)), direct attorney participation in the voir dire examination is discretionary with the court. *See, e.g., United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000). Many courts permit attorney voir dire. The extent of attorney participation varies greatly from court to court. Some courts permit attorneys to participate orally in voir dire, some permit attorney participation via written questions, and others use a combination of the practices. *See, e.g., Csiszer v. Wren*, 614 F.3d 866, 875 (8th Cir. 2010).

2.6 Voir Dire Issues

A. Overview

Voir dire in criminal cases developed under the common law as a natural component of the Sixth Amendment's impartial jury guarantee. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Because there is no constitutional right to peremptory challenges, *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988), questioning originally served to disclose actual bias. Now that the federal rules grant participants peremptory challenges, the scope of voir dire is broadened considerably to help parties intelligently exercise these challenges. *Swain v. Alabama*, 380 U.S. 202, 220-21 (1965). Regardless of the questions posed or challenges made to prospective jurors by the parties, however, the ultimate responsibility for impaneling an impartial jury rests with the trial judge, who retains significant discretion in crafting questions appropriate for the case at hand. *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991); *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). But this discretion is not unyielding. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* at 188.

B. Voir Dire Open to Public

Voir dire is part of the trial process that is open to the public pursuant to the First and Sixth Amendments. *Presley v. Georgia*, 558 U.S. 209 (2010). Whether or not a party has asserted a right to have the public in attendance, a trial court is required to take all reasonable measures to accommodate public attendance during voir dire. *Id*.

C. Closed Voir Dire

Generally, a court may not close criminal voir dire to the public. *Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cnty.,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"). Courts may consider the right of the defendant to a fair trial and the right of prospective jurors to privacy in determining whether or not to close voir dire proceedings.

In order to close the proceedings, a court must make specific findings that open proceedings would threaten those interests and that less restrictive alternatives to closure are inadequate. *Id.* at 510-11 ("presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). When there are legitimate privacy concerns, judges should inform the potential jurors of the general nature of sensitive questions to be asked and allow individual jurors to make affirmative requests to proceed at sidebar or in chambers. *Id.* at 512. Before a closure order is entered, members of the press and the public must be afforded notice and an opportunity to object to the closure. *Unabom Trial Media Coalition v. U.S. Dist. Court*, 183 F.3d 949, 951 (9th Cir. 1999); *United States v. Brooklier,* 685 F.2d 1162, 1167-68 (9th Cir. 1982).

D. Statements by Prospective Jurors—Risk of Infection of Panel

Caution should be exercised to ensure that the responses of a prospective juror do not infect the panel. Individual jurors may be questioned at sidebar to avoid this problem.

A jury panel's exposure to inflammatory statements made by a prospective juror requires, at a minimum, that the trial judge question the entire panel "to determine whether the panel ha[s] in fact been infected." *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998).

E. Criminal Voir Dire

1. *Juror Veracity*

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). A juror's lying during voir dire may warrant an inference of implied bias. *Id*. at 979. Simple forgetfulness does not fall within the scope of dishonesty. *United States v. Edmond*, 43 F.3d 472, 474 (9th Cir. 1994). "Whether a juror intentionally conceals or gives a misleading response to a question on voir dire about relevant facts in his or a relative's background may shed light on the ultimate question of that juror's ability to serve

impartially." *Fields v. Woodford*, 309 F.3d 1095, 1105-06 (9th Cir. 2002) (juror's omission of key facts during voir dire required hearing to determine whether juror had been intentionally misleading).

When confronted with a colorable claim of juror bias, a district court must investigate the circumstances. *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000).

2. *Areas To Be Covered*

"[A] defendant is entitled to a voir dire that fairly and adequately probes a juror's qualifications . . . ." *United States v. Toomey*, 764 F.2d 678, 683 (9th Cir. 1985). Specific questioning probing particular topics is required when topic involves a real possibility of prejudice (such as a topic on which it is commonly known the populace harbors strong feelings), but when a party suggests questions that do not involve such a topic, the proposing party must show that the questions are calculated to uncover actual and likely sources of prejudice. *United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991).

> a. Law enforcement officers. When important testimony is anticipated from a law enforcement officer, the court should inquire whether any prospective juror would be inclined to give more or less weight to an officer's testimony by virtue of the officer's position. *United States v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987).
>
> b. Government witnesses. The court should ask, or permit counsel to ask, the prospective jurors whether they know any of the government's witnesses. *United States v. Washington*, 819 F.2d 221, 224 (9th Cir. 1987); s*ee also United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993) ("Although a trial court abuses its discretion in failing to ask prospective jurors any questions concerning acquaintance with any government witnesses, [the case law] [n]either . . . requires disclosure of all witnesses [n]or directs the trial court to question veniremen about every possible government witness." (citation omitted)), *overruled on other grounds by United*

States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

c. Case participants. It is appropriate to inquire whether any prospective juror is acquainted with counsel, parties or any other prospective juror. Because bias is presumed only in extraordinary cases, there are no categories of relationships that mandate dismissal of a prospective juror. *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) (holding that bias is presumed only "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances").

d. Bias or prejudice relating to crime charged. A prospective juror's bias concerning a crime is not grounds for that individual to be excused, so long as the bias is such that "those feelings do not lead to a predisposition toward the prosecution or accused." *Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (citation omitted).

e. Bias or prejudice based on race. "[A]bsent some indication prejudice is likely to arise, or that the trial will have racial overtones," the district court is not required to inquire about racial prejudice. *United States v. Rosales-Lopez*, 617 F.2d 1349, 1354 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981). Nevertheless, it is advisable to make such an inquiry if requested by the defendant, and the trial court must do so if requested by the defendant in a case involving a violent crime when the perpetrator and the victim are of different races. *Rosales-Lopez*, 451 U.S. at 191-92.

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

g. Supplemental questions. "It is wholly within the judge's discretion to reject supplemental questions proposed by

> counsel if the voir dire is otherwise reasonably sufficient to test the jury for bias or partiality." *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir. 1991).

F. Civil Voir Dire

Many of the considerations in criminal cases also apply to civil cases.

1. *Juror Veracity*

A new civil trial is justified when a party demonstrates that (1) a juror failed to answer honestly a material question on voir dire, and (2) a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (in product liability trial, juror's failure to reveal that his son had been injured when truck tire exploded did not justify new trial). Failure to answer a question because of simple forgetfulness does not indicate a lack of impartiality and is not within the scope of dishonest answers under *McDonough*. *Edmond*, 43 F.3d at 474.

2. *Prospective Juror's Employment*

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

d. *Supplemental Questions*

It is within the trial court's discretion to reject supplemental questions proposed by counsel if the voir dire is otherwise adequate to test the prospective jurors for bias or partiality. *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir. 1998).

2.7 Challenges for Cause

A. In General

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

B. Law Governing

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

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

In a criminal case if a defendant, by exercising a peremptory challenge, cures the erroneous denial of a challenge for cause, the defendant has been deprived of no rule-based or constitutional right. *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000).

2.8 Hardship Excusals

Excusal for juror hardship is typically handled in connection with the court's jury plan or prescreening process (*see* Section 1.10). *See United States v. Calaway*, 524 F.2d 609, 616 (9th Cir. 1975) ("Ordinarily it falls to the jury clerks or commissioners to excuse jurors for hardship, a practice that has been approved by the courts"). However, the screening process can miss a legitimate ground for excusal, in which case the court should also assess potential juror hardships during voir dire and jury selection.

For example, prospective jurors are commonly asked whether there is anything that would make it difficult for them to participate as a juror. In response, a prospective juror may claim a disability, such as impaired vision or hearing; a physical limitation, such as an inability to sit for prolonged periods of time; or undue financial hardship. *See* 28 U.S.C. § 1866(c) (persons summoned for federal juries may be excused on a showing of "undue hardship or extreme inconvenience"); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946) ("It is clear that a federal judge would be justified in excusing a daily wage earner for whom service would entail an undue financial hardship.").

The court has broad discretion in determining whether a juror should be excused because of an undue hardship or extreme inconvenience. *See United States v. Barnette*, 800 F.2d 1558, 1568 (11th Cir. 1986); *United States v. Layton*, 632 F. Supp. 176, 178 (N.D. Cal. 1986) (citing 28 U.S.C. § 1866(c)(1)).

If an otherwise qualified prospective juror claims a disability, then the court should explore whether it can make a reasonable accommodation to address the condition. However, the court should ensure that the disability, even with the accommodation, will not materially affect the ability of any juror to fulfill the necessary obligations of a juror.

2.9 Peremptory Challenges

Peremptory challenges are not guaranteed by the federal Constitution. They are created exclusively by statute. *Rivera v. Illinois*, 556 U.S. 148, 157 (2009).

A. Civil

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

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

B. Criminal

1. *Number of Peremptory Challenges*

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

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

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

2. *Additional Peremptory Challenges–When Alternates To Be Impaneled*

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

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

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

3. *Additional Peremptory Challenges–Multiple Defendants*

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

2.10 *Batson* Challenges

A. In General

1. *Prosecution Peremptory Challenges*

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

2. *Criminal Defense Challenges*

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

3. *Civil Litigation*

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

4. *Standing*

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

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

In addition to those based on race, peremptory challenges based on gender violate the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994); *De Gross*, 960 F.2d at 1437-43. Peremptory challenges based on religion may also be improper, although there is no consensus. *Compare United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to religion), *with Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999) (no precedent exists dictating extension of *Batson* to religion).

Courts generally reject *Batson* challenges based on age, political ideology and membership in other definable classes. *United States v. Prince*, 647 F.3d 1257, 1262 (10th Cir. 2011) (*Batson* not applicable to groups with similar political or ideological beliefs); *Weber v. Strippit, Inc.,* 186 F.3d 907, 911 (8th Cir. 1999) (declining to extend *Batson* to peremptory challenges based on age); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (no *Batson* challenge based on obesity); *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) (no *Batson* challenge based on marital status); *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) (young adults are not a cognizable group for purposes of a *Batson* challenge).

B. *Batson* Procedure

1. *Three-Step Process*

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

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

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

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

See Johnson v. California, 545 U.S. 162, 168 (2005); *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006).

2. *Prima Facie Case*

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

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

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

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

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

3. *Opposing Party's Burden*

Once a prima facie case is established, the opposing party must offer facially nondiscriminatory reasons for the peremptory challenge. The trial court considers the persuasiveness of the opposing party's reasons only when, at the third step of the *Batson* procedure, it determines whether the moving party has carried its burden of proving purposeful discrimination. *United States v. Bauer*, 84 F.3d 1549, 1554 (9th Cir. 1996).

4. *Court's Duty*

The trial court has the duty to determine whether the party objecting to the peremptory challenge has established purposeful discrimination. This finding turns largely on the court's evaluation of the credibility of the justification offered for the peremptory challenge. *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011). A court

must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 94. When a challenger offers mixed motives (both permissible and impermissible reasons for exercising a peremptory challenge), the challenger must show the same decision would have been made absent improper motivation. *Kesser*, 465 F.3d at 373 (applying preponderance of the evidence standard).

5. *Timeliness of Batson Challenges*

A *Batson* challenge must be made as soon as possible during trial, preferably before the jury is sworn. *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir. 1996).

6. *No Specific Findings Required*

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

2.11 Number of Jurors and Alternate Jurors

A. Civil Trials

1. *Number of Jurors*

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

2. *Alternates*

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

3. *Unanimous Verdict*

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

B. Criminal Trials

1. *Number of Jurors*

Fed. R. Crim. P. 23(b) specifies that juries in criminal trials must consist of twelve members. The rule also provides that, at any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (a) the jury may consist of fewer than twelve persons; or (b) a jury of fewer than twelve persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

After the jury has retired to deliberate, the court may permit a jury

of eleven persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror. Fed. R. Crim. P. 23(b)(3).

2. *Alternates*

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

3. *Unanimous Verdict*

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

2.12 Dual Juries

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

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

Notes

Chapter Three: The Trial Phase

Description:

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

Topics:

3.1 Setting Trial Schedule—Options

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

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

3.2 Jury Admonitions

When the jury is first impaneled and sworn, it is recommended that the court instruct jurors concerning their conduct during trial. *See* 9TH CIR. CRIM. JURY INSTR. 1.8; 9TH CIR. CIV. JURY INSTR. 1.12. They should be advised not to conduct their own investigation or visit the scene of events involved or undertake any research, such as use of the Internet. *Id.* At appropriate times during the trial the court should remind the jurors not to discuss the case among themselves or allow anyone to discuss the case with them or read or listen to any media reports of the trial. *See* 9TH CIR. CRIM. JURY INSTR. 2.1; 9TH CIR. CIV. JURY INSTR. 1.12.

3.3 Preliminary Instructions and Orientation of the Jury

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

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

See 9TH CIR. CRIM. JURY INSTR., 1.1-1.13; 9TH CIR. CIV. JURY INSTR. 1.1A-1.19.

Preliminary jury instructions can be a basis for appeal. *United States v. Hegwood*, 977 F.2d 492, 495 (9th Cir. 1992); *see also United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006).

3.4 Notetaking by Jurors

The decision of whether to allow jurors to take notes is in the discretion of the trial judge. *United States v. Scott*, 642 F.3d 791, 797 (9th Cir. 2011). If notetaking is permitted, the jurors should be given a preliminary instruction on taking notes. 9TH CIR. CRIM. JURY INSTR. 1.10; 9TH CIR. CIV. JURY INSTR. 1.14.

The Committee recommends that the trial judge always provide a means for jurors to take notes.

If notetaking is permitted, the court should instruct the jurors to leave the notes in the jury room or courtroom when the court is not in session, where they will be kept secured.

3.5 Juror Questions of Witnesses During Trial

There may be occasions when a juror desires to ask a question of a witness, and the court has discretion in permitting or refusing to permit jurors to do so. *United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994); *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970) (no error by trial judge in allowing juror to submit question to court).

There are risks involved in allowing jurors to ask questions of witnesses. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985) ("[J]uror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable."). The *DeBenedetto* court explained the hazards of jury questioning and the reasons such questioning may not only be improper but also prejudicial to the point of necessitating a mistrial or reversal on appeal. Extreme caution should be exercised in permitting questions from the jury in criminal cases.

If the court permits juror questions, the court should take appropriate precautions. *See, e.g., United States v. Rawlings*, 522 F.3d 403, 408-09 (D.C. Cir. 2008) (compiling cases to extract best practices).

Practical Suggestions

In the event the judge allows jurors to submit questions for witnesses, the judge may consider taking the following precautions and using the following procedures:

1. The preliminary instructions should describe the court's policy on juror-submitted questions, including an explanation of why some questions may not be asked. All juror-submitted questions should be retained by the clerk as part of the court record whether or not the questions are asked.

2. At the conclusion of each witness's testimony, if a juror has a written question it is brought to the judge.

3. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room.

4. Counsel or the judge asks the question of the witness.

5. Counsel are permitted to ask appropriate follow-up questions.

6. The written questions are made part of the record.

3.6 Judges Examining Witnesses

A. Civil Jury Cases

A trial judge has the discretion to examine witnesses and call the jury's attention to important evidence. *Swinton v. Potomac*, 270 F.3d 794, 808 (9th Cir. 2001). Questions by the judge that aid in clarifying the testimony of witnesses, expedite the examination of witnesses or confine the testimony to relevant matters in order to arrive at the ultimate truth are proper so long as conducted in a nonprejudicial manner. *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir. 1984). Questions by a court indicating skepticism are proper when the witnesses are permitted to respond to the district court's expressed concerns to the best of their ability. *Id.* A judge must be careful, however, not to project to the jury an appearance of advocacy or partiality.

B. Criminal Jury Cases

The trial judge should exercise great caution in examining witnesses during a criminal trial, but his or her role is more than that of a moderator. *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001). The court may participate in the examination of witnesses for the purpose of clarifying the evidence, controlling the orderly presentation of evidence, confining counsel to evidentiary rulings and preventing undue repetition of testimony. *United States v. Scott*, 642 F.3d 791, 800 (9th Cir. 2011); *United States v. Allsup,* 566 F.2d 68, 72 (9th Cir. 1977). The court must be mindful, however, "that in the eyes of a jury, the court occupies a position of 'preeminence and special persuasiveness,'" and thus must avoid the appearance of giving aid to one side or the other. *Id.* at 72 (citation omitted). *See also Parker*, 241 F.3d 1114 at 1119 ("The judge may therefore 'participate in the examination of witnesses to clarify issues . . . .'") (citation omitted).

A trial judge deprives parties of a fair trial when the record reflects actual bias or if the judge's questions project an appearance of advocacy or partiality to the jury. *Scott*, 642 F.3d at 799. The court's discretion to supervise trials is broad, however, and reversal

will occur only when it abuses that discretion. *United States v. Marks*, 530 F.3d 799, 806 (9th Cir. 2008). When questioning occurs, the judge may deflect prejudice by instructing the jury not to infer any opinion from its questioning and reminding the jurors that they are the judges of the facts. *Parker,* 241 F.3d at 1119; *see also Swinton*, 270 F.3d 794 at 808.

That lenient standard notwithstanding, prejudicial judicial questioning has resulted in the reversal of convictions in several cases. *See, e.g., Allsup*, 566 F.2d at 72-73 (court's rehabilitation of a prosecution witness whose credibility had been seriously undermined by the defense constituted error that, when considered together with other errors, required new trial); *United States v. Pena-Garcia*, 505 F.2d 964, 967 (9th Cir. 1974) (judge threatened and intimidated witnesses and gave jury impression he thought defense witness was lying under oath); *United States v. Stephens*, 486 F.2d 915, 916 (9th Cir. 1973) (judge implied to jury that he thought defendant was guilty); *but see Scott*, 642 F.3d at 799-800 (reversal not required, despite judge's interrupting and admonishing defense counsel over 100 times).

3.7 Interpreters

A. Use and Competency

1. *Availability of Interpreter in Civil Actions*

Fed. R. Civ. P. 43(d) provides for the appointment of a court interpreter, with the determination of interpreter's fees and assessment of fees as costs in a civil action. In many civil actions the parties provide their own interpreters.

When an interpreter is presented by a party to a civil case, the court may wish to determine if the interpreter is qualified, and, if so, appoint that person as the court's interpreter in order to control fees and assess costs if appropriate under Fed. R. Civ. P. 43(d). If the suggested interpreter is not qualified, the court should appoint one of its own choosing pursuant to Fed. R. Civ. P. 43(d).

2. *Right of Criminal Defendant to Interpreter*

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

Pretrial documents affecting the defendant's rights, such as plea agreements and jury trial waivers, should be translated by a certified or otherwise qualified interpreter. *See United States v. Bailon-Santana*, 429 F.3d 1258, 1261-62 (9th Cir. 2005) (holding defendant's jury trial waiver was involuntary when waiver form was translated by lawyer, not by qualified interpreter, and trial court failed to conduct appropriate colloquy).

3. *Qualifications of Interpreter*

In cases instituted by the United States (both civil and criminal), the court must appoint a certified interpreter, or, if one is not "reasonably available," then an "otherwise qualified interpreter." 28 U.S.C. § 1827(d)(1). Otherwise qualified interpreters include

"professionally qualified interpreters," who must satisfy one of four prerequisites with sufficient documentation. *See* 5 Guide to Judiciary Policy § 320.20.20 (describing requisites for "professionally qualified interpreters"). If a professionally qualified interpreter is not available, the court may qualify an interpreter using Fed. R. Evid. 604. *Bailon-Santana*, 429 F.3d at 1261 (holding that lawyer, who professed fluency in Spanish, was not qualified an interpreter because trial court did not employ Fed. R. Evid. 604 methodology used for qualifying expert witness (*see* Fed. R. Evid. 702)).

When using anyone other than a certified interpreter, the trial court should make a record both about the unavailability of a certified interpreter and about the substitute interpreter's status as professionally qualified or as qualified under Fed. R. Evid. 604. The court should also invite the parties to stipulate to the interpreter's qualifications.

4. *Competence of Interpreter*

Any determination as to the competence of an interpreter rests with the trial judge. In making that determination, the court should consider whether the interpreter is federally certified by the Administrative Office of the U.S. Courts. During trial, counsel and the court should be informed of any difficulty with an interpreter. The judge must then decide whether to retain or replace the interpreter. *See United States v. Anguloa*, 598 F.2d 1182, 1184 (9th Cir. 1979). Complaints directed toward an interpreter by a party may require that the trial court conduct an evidentiary hearing. *Chacon v. Wood*, 36 F.3d 1459, 1465 (9th Cir. 1994).

B. Translations of Disputed Documents

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

C. Necessity of Oath

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

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

D. Cautionary Instruction to Bilingual Jurors

There are model instructions regarding the obligation of bilingual jurors to accept the translation given by the federally certified court interpreter. *See* 9TH CIR. CIV. JURY INSTR. 1.16; 9TH CIR. CRIM. JURY INSTR. 1.12.

3.8 Restrictions on Cross-Examination

A. In General

Although within its discretion, the court in criminal cases should exercise extreme caution in limiting cross-examination. In criminal cases a restriction on cross-examination can run afoul of the Confrontation Clause if it "limits relevant testimony and prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness." *United States v. Urena*, 659 F.3d 903, 907-08 (9th Cir. 2011).

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

The court has discretion to limit cross-examination in order to preclude repetitive questioning when it determines that a particular subject has been exhausted. *United States v. Scott*, 642 F.3d 791, 796 (9th Cir. 2011) (district court did not abuse discretion in limiting repetitive testimony "far afield of the issues in the case"). Cross-examination may also be limited to avoid extensive and time-wasting exploration of collateral matters. The trial court has the duty to control cross-examination to prevent an undue burdening of the record with cumulative or irrelevant matters. This general duty includes a specific duty to prevent counsel from confusing the jury with a proliferation of details on collateral matters. *United States v. Weiner*, 578 F.2d 757, 766 (9th Cir. 1978).

B. Scope of Redirect and Recross-Examination

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

3.9 Managing Exhibits

The practices and policies for managing and handling exhibits vary among courts. The MANUAL FOR COMPLEX LITIGATION provides a discussion of the techniques that may be used in the orderly and illuminating presentation of exhibits to the court and jury. *See* Fed. Judicial Ctr., MANUAL FOR COMPLEX LITIGATION §§ 12.13, 12.32 (4th ed. 2004).

The court should avoid sending certain admitted exhibits into the jury deliberation room, such as toxic substances and chemicals, contraband drugs, firearms and currency. These exhibits can be viewed in the courtroom prior to or during deliberations, or in the jury room pursuant to court direction. Firearms, ammunition clips or cylinders should be rendered safe or inoperable for trial. If toxic exhibits must be handled by the jury, protective garments, such as surgical-type, disposable gloves can be provided, or the exhibits can be placed in sealed containers.

On occasion, a trial may involve exhibits containing classified information. If so, it is important for the court to coordinate management of that information with the Classified Information Security Officer from the Litigation Security Group of the United States Department of Justice.

3.10 Summaries

A. Summary Exhibits and Charts

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

1. *Admission as Evidence*

The admission of summary exhibits and charts into evidence is governed by Fed. R. Evid. 1006, which allows the introduction of charts, summaries or calculations of "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court." Fed. R. Evid. 1006. The party seeking admission of a summary exhibit or chart must show that originals or duplicates of the underlying materials were "made available for examination or copying, or both, by other parties at a reasonable time and place," Fed. R. Evid. 1006, and that the underlying materials are admissible in evidence. *United States v. Rizk*, 660 F.3d 1125, 1130-31 (9th Cir. 2011). The underlying materials need not be admitted into evidence, *id.*, but the court may order their production. Fed. R. Evid. 1006. Rule 1006 does not encompass summaries of previously admitted oral testimony. *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

2. *Demonstrative (Illustrative) Exhibits and Materials*

Exhibits or charts summarizing testimony or documents already in evidence are merely illustrative and are not evidence themselves. Demonstrative materials used only as testimonial aids should not be admitted into evidence, permitted in the jury room or otherwise used by the jury during deliberations. *Wood*, 943 F.2d at 1053-54 (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984); *United States v. Abbas*, 504 F.2d 123, 125 (9th Cir. 1974)); *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980). The court may consider informing the jury that such exhibits or charts will not be available during deliberations. In addition, the court should give cautionary instructions to the jury when summary exhibits or charts are used for

demonstrative purposes. These instructions may be issued when the summary exhibit or chart is introduced, during final instructions, or both. *See Soulard*, 730 F.2d at 1300; 9TH CIR. CIV. JURY INSTR. 2.12; 9TH CIR. CRIM. JURY INSTR. 4.15. The court may wish to include in the pretrial order a requirement that summary exhibits or charts be produced in advance of trial.

B. Summary of Testimony

A summary of oral testimony as opposed to documentary evidence, whether by an expert or a nonexpert, is disfavored. However, such a summary may be admissible in exceptional cases under Fed. R. Evid. 611(a). The court should "exercise reasonable control over the mode . . . of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time." *Baker*, 10 F.3d at 1411-12 (permitting nonexpert summary testimony was not abuse of discretion when court required government to lay foundation for summary evidence outside jury's presence, continued trial for over one week to give defense time to examine materials, gave limiting instructions that witness's testimony was not admissible as substantive evidence and invited defense counsel to present summary witnesses, and when defense thoroughly cross-examined witness); *accord United States v. Olano*, 62 F.3d 1180, 1204 (9th Cir. 1995) (finding that district court did not abuse its discretion in permitting certified public accountant who was case agent for bank fraud investigation to give nonexpert summary testimony of evidence presented by government's preceding witnesses); *United States v. Cuevas*, 847 F.2d 1417, 1428 (9th Cir. 1988) (upholding admission of summary testimony by DEA and customs agent despite fact that agent relied on hearsay in his testimony because "the evidence of narcotics and currency transaction conspiracies" for which defendant was charged was "overwhelming, even absent the agent's testimony," and thus "any possible prejudice was harmless"); *United States v. Marchini*, 797 F.2d 759, 765-66 (9th Cir. 1986) (finding that district court did not abuse its discretion by permitting expert summary testimony because agent was qualified as expert, his summary was based on evidence previously adduced at trial, and he "was cross-examined by the defendant as to the basis of his testimony").

C. Summary Witness Using Charts and Exhibits

Summary witnesses may use charts and summary exhibits for illustrative and demonstrative purposes, provided the offering party lays a foundation, the opposing party has had an opportunity to review the charts and summary exhibits, the opposing party has had an opportunity to cross-examine the summary witness, and the court gives appropriate limiting instructions that such charts and exhibits as well as the summary testimony are not admissible as substantive evidence. *See Olano*, 62 F.3d at 1204; *Baker*, 10 F.3d at 1412. The Ninth Circuit has cautioned, however, that when the summary witness is summarizing previous oral testimony, the charts and summary exhibits are more appropriately presented by counsel during closing argument. *Baker*, 10 F.3d at 1412.

D. Summaries of Evidence by Counsel

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

E. Judicial Comment on the Evidence

It is strongly recommended that the court not comment on the evidence. If the court comments on the evidence, great caution should be exercised in doing so. *Quercia v. United States*, 289 U.S. 466, 469-70 (1933); *see also Rodriguez v. Marshall*, 125 F.3d 739, 749 (9th Cir. 1997). If the court comments on the evidence, the court should take care to "make[] clear to the jury that all matters of fact are submitted to their determination." *Navellier v. Sletten*, 262 F.3d 923, 943 (9th Cir. 2001). Judges must avoid the appearance of advocacy or partiality. *United States v. Sanchez-Lopez*, 879 F.2d 541, 552 (9th Cir. 1989); *see also United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001). Nor may a judge comment on a witness's credibility if such credibility is a crucial factor in the case. *Sanchez-Lopez*, 879 F.2d at 552. Reversal is required if a judge expresses his or her opinion on an ultimate issue of fact in front of the jury or argues for one of the parties. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991). Judges should avoid making prejudicial remarks,

especially in criminal cases. For instance, a judge may not comment on a criminal defendant's guilt. *United States v. Wills*, 88 F.3d 704, 718 (9th Cir. 1996). In sum, "[j]udicial comments must be aimed at aiding the jury's fact finding duties rather than usurping them." *United States v. Stephens*, 486 F.2d 915, 917 (9th Cir. 1973).

3.11 Recordings and Transcripts

A. Recordings

"A recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy." *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999) (citations omitted); *United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001) (citations omitted). In ruling on the admissibility of recordings, courts have considered whether: (1) the recording device was capable of taking the conversation now offered in evidence; (2) the operator of the device was competent to operate it; (3) the recording is authentic and correct; (4) changes, additions or deletions have been made to the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *See, e.g.*, *United States v. Oslund*, 453 F.3d 1048, 1054-57 (8th Cir. 2006). No single factor or set of factors is dispositive; rather, "the paramount purpose of laying a foundation is to ensure the accuracy of the evidence in question." *United States v. Green*, 175 F.3d 822, 830 (10th Cir. 1999).

B. Transcripts of Recordings

1. *Generally Inadmissible*

A transcript of a recording is generally not admissible evidence and may only be used to assist the jury as it listens to the recording. *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (the recording is the evidence to be considered while the transcript is merely an aid). Immediately before the recording is played, it is recommended that a limiting instruction be given so that the jury is reminded that the recording, not the transcript, is the evidence, and that they should disregard anything in the transcript that they do not hear. *See* 9TH CIR. CIV. JUR. INSTR. 2.5 and 9TH CIR. CRIM. JUR. INSTR. 2.7; *see also United States v. Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004) (court instructed jury that transcripts were only aids to understanding and that recordings themselves were evidence).

The district court's decision to allow transcripts to be used as aids in listening to recordings is reviewed for abuse of discretion. *Delgado*, 357 F.3d at 1070 "Generally, the Court [of Appeals]

reviews the following steps taken to ensure the accuracy of the transcripts: (1) whether the court reviewed the transcripts for accuracy; (2) whether defense counsel was allowed to highlight alleged inaccuracies and to introduce alternative versions; (3) whether the jury was instructed that the tape, rather than the transcript, was evidence; and (4) whether the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations." *Rrapi*, 175 F.3d at 746 (citation omitted). *Accord Delgado*, 357 F.3d at 1070-71. However, when the district court did not review a transcript for accuracy but nevertheless permitted the jury to review the transcript while listening to a tape recording involving the defendant, it was not an abuse of discretion if the defendant "was allowed to highlight alleged inaccuracies . . . ; the jury was instructed that the tape, rather than the transcript, was evidence; and the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations." *Delgado*, 357 F.3d at 1071.

2. *Exceptions*

Pursuant to Fed. R. Evid. 1004, a transcript of a recording may be admissible if:

> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

3. *Foreign Language Recording*

When a foreign language recording has been translated into a transcript, the usual admonition that the recording and not the transcript is the evidence is not only nonsensical, but also has the

potential for harm if the jury includes bilingual jurors. *Rrapi*, 175 F.3d at 746; *Franco*, 136 F.3d at 626; *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995). If the accuracy of the translated transcript is not an issue, the jury must be instructed that the translated transcript is the evidence, not the foreign language spoken in the recording. *See* 9TH CIR. CIV. JUR. INSTR. 2.6; 9TH CIR. CRIM. JUR. INSTR. 2.8; *Franco*, 136 F.3d at 626 (jury properly instructed that it must accept translation of foreign language recording when accuracy of translation is not in issue); *Fuentes-Montijo*, 68 F.3d at 355-56. The court should encourage the parties to produce an official or stipulated transcript of the foreign language recording that satisfies all sides. *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985); *United States v. Wilson*, 578 F.2d 67, 69-70 (5th Cir. 1978). If the parties are unable to do so, then they should submit competing translations of the disputed passages, and each side may submit evidence supporting the accuracy of its version or challenging the accuracy of the other side's. *Cruz*, 765 F.2d at 1023; *Wilson*, 578 F.2d at 70; *Franco*, 136 F.3d at 626. When the accuracy of the translated transcript is disputed, the jury should be instructed that it must decide whether and to what extent a translated transcript is accurate based on all the evidence in the case. *Franco*, 136 F.3d at 626; 9TH CIR. CIV. JUR. INSTR. 2.6A; 9TH CIR. CRIM. JUR. INSTR. 2.8A. Regardless of whether the accuracy of the translated transcript is an issue, a juror cannot rely on any knowledge the juror may have of the foreign language spoken on the recording. *Fuentes-Montijo*, 68 F.3d at 355; 9TH CIR. CIV. JUR. INSTR. 2.6A; 9TH CIR. CRIM. JUR. INSTR. 2.8A.

C. Sending Recordings or Transcripts to Jury Room

See § 5.1.D for discussion.

3.12 Jury Examination of Demonstrative Evidence

A. Jury View of Scene

1. *Discretionary*

No specific federal rule addresses an inspection of the premises or place involved in the action or the scene of the crime. Federal courts recognize the inherent power of the trial court to permit a view or inspection. *See, e.g.*, *N.W. Nat'l Cas. Co. v. Global Moving & Storage Co.*, 533 F.2d 320, 323 (6th Cir. 1976); *Gunther v. E.I. Du Pont De Nemours & Co.*, 255 F.2d 710, 716 (4th Cir. 1958); *Fitzpatrick v. Sooner Oil Co*., 212 F.2d 548, 551 (10th Cir. 1954). "It is well established that the granting or denial of a motion for a jury view of premises rests in the discretion of the trial judge and is reviewable only for abuse." *Hughes v. United States*, 377 F.2d 515, 516 (9th Cir. 1967).

When ruling on motions for a jury view of the scene, courts have considered the following factors: (1) whether the view will be cumulative of other evidence (Fed. R. Evid. 403; *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 958 (5th Cir. 1979)); (2) whether the view will incur unwarranted delay and inconvenience (*Hametner v. Villena*, 361 F.2d 445, 445-46 (9th Cir. 1966)); (3) whether the view will expose the jury to prejudicial comments or conditions (*Lopez v. Thurmer*, 573 F.3d 484, 494-96 (7th Cir. 2009)); (4) whether the view has changed in appearance since the event in question, although that will not necessarily bar a jury view of the scene (*Dugas v. Coplan*, 506 F.3d 1, 12-13 (1st Cir. 2007); *N.W. Nat'l Cas. Co.*, 533 F.2d at 323); and (5) whether the view will invite jury members to tamper or experiment with the site, although this alone is not sufficient ground for refusing to permit the view (*Clemente v. Carnicon-P.R. Mgmt. Assocs., L.C.*, 52 F.3d 383, 387 n.4 (1st Cir. 1995), *abrogated on other grounds by United States v. Gray*, 199 F.3d 547, 548 (1st Cir. 1999)).

2. *Procedure*

When a jury view is desired, counsel should request it as early as possible. Opposing counsel should be afforded an opportunity to object. *Clemente*, 52 F.3d at 386. Any request for a view should be made outside the presence of the jury. *Fitzpatrick*, 212 F.2d at 551.

The trial judge and court reporter should be present during the view. *Gray*, 199 F.3d at 550. The court should also secure one or more jury officers to accompany the jury to ensure compliance with the court's order. Counsel should be given the opportunity to attend the view, although limits may be set on counsel's interaction with the subject matter of the view and with the jurors. *Id*. In a criminal case, the defendant should be present at a view, but the absence of a defendant does not necessarily violate the defendant's constitutional rights. *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *see also Devin v. DeTella*, 101 F.3d 1206, 1208 (7th Cir. 1996) ("The lesson of *Snyder* is that, if in any given case the exclusion of the defendant from a jury view is found to be a deprivation of due process, it is not because the Constitution guarantees the defendant an absolute right to be present; it is only because his absence, under the particular circumstances of his case, can be said to have denied him a fair proceeding.").

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

3. *Admissible Evidence*

The courts are divided over whether a view of the premises is evidence in the case. The trend is to allow jury views as evidence. *Gray*, 199 F.3d at 548-50; *United States v. Harris*, 141 F. Supp. 418, 419-20 (S.D. Cal. 1955) (holding that view of premises is evidence and that motion for view should be granted during trial and not deferred until conclusion of trial). The Tenth Circuit has best articulated the reason for this trend in *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992). It stated that a court should simply allow the view of the premises as evidence because the distinction between a viewing as a demonstrative aid and as admissible evidence "is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence. The United States Supreme Court has stated that the 'inevitable effect [of a view] is that of evidence no matter what label the judge may choose to give it.'" *Id.* (quoting *Snyder*, 291 U.S. at 121). *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1267 (9th Cir. 2001) (Ninth Circuit

recognized that judge's site visit improperly exposed him to factual evidence). For a jury view or inspection to be admissible evidence, precautionary measures—such as judicial oversight and limitations on the interaction between counsel, the subject of the view, and the jurors—should be taken to minimize the problems of supervising jurors outside the courtroom. *Gray*, 199 F.3d at 550.

B. Jury Examination of Other Demonstrative Evidence

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

3.13 Incompetent Jurors; Late or Missing Jurors

A. Civil

"During trial or deliberation, the court may excuse a juror for good cause." Fed. R. Civ. P. 47(c); *United States v. Gay*, 967 F.2d 322, 324 (9th Cir. 1992). A trial court's "need to manage juries, witnesses, parties, and attorneys, and to set schedules" are factors that can outweigh a party's right to a particular jury. *Id.* (citing *United States v. Jorn*, 400 U.S. 470, 479-80 (1971)). Although "[s]ickness, family emergency or juror misconduct that might occasion a mistrial are examples of 'appropriate grounds' for excusing a juror" (Fed. R. Civ. P. 47(c) advisory committee's note 1991 amendment), the judge's discretion is not limited to those scenarios. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9th Cir. 1995) (discussing removal of jurors due to scheduling conflicts, business trips and planned vacations). However, "it is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict." Fed. R. Civ. P. 47(c) advisory committee's note 1991 amendment. Before excusing a juror, the court should determine the basis for the actions and discuss the matter with the lawyers on the record.

B. Criminal

In a criminal case, the trial judge makes the determination as to whether to substitute alternates for sitting jurors who "are unable to perform or who are disqualified from performing their duties." Fed. R. Crim. P. 24(c)(1).

The trial court may remove a juror and replace the juror with an alternate whenever facts convince the judge that the juror's ability to perform his or her duties as a juror has been impaired. *United States v. Jones*, 534 F.2d 1344, 1346 (9th Cir. 1976) (juror's drunkenness); *see United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995) (trial court acted within its discretion in removing juror who was absent from last day of two-week trial due to child's illness of uncertain duration). The missing or late juror who is absent from court for a period sufficiently long to interfere with the reasonable dispatch of business may be the subject of dismissal. *See Gay*, 967 F.2d at 325 (9th Cir. 1992) ("Whether a juror's absence is sufficiently disruptive to warrant removal is thus a function of the managerial complexity of the case, the flexibility of the court's and parties'

schedules, and the availability of witnesses and other evidence.") Although a hearing may not be required, it is advisable for the court to make an adequate record. *See United States v. Lustig*, 555 F.2d 737, 745 (9th Cir. 1977).

3.14 Juror Exposure to Extrinsic Influences

A. Categories of Extrinsic Influences

A jury should reach a verdict based on evidence admitted at trial. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir. 2011). The cases draw a distinction between a juror's exposure to extrinsic evidence and *ex parte* contacts with one or more jurors that do not include imparting information that might bear on the case. *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006).

If a juror has been exposed to extraneous material, then the trial court should grant a new trial if there is a reasonable possibility that the material could have affected the verdict. *See Montes*, 628 F.3d at 1187-88 (discussion of multi-factor test); *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998). A court examines whether there is "a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning." *Montes*, 628 F.3d at 1190 (citation omitted) (collecting cases). The inquiry is objective, and the court is not required to ascertain whether the extrinsic evidence actually influenced a juror. *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002).

If a juror has been exposed to improper *ex parte* contact that does not pertain to any fact in controversy or applicable law, the trial court should grant a new trial only if the defendant establishes actual prejudice. *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988). When there has been improper contact with a juror or any form of jury tampering, whether direct or indirect, the Ninth Circuit applies a presumption of prejudice when the contact is possibly prejudicial or coercive. *United States v. Stinson*, 647 F.3d 1196, 1216 (9th Cir. 2011); *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906-07 (9th Cir. 2000). *See* §§ 5.2.B and 6.2.B and D.

Although the precedents are mostly in criminal cases, the same rules apply in civil cases. *Sea Hawk Seafoods,* 206 F.3d at 906.

B. Evidentiary Hearing

Ordinarily, a trial court should hold an evidentiary hearing "at which the court hears admissible juror testimony and determines 'the precise nature of the extraneous information.'" *Montes*, 628 F.3d at 1187. However, an evidentiary hearing is not always mandated. In determining whether an evidentiary hearing is warranted, "the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *Id.* at 1187-88 (citation omitted); *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). A trial court may consider only evidence admissible under Fed. R. Evid. 606(b). "Under that rule, a juror may testify as to '*whether* extraneous prejudicial information was improperly brought to the jury's attention,' but not as to 'any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith.'" *Montes*, 628 F.3d at 1188 (quoting Fed. R. Evid. 606(b)).

When the case involves an *ex parte* contact that does not pertain to any fact in controversy or applicable law, the trial court "upon finding a reasonable possibility of prejudice, must hold a fair hearing." *Rosenthal*, 454 F.3d at 949. A "reasonable possibility" of prejudice does not arise when a court or its staff shows a "courtesy" to a juror by providing the juror a ride to a bus stop, such service was offered by the judge in open court and the defendant, who claimed his due process rights were violated, failed to object. *United States v. Velasquez-Carbona*, 991 F.2d 574, 576 (9th Cir. 1993).

3.15 Removal of Counts or Defendants (Criminal)

Granting a motion for acquittal pursuant to Fed. R. Crim. P. 29 may affect the trial as to the remaining defendants and/or counts, because evidence admitted relating to a discharged defendant or count might not otherwise have been admitted. Motions for mistrial may be made on the ground that the discharged defendant or count should not have been before the trier of fact and a fair trial cannot be had. *United States v. DeRosa*, 670 F.2d 889, 897 (9th Cir. 1982).

When a codefendant in a joint trial enters a plea, is severed or is dismissed after trial has commenced, 9TH CIR. CRIM. JURY INSTR. 2.14 should be given. Similarly, when one or more counts is dismissed after trial has commenced, 9TH CIR. CRIM. JURY INSTR. 2.13 should be given. Before giving either instruction, a court should seek counsel's agreement to the instruction.

3.16 Curative Instructions

A. During Trial

A curative instruction is of particular importance when a serious matter has occurred in the jurors' presence and an admonition to disregard is needed from the court. A strong instruction promptly given may save a case that otherwise would have to be retried. Juries are presumed to follow curative instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). However, "[t]here are some extreme situations in which curative instructions will not neutralize the prejudice when evidence is improperly admitted." *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997) (citations omitted.)

B. General Jury Instructions

In addition to any curative instructions given during trial, it is advisable to include an appropriate "What is Not Evidence" instruction among the instructions given at the close of the case. *See* 9TH CIR. CRIM. JURY INSTR. 3.7; 9TH CIR. CIV. JURY INSTR. 3.3.

3.17 Mini-Arguments During Trial

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

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

It is recommended that mini-arguments be used only when all parties stipulate to their use.

3.18 Criminal Defendant's Testimony

A. Defendant's Right to Testify

Although a defendant's right to testify is well established, *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), a defendant must assert the right to testify before the jury has reached a verdict. *See United States v. Pino-Noriega*, 189 F.3d 1089, 1095-96 (9th Cir. 1999). If the defendant does not testify, use 9TH CIR. CRIM. JURY INSTR. 3.3 . If the defendant testifies, use 9TH CIR. CRIM. JURY INSTR. 3.4.

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

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

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

3.19 Permitting Government to Reopen After Motion for Judgment of Acquittal

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

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

3.20 Closing Argument

A. In General

Lawyers are entitled to argue reasonable inferences from the evidence. *See United States v. Young*, 470 U.S. 1, 9 n.7 (1985); *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005) (noting that prosecutors have "reasonable latitude to fashion closing arguments").

B. Duty to Respond to Objectionable Closing Argument

To preserve the integrity of the trial, the trial judge has a duty to take prompt and affirmative action to stop professional misconduct, and "the overriding interest in the evenhanded administration of justice requires that [the appellate court] accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by [an] improper comment." *Arizona v. Washington*, 434 U.S. 497, 511 (1978). The court has a duty to dispel prejudice from the government's argument. *See Allen v. Woodford*, 395 F.3d 979, 997-98 (9th Cir. 2005); *United States v. Rodrigues,* 159 F.3d 439, 450-51 (9th Cir. 1998), *amended by* 170 F.3d 881 (9th Cir. 1999) (when court did not "rebuke" government's counsel for "gratuitous attack on the veracity of defense counsel," it took inadequate steps to dispel prejudice). Although counsel bears responsibility to object when necessary, "even in the absence of objections . . . , a trial judge should be alert to deviations from proper argument and take prompt corrective action as appropriate." *United States v. Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2011); *see also Igo v. Coachmen Indus., Inc.*, 938 F.2d 650, 654 (6th Cir. 1991) ("trial court cannot sit quietly while counsel inflames the passions of the jury with improper conduct, even if opposing counsel does not object"). Such action "may neutralize the damage by admonition to counsel or by appropriate curative instructions to the jury." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990).

C. Response to Objectionable Closing Argument

Curative instructions and admonishment of counsel from trial courts play a crucial role in correcting objectionable closing arguments. "When prosecutorial conduct is called in question, the issue is whether, considered in the context of the entire trial, that

conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." *Simtob*, 901 F.2d at 806 (citing *Young*, 470 U.S. at 11); *see also United States v. Wright*, 625 F.3d 583, 613 (9th Cir. 2010) (the question is "whether it is more probable than not that the prosecutor's conduct materially affected the fairness of the trial"). "To determine whether prosecutorial misconduct has deprived a defendant of a fair trial, [courts] look to the substance of any curative instructions, and the strength of the case against the defendant absent the misconduct." *Sanchez*, 659 F.3d at 1257 (citation omitted). To warrant a mistrial, a prosecutor's closing argument must rise to the level of plain error. *United States v. Bagley*, 772 F.2d 482, 495 (9th Cir. 1985); *see also Simtob*, 901 F.2d at 806 (prosecutorial misconduct invites reversal if it appears more probable than not that alleged misconduct affected jury's verdict).

Examples of improper argument include expressing personal opinions about defendant's guilt; vouching for witnesses; commenting on a criminal defendant's failure to testify; misstating the evidence; appealing to juror sympathy, passion or prejudice; and urging jurors to convict a criminal defendant to protect community values, preserve civil order or deter future lawbreaking.

D. Admonishment of Counsel

When counsel makes an improper argument, the court should admonish counsel and/or give the jury an appropriate curative instruction. *United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997) (prosecutor's unimpeded improper vouching for witness during questioning and summation required reversal); *United States v. Hoskins*, 446 F.2d 564, 565 (9th Cir. 1971).

E. Curative Jury Instructions

When a court gives a curative instruction to the jury, the instruction should specifically address the improper argument, rather than state a boilerplate rule regarding evaluation of evidence. *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992); *Simtob*, 901 F.2d at 806. For example, a belated instruction that the jurors "are the sole judges of the credibility of the witnesses" was insufficient to neutralize the harm caused when the prosecutor vouched for government witnesses. *Kerr*, 981 F.2d at 1053. Likewise, a generic instruction "advising a jury that lawyers' statements are not evidence is not equivalent to advising it to consider only the facts of the

immediate case, rather than the possible societal consequences of its ruling." *Sanchez*, 659 F.3d at 1258.

F. Time Limits

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

Chapter Four: Jury Instructions

Description:

This chapter contains materials dealing with instructing the jury.

Topics:

4.1 Duty of Judge

"The district court must formulate jury instructions so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Abromson v. Am. Pac. Corp.*, 114 F.3d 898, 901 (9th Cir. 1997); *see also White v. Ford Motor Co.,* 312 F.3d 998, 1012 (9th Cir. 2002), *amended on other grounds,* 335 F.3d 833 (9th Cir. 2003). Nonetheless, the district court has substantial latitude in tailoring jury instructions and will not be reversed absent abuse of discretion. *See Josephs v. Pac. Bell*, 443 F.3d 1050, 1065 (9th Cir. 2006); *United States v. Franklin*, 321 F.3d 1231, 1240-41 (9th Cir. 2003). Thus, a party is not entitled to any particular form of instruction, *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1051-52 (9th Cir. 1998), or to the precise wording of a proposed instruction, *United States v. Romero-Avila*, 210 F.3d 1017, 1023 (9th Cir. 2000); *Pavon v. Swift Transp. Co., Inc.,* 192 F.3d 902, 907 (9th Cir. 1999).

A party is not entitled to a jury instruction that is unsupported by the evidence. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1064 (9th Cir. 2008); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

In considering a party's request to give jurors an instruction that defines a common word, the trial court should take into account "the obvious, almost banal, proposition that the district court cannot be expected to define the common words of everyday life for the jury." *United States v. Somsamouth*, 352 F.3d 1271, 1275 (9th Cir. 2003) (in criminal prosecutions for making false representations to Social Security Administration about defendant's ability to work, it was not error for trial court to refuse to define "work"). *See United States v. Shryock,* 342 F.3d 948, 986 (9th Cir. 2003) (the district court "need not define common terms that are readily understandable to the jury").

4.2 Submission of Instructions

Fed. R. Crim. P. 30 and Fed. R. Civ. P. 51 govern instructions to juries in criminal and civil cases, respectively. Both rules provide that, at the close of the evidence or at an earlier time that the court reasonably sets, a party may file a written request that the court instruct the jury on the law as specified in the request. Fed. R. Civ. P. 51(a)(2) also allows a party to file requests for instructions after the close of the evidence on issues that could not reasonably have been anticipated at an earlier time set for requests, or, with the court's permission, on any issue. Although Fed. R. Crim. P. 30 does not include equivalent language expressly permitting requests during trial, "[t]he rule does not preclude the practice of permitting the parties to supplement their requested instructions during trial." Fed. R. Crim. P. 30 advisory's committee note. In any trial, civil or criminal, the court should be careful to consider instructions submitted at any time during trial.

Whenever a request that the court give a jury instruction is made, the requesting party must furnish copies to every other party. *See* Fed. R. Crim. P. 30; Fed. R. Civ. P. 51. Ordinarily, a party may not assert error if an instruction was not submitted in writing. *Swiderski v. Moodenbaugh*, 143 F.2d 212, 213 (9th Cir. 1944). However, when the pretrial order specified the parties' legal contention and the record demonstrated that the trial court was fully informed but believed the contention in error, the fact that the charge was requested orally did not preclude a finding of error. *Id.*

4.3 Model Jury Instructions

The Ninth Circuit Jury Instructions Committee has prepared both civil and criminal Manuals of Model Jury Instructions. These instructions are continually reviewed by the Committee and updated on a regular basis. In addition to a hard-copy format, the model instructions, and revisions thereto, are available online by accessing the "Attorneys" area of the Ninth Circuit's website at http://www.ca9.uscourts.gov/attorneys/. All references herein are to the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL (2007) and the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CRIMINAL (2010) as well as the online revisions.

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

As the introductions to the Ninth Circuit model instructions note, the instructions are models that must be carefully reviewed for use in a particular case. They do not substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries. *McDowell v. Calderon*, 130 F.3d 833, 840-41 (9th Cir. 1997) (en banc), *implicitly overruled on other grounds by Calderon v. Coleman*, 525 U.S. 141, 146 (1998). Model jury instructions are not "blessed with any special . . . precedential authority." *McDowell,* 130 F.3d at 840. For that reason, error may be found in the use of a model jury instruction. *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011). *See generally Weeks v. Angelone*, 528 U.S. 225 (2000).

4.4 Record on Instructions

A. In General

Both the civil and criminal rules provide that the court must inform counsel of its proposed action on the requested instructions prior to their arguments to the jury. Fed. R. Crim. P. 30(b); Fed. R. Civ. P. 51(b). The purpose of these rules is to avoid error by affording the trial judge an opportunity to correct instructions before the jury has decided the case. *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975). A failure to inform counsel of the disposition of their requested instructions is reversible error if it prejudicially affects closing argument. *United States v. Gaskins,* 849 F.2d 454, 458 (9th Cir. 1988).

Both the civil and criminal rules require the court to provide an opportunity for counsel to make objections on the record out of the hearing of the jury, and, in criminal cases, if requested, out of the presence of the jury. Fed. R. Crim. P. 30(d); Fed. R. Civ. P. 51(b). It is customary for the court to have an in-chambers conference with counsel in which the instructions are discussed and settled. While it is clear that a defendant in a criminal case need not be present during the discussions settling the instructions, *see United States v. Romero*, 282 F.3d 683, 689-90 (9th Cir. 2002); *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987), some judges prefer to settle the instructions in open court with the jury excused and the defendant present**.** If so, it would appear advisable that the entire discussion concerning instructions be on the record.

B. Criminal Cases

It is the court's responsibility to ensure that the instructions adequately present the defendant's theory of the case. *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir. 2000). Moreover, on proper request, a specific instruction as to the defendant's theory of the case must be given, provided it is supported by law and has some foundation in the evidence. *United States v. Thomas*, 612 F.3d 1107, 1120 (9th Cir. 2010). A failure to give such an instruction is reversible error, but the court may refuse a defendant's proposed instruction if other instructions adequately cover the defense theory. *United States v. Del Toro-Barboza,* 673 F.3d 1136, 1147 (9th Cir. 2012).

A party must object to instructions with adequate specificity; an objection must distinctly state the matter to which the party objects as well as "the grounds for the objection," and it must be made before the jury retires to deliberate. Fed. R. Crim. P. 30(d); *see also United States v. Peterson,* 538 F.3d 1064, 1070 (9th Cir. 2008). Offering an alternative instruction alone is not enough to satisfy the specificity objection. *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Williams*, 990 F.2d 507, 511 (9th Cir. 1993). The district court must be made fully aware of the objecting party's position. *Id*.

Global objections to the court's instructions, for instance, "to the extent they are inconsistent to the ones that [were] submitted," are insufficient. *United States v. Elias*, 269 F.3d 1003, 1017-18 (9th Cir. 2001).

All instructions must be read aloud to the jury in the presence of counsel and the defendant. *Guam v. Marquez*, 963 F.2d 1311, 1314-15 (9th Cir. 1992); *see also Ho v. Carey*, 332 F.3d 587, 593 (9th Cir. 2003).

C. Civil Cases

Fed. R. Civ. P. 51(a) allows a party to file a written request for instructions. The court must inform the parties of its proposed instructions and proposed action on the requests for instructions before final arguments are made to the jury. Fed. R. Civ. P. 51(b)(1).

"A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence." *Jones v. Williams,* 297 F.3d 930, 934 (9th Cir. 2002). *See also Hunter v. Cnty. of Sacramento,* 652 F.3d 1225, 1232 (9th Cir. 2011).

An objection to a jury instruction must "stat[e] distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51(c)(1). However, an objection to an instruction need not be formal. *Hunter,* 652 F.3d at 1230. An objection is timely if it is made before the court instructs the jury and before final jury arguments are delivered, or, if a party has not previously been informed of an instruction or an action on a request, that party objects promptly after learning that the instruction or request will be, or has been, given or refused. Fed. R. Civ. P. 51(b) & (c). In a civil case, unlike a criminal case, a party may properly object by submitting a proposed instruction

supported by relevant authority and having language specific enough to make the nature of the alleged error clear. *Hunter,* 652 F.3d at 1230-31.

Fed. R. Civ. P. 51(d)(1) provides that a party may assign as error (A) an error in an instruction actually given if that party made a proper objection, or (B) a failure to give an instruction, if that party properly requested it and, unless the court made a definitive ruling on the record rejecting the request, also made a proper objection. However, in addition to the assignment of error in Fed. R. Civ. P. 51(d)(1),"[a] court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights." Fed. R. Civ. P. 51(d)(2). *See Hunter,* 652 F.3d at 1230 n.5.

Practical Suggestions

Manner of Submission of Instructions

1. The trial court should require that counsel submit proposed instructions prior to the commencement of trial. Notwithstanding any deadline set by the court, the court should consider any instructions submitted by counsel during trial.

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

3. The court may find it helpful to request that counsel submit proposed nonpattern instructions in an editable electronic format.

4.5 Preliminary and Final Instructions

A. Preliminary Instructions

Some judges give a preliminary charge to the jury regarding the elements of the offense and related principles. *See* 9TH CIR. CRIM. JURY INSTR. 1.1-1.13; 9TH CIR. CIV. JURY INSTR., Introductory Comment. If the judge gives preliminary instructions, the jury should be told that instructions given at the end of the case will govern the jury's deliberations and will be binding on the jury.

B. Instructions at End of Trial

Many courts are now instructing at the close of the evidence and before argument. A judge has discretion to give instructions before or after argument. Fed. R. Crim. P. 30(c); Fed. R. Civ. P. 51(b)(3). The judge may then instruct on the rules governing deliberations after counsel have concluded their arguments.

In criminal cases jury instructions must be recorded as they are being read to the jury. Under 28 U.S.C. § 753(b), court reporters are required to record verbatim "all proceedings . . . had in open court." In civil cases, with the approval of the judge, the parties may specifically agree otherwise. *Id.*

The trial court should furnish the jury with a copy of the written instructions to assist it during deliberations. *See United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) ("[t]he preferred procedure [is] sending a copy of [the] instructions to the jury at the start of deliberations"); *see also United States v. Tagalicud*, 84 F.3d 1180, 1184 (9th Cir. 1996) (criticizing the trial court for giving instructions once, orally, and for not sending the jury instructions into the jury room). The trial court may consider providing a copy of the jury instructions to each juror during the reading of the instructions and for use during deliberations.

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

4.6 Jury's Use of Indictment

A. Availability of Indictment to Jury During Trial and Deliberations

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

B. Tailoring Indictment

If the judge nonetheless determines that it is appropriate to provide the jury with a copy of the indictment, care should be taken to tailor the indictment, limiting it to the issues before the jury. So long as the court does not add anything or broaden the scope of the indictment, it may withdraw surplusage from the jury's consideration. *See Ford v. United States*, 273 U.S. 593, 602 (1927) (holding that striking of surplusage is not unconstitutional amendment of indictment); *see also United States v. Fulbright*, 105 F.3d 443, 452 (9th Cir. 1997), *overruled on other grounds by United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc).

Chapter Five: Jury Deliberations

Description:

This chapter contains materials dealing with jury deliberations.

Topics:

5.1 Jury Questions During Deliberations

A. General Procedure for Considering Jury Questions

The judge must use procedural safeguards when communicating with the jury. *See United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979). When a jury has asked a question, such safeguards should include providing the parties with the question, suggesting a response, hearing comments, objections and alternate responses, and articulating the court's answer to the jury's question before responding to the jury. *See United States v. McDuffie,* 542 F.2d 236, 240-41 (5th Cir. 1976). This should be done on the record. Failure to allow the defendant to be present during such proceedings violates Fed. R. Crim. P. 43 unless the defendant has waived his or her presence.

The district court has an obligation, when a jury requests clarification on an issue, to "clear away the confusion 'with concrete accuracy.'" *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979) (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946)).

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

B. Supplemental Jury Instructions

When a question indicates confusion about the original instructions, supplemental instructions may be necessary to eliminate the apparent confusion. The decision to deliver supplemental instructions to the jury is within the sound discretion of the trial court. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979).

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

"[I]f a supplemental jury instruction given in response to a jury's question introduces a new theory to the case, the parties should be

given an opportunity to argue the new theory . . . to prevent unfair prejudice." *United States v. Fontenot*, 14 F.3d 1364, 1368 (9th Cir. 1994). *See also Hannah*, 97 F.3d at 1269 (holding no prejudice when court permitted additional closing argument on supplemental instructions); *United States v. Warren*, 984 F.2d 325, 329-30 (9th Cir. 1993); *Gaskins*, 849 F.2d at 458 (finding prejudice when court gave supplemental instructions but no additional time for argument to address new theory).

C. Requests for Readbacks of Testimony

1. *In General*

The court has discretion to read back portions of testimony to a jury. *United States v. Binder*, 769 F.2d 595, 600 (9th Cir. 1985).

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

Furnishing prior testimony may place undue emphasis on that testimony. This is particularly true when the testimony repeated to the jury directly contradicts the defendant's testimony or that of other defense witnesses. *United States v. Sacco*, 869 F.2d 499, 501-02 (9th Cir. 1989).

2. *Cautionary Instruction Regarding Readbacks*

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

A cautionary instruction can mitigate the danger of undue emphasis. *See United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th

Cir. 1989) (finding no error from testimony read back when "trial court cautioned the jury about the danger of concentrating on the testimony of only one witness and instructed the jurors to reach their decision on the basis of all of the evidence").

The Ninth Circuit has provided guidance to the trial courts by specifying a preferred method of rehearing testimony that has it performed under the court's supervision in open court with the defendant and the attorneys present. *Hernandez*, 27 F.3d at 1408.

In *United States v. Newhoff,* 627 F.3d 1163, 1168 (9th Cir. 2010), the Ninth Circuit stated if the judge allows a readback, the jurors should be given an admonition that tells them:

> (1) Because they requested a readback, it is being provided to them, but all readbacks run the risk of distorting the trial because of overemphasis of one portion of the testimony; (2) the jury will be required to hear all the witness's testimony (except when an excerpt was selected because of excessive length), on direct and cross-examination, to avoid the risk that they might miss a portion bearing on their judgment or what testimony to accept as credible; (3) the transcript is not evidence, just a record of what the testimony was, and since nothing is perfect and the transcript could possibly contain errors, their recollection and understanding of the testimony itself rather than the transcript is the evidence on which they must make their decision; (4) the transcript cannot reflect matters of demeanor, tone of voice, and other aspects of the live testimony the jurors heard, which may affect what they judge to be credible; and (5) the testimony read cannot be considered in isolation, but must be considered in the context of all the evidence presented, both testimony and exhibits, in the jurors' exercise of their judgment.

Id. at 1186. *See* 9TH CIR. CRIM. JURY INSTR. 7.10 (Script for Admonition Regarding Readback of Testimony Requested By Jury or Juror During Deliberation); 9TH CIR. CIV. JURY INSTR. 3.2A (Script for Admonition Regarding Readback of Testimony Requested By Jury or Juror During Deliberation).

3. *Refusal to Provide Readback*

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

However, the Second Circuit has held that "the district court erred in announcing before jury deliberations began a prohibition against readbacks of testimony." *Criollo*, 962 F.2d at 244. *See also United States v. Damsky*, 740 F.2d 134, 138 (2d Cir. 1984). *But see United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir. 1976) (per curiam) (although not subscribing to wisdom of policy of no readbacks, not abuse of discretion when court explained its rule as being inducement to jurors to pay close attention). "It is error . . . for the court to deny the jury's [readback] request without consulting counsel for their views . . . ." *United States v. Birges*, 723 F.2d 666, 671 (9th Cir. 1984).

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

A defendant has the right to be present at readbacks. *Fisher v. Roe*, 263 F.3d 906, 915 (9th Cir. 2001). *See also La Crosse v. Kernan*, 244 F.3d 702, 707-08 (9th Cir. 2001).

D. Materials Sent to Jury Room

1. *Transcript of Testimony*

The trial court should probably never send a transcript of testimony into the jury room. If it decides to do so, great caution should be exercised. "To avoid the possibility of this undue emphasis, the preferred method of rehearing testimony is in open court, under the supervision of the court, with the defendant and attorneys present." *Hernandez*, 27 F.3d at 1404, 1408 (reversing because court allowed witness transcript into jury room without adequate precautions).

2. *Tape Recordings*

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

Tape recordings that have not been played to the jury during trial should not be sent to the jury room during deliberations. *Id.* at 1445-46

3. *Translated Transcripts of Tape Recordings*

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

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

5.2 Other Issues Arising While Jury is Deliberating

A. Judge's Physical Absence During Deliberations

Trial judges are encouraged to be physically present for proceedings during jury deliberations, and under many but not all circumstances the judge's absence constitutes reversible error. *United States v. Arnold*, 238 F.3d 1153, 1155 (9th Cir. 2001) (replying to jury's question after telephonic conference with attorneys and dictating response that was delivered to jury was not error).

Under Fed. R. Crim. P. 25(a), a substitute judge may not preside over continuing deliberations, unless the original judge cannot proceed by reason of death, sickness or disability and the substitute judge certifies familiarity with the record. When substitution was for the convenience of the original judge, the rule was violated, but reversal was not required because the defendant suffered no prejudice. *United States v. Lane*, 708 F.2d 1394, 1396-98 (9th Cir. 1983).

B. Improper Communications

1. *Ex Parte Communications and Contacts Other than Jury Tampering*

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

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

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their

harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 150 (1892). The Ninth Circuit has held that *Mattox* established a bright-line rule: "[a]ny unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing." *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004) (citations omitted); *see also Rinker v. Cnty. of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (applying the *Mattox* rule to a civil action). On the other hand, if "an unauthorized communication with a juror is *de minimis,* the defendant must show that the communication could have influenced the verdict before the burden of proof shifts to the prosecution." *Caliendo,* 365 F.3d at 696. (citations omitted). Whether an unauthorized communication between a juror and a third party concerned the case is only one factor in determining whether the communication raised a risk of influencing the verdict. Other factors may include "the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction." *Id.* at 697-98.

2. *Extrinsic Material During Deliberations*

The jury's exposure to extrinsic material will only warrant a new trial "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *United States v. Plunk,* 153 F.3d 1011, 1024 (9th Cir. 1998) (quoting *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987)), *overruled on other grounds*, *United States v. Hankey,* 203 F.3d 1160, 1169 n.7 (9th Cir. 2000). Courts evaluate "five separate factors to determine the probability of prejudice: (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict." *Plunk*, 153 F.3d at 1024-25 (internal quotation marks and citation omitted).

See §§ 3.14 and 6.2.

3. *Jury Tampering*

As to jury tampering, *see* § 6.2.B and D.

C. Investigating Alleged Jury Misconduct

1. *In General*

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

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

2. *Necessity for Evidentiary Hearing*

"An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) (internal citations omitted).

As to jury tampering, *see* § 6.2.B and D.

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

A. Size of Jury

1. *Generally*

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

2. *Upon Stipulation of the Parties*

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

> (A) the jury may consist of fewer than 12 persons, or
> (B) a jury of fewer than 12 persons may return a verdict if a juror is excused by the court for good cause.

Fed. R. Crim. P. 23(b)(2)(A), (B).

Although there is not a clear minimum number of jurors required to return a verdict upon the parties' stipulation and the court's approval, a sufficient number of jurors must remain so as to constitute the "essential feature of a jury." *See* Fed. R. Crim. P. 23 advisory committee's notes to 1983 amendments.

3. *Without Stipulation of the Parties*

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

B. Removal of Jurors

1. *In General*

The court must have an adequate basis for finding good cause to excuse a juror. Good cause "generally focuses on sickness, family emergency, or juror misconduct." *See United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998). Good cause may arise when the length of a juror's absence is unknown, such as from sickness. Good

cause may also exist when a prolonged absence would result in dulled memories during a lengthy and complex trial. *See United States v. Tabacca*, 924 F.2d 906, 914-15 (9th Cir. 1991) (excusing a juror who could not attend one day of a two-and-one-half-day trial was reversible error). *See also United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985) (excusing juror who notified court of upcoming religious holiday was not abuse of discretion since jury would have been forced to wait four and one-half days).

2. *Grounds for Excusing a Deliberating Juror*

Trial courts may dismiss and replace jurors whose physical or mental condition prevents effective participation in deliberations. *Perez v. Marshall*, 119 F.3d 1422, 1426-28 (9th Cir. 1997) (replacing juror who was emotionally incapable of deliberating was not error). Demonstrated bias—by communicating with the defendant, his family or his attorney, for example—can constitute good cause to dismiss the juror. *United States v. Vartanian*, 476 F.3d 1095, 1099 (9th Cir. 2007).

However, the court must not dismiss a juror "if the record evidence discloses any *reasonable* possibility that the impetus for . . . dismissal stems from the juror's views on the merits of the case." *Williams v. Cavazos*, 646 F.3d 626, 646 (9th Cir. 2011) (citing *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (emphasis in original). "Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial." *Symington*, 195 F.3d at 1087.

There is no "good cause" requirement for the parties to stipulate to fewer than 12 jurors, so the court may dismiss a juror by stipulation even when there is evidence the dismissed juror was holding out. *United States v. Murphy*, 483 F.3d 639, 644-45 (9th Cir. 2007) (affirming denial of new trial in this circumstance).

C. Alternate Jurors

1. *Seating Alternate Jurors*

The court may impanel up to six alternate jurors who (1) have the same qualifications, and (2) were selected and sworn in the same manner as any other juror to replace any jurors who are unable to

perform or who are disqualified from performing their duties. Fed. R. Crim. P. 24(c).

2. *Retaining Alternate Jurors*

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

3. *Substituting Alternate Jurors During Deliberations*

"If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." Fed. R. Crim. P. 24(c)(3); *see also* 9TH CIR. CRIM. JURY INSTR. 7.12. It may also be appropriate to confiscate any notes taken by jurors during their previous deliberations. *See United States v. Guevara*, 823 F.2d 446, 448 (8th Cir. 1987).

5.4 Handling Jury Deadlock

A. In General

Jurors must deliberate with one another in an attempt to reach a verdict. If the jury is unable to agree upon a verdict, the court may either (1) return the jury to the jury room for further deliberations or (2) declare a mistrial and discharge the jury. *See* § 5.6.

On receiving a communication from the jury stating that it cannot agree, the trial court is required to question the jury to determine independently whether further deliberations or instruction might overcome the deadlock. *United States v. Cawley*, 630 F.2d 1345, 1349 (9th Cir. 1980). Questioning the foreperson individually and the jury either individually or as a group is satisfactory. *United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974). Merely questioning the jury foreperson may be insufficient. *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978). However, it is *per se* error for a court to inquire into the jury's numerical division, as doing so serves no useful purpose and generally has a coercive effect on a divided jury. *Brasfield v. United States*, 272 U.S. 448, 450 (1926); *see also Sanders v. Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004); *Jimenez v. Myers*, 40 F.3d 976, 980 n.3 (9th Cir. 1993). But the mere fact that jurors volunteer the numerical division of the jury does not compel mistrial or reversal. *United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992). When the trial court inadvertently learns of the numerical split, the court may inform the jury: (1) not to disclose the numerical vote again; (2) to continue deliberations; and (3) that no juror is to surrender conscientiously held beliefs. *United States v. Changco*, 1 F.3d 837, 842 (9th Cir. 1993). *See also* § 5.1.

The court may give supplemental instruction to the jury, sometimes known as an "*Allen* charge," when the jury reaches an impasse. *See* § 5.5; 9TH CIR. CRIM. JURY INSTR. 7.7; 9TH CIR. CIV. JURY INSTR. 3.5. However, extraordinary caution is to be exercised when giving an *Allen* charge so as not to have an impermissibly coercive effect on the jury. *See, e.g.*, *United States v. Evanston*, 651 F.3d 1080, 1085-88 (9th Cir. 2011) (finding that combined use of deadlock instruction and supplemental arguments targeted to jury's exact areas of dispute were coercive and impermissibly interfered with jury's role as sole fact-finder). The court may also ask the foreperson if anything would further assist the jury in its deliberations, such as reading back witness testimony or hearing

supplemental arguments. *See United States v. Della Porta*, 653 F.3d 1043, 1050-51 (9th Cir. 2011) (holding that the district court neither coerced a guilty verdict nor abused its discretion by ordering supplemental arguments because, unlike in *Evanston*, the court never gave an *Allen* charge and did not ask the jury to identify specific areas of disagreement). Ultimately, however, there are no bright-line rules for determining what constitutes an impermissible coercive effect on the jury, as this is determined from the totality of the circumstances of the particular case. *See id.* at 1051.

Practical Suggestion

Procedure for Determining if Jury is Deadlocked

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

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

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

If the foreperson's response is,"No," then ask the following question of each member of the panel, "Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?" The court may wish to poll the jurors and record their answers which must be yes or no. *See United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000) ("The most critical factor is the jury's own statement that it is unable to reach a verdict. Without more, however, such a statement is insufficient to support a declaration of mistrial.") (internal quotations and citations omitted).

B. Partial Deadlock

A partial deadlock may result when the answered verdict forms do not dispose of all the issues submitted to the jury. The court must then either resubmit the unanswered verdicts to the same jury or declare a mistrial as to the unresolved issues if the court finds manifest necessity for doing so. *California v. Altus Finance S.A.*, 540 F.3d 992, 1005 (9th Cir. 2008); *Union Pac. R.R. Co. v. Bridal Veil Lumber Co.*, 219 F.2d 825, 832 (9th Cir. 1955) ("To do other than send the case back for a new trial when decision on a vital issue by the jury is missing would deprive the parties of the jury trial to which they are entitled constitutionally.").

5.5 "*Allen*" Charge

A. In General

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

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

In the Ninth Circuit, an *Allen* charge is upheld "'in all cases except those where it's clear from the record that the charge had an impermissibly coercive effect on the jury.'" *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992)); *see also United States v. Croft*, 124 F.3d 1109, 1123 (9th Cir. 1997); *United States v. Mason*, 658 F.2d 1263, 1266 (9th Cir. 1981) (approving charges "only if in a form not more coercive than that approved in *Allen*"). The same instruction as to a deadlocked jury is recommended for both civil and criminal trials. *See* 9TH CIR. CRIM. JURY INSTR. 7.7; 9TH CIR. CIV. JURY INSTR. 3.5.

B. Timing

The *Allen* instruction is usually delivered after the jury announces a deadlock, but may be given as part of an original charge. *Wills*, 88 F.3d at 716. An *Allen* charge included in the initial instructions is less coercive than one provided after the jury reaches impasse. *United States v. Armstrong*, 654 F.2d 1328, 1334-35 (9th Cir. 1981).

Generally, a second *Allen* charge is impermissible because it conveys a message that "'the jurors have acted contrary to the earlier instruction' . . . and that message serves no other purpose than impermissible coercion." *United States v. Evanston*, 651 F.3d 1080, 1085 (9th Cir. 2011) (quoting *United States v. Seawell*, 550 F.2d

1159, 1162-63 (9th Cir. 1977)); *see also United States v. Nickell*, 883 F.2d 824, 828 (9th Cir. 1989).

C. Coercion

Three factors are examined in determining the coerciveness of an *Allen* instruction: "(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge in relation to the total time of deliberation and (3) any other indicia of coerciveness." *United States v. Berger*, 473 F.3d 1080, 1090 (9th Cir. 2007) (quoting *United States v. Steele*, 298 F.3d 906, 911 (9th Cir. 2002)); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (weekend interval between *Allen* charge and resumed deliberations "probably would have diluted any coercive effect").

1. *Form or Content of Allen Charge*

See 9TH CIR. CRIM. JURY INSTR. 7.7 and 9TH CIR. CIV. JURY INSTR. INSTR. 3.5. These instructions have been referred to as a neutral form of the *Allen* charge. *See United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007); *Steele*, 298 F.3d at 911.

Allen instructions should caution jurors not to abandon their conscientiously held views. *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995). While it is helpful to incorporate an instruction on the burden of proof, its absence does not necessarily require reversal. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1350 (9th Cir. 1995); *United States v. Cuozzo*, 962 F.2d 945, 952 (9th Cir. 1992).

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

2. *Time of Post-Allen Charge Deliberation in Relation to Total Deliberation Period*

In its most recent opinions, the Ninth Circuit has considered the periods of deliberation prior to and after an *Allen* charge in relation to each other, looking to see whether the amount of time was disproportionate. *See, e.g.*, *Freeman*, 498 F.3d at 908 (finding no coercion when jury deliberated for three hours prior to the *Allen*

instruction and for two hours after); *Berger*, 473 F.3d at 1092-93 (finding no coercion when jury deliberated for three and one-half days prior to the *Allen* instruction and seven hours after); *Cuozzo*, 962 F.2d at 952 (finding no appearance of coercion when total time of deliberation was proportionate for eleven-day trial, after which the jury deliberated two days before receiving *Allen* charge, and six additional hours after it). A relatively short deliberation after an *Allen* charge does not raise a suspicion of coercion if the jury decided simple issues and the time was not disproportionate in relation to the total deliberation period. *See Hernandez*, 105 F.3d at 1334 (finding that forty minutes of additional deliberations compared to four and one-half hours of initial deliberations did not raise suspicion of coercion).

3. *Indicia of Coercion*

a. Court's Reference to Expense of Trial or Retrial. An *Allen* charge should not refer to the costs of trial or the possible need for retrial. *Hernandez*, 105 F.3d at 1334; *United States v. Bonam,* 772 F.2d 1449, 1450 (9th Cir. 1985).

b. Court's Knowledge of Division of Jurors. The judge should avoid learning the split or the identity of holdout jurors. *Ajiboye*, 961 F.2d at 894. If the judge learns of a numerical split, even inadvertently, extreme caution should be exercised before giving an *Allen* instruction. *Ajiboye*, 961 F.2d at 893-94. Similarly, an *Allen* charge should not be given if the court learns the identity of the holdout jurors. *United States v. Williams*, 547 F.3d 1187, 1205-07 (9th Cir. 2008) (finding that reversal was required when judge received note by lone hold-out juror and then gave supplemental instruction to continue deliberating, which hold-out could have interpreted as directed specifically at her).

5.6 Mistrial Due to Jury Deadlock

A. Declaring Mistrial

Prior to discharging the jury, the trial judge must determine whether there is any probability that the jury can reach a verdict within a reasonable time. If the trial judge determines that there is no such probability and that the jury is hopelessly deadlocked, then the judge must declare a mistrial and discharge the jury. *Arizona v. Washington*, 434 U.S. 497, 509-10 (1978). "In determining whether to declare a mistrial because of jury deadlock, relevant factors for the district court to consider include the jury's collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury." *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000).

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

B. Double Jeopardy

If a criminal defendant does not seek a mistrial, to forestall double jeopardy claims, the court must find that manifest necessity supports discharging the jury. *United States v. Sammaripa*, 55 F.3d 433, 434 (9th Cir. 1995). A deadlocked jury is a classic example of "manifest necessity," authorizing the court to declare a mistrial without violating the prohibition against double jeopardy. *See Richardson v. United States*, 468 U.S. 317, 326 (1984); *Arizona*, 434 U.S. at 509; *Hernandez-Guardado*, 228 F.3d at 1029; *see also* § 1.2. However, if there is no manifest necessity for the district court to declare the mistrial, the Double Jeopardy Clause bars retrial of that offense, but only the offense on which the district court improperly declared a mistrial. *See United States v. Carothers*, 630 F.3d 959, 964 (9th Cir. 2011) (permitting retrial on greater offense on which jury was hopelessly deadlocked and prohibiting retrial on lesser included offense on which district court refused to receive jury's verdict).

5.7 Verdicts

A. In General

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

B. Written Verdict Controls

When a court misreads a written verdict, the written verdict controls, even if the jurors failed to correct the trial court's misreading. It is unreasonable to expect the jurors to correct the court, or to conclude by their silence their assent to the misread verdict. *United States v. Boone*, 951 F.2d 1526, 1532-33 (9th Cir. 1991). *See also United States v. Rojas*, 617 F.3d 669, 677 (2d Cir. 2010).

C. Partial Verdicts

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

Jurors "should be neither encouraged nor discouraged to return a partial verdict but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants." *United States v. Dolah,* 245 F.3d 98, 108 (2d Cir. 2001) (citing *United States v. DiLapi*, 651 F.2d 140, 147 (2d Cir. 1981)), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). "The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one." *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) (citing *United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986)). *See also United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007).

The trial court has broad discretion to question a potentially deadlocked jury about its ability to reach a partial verdict. *See United States v. Armstrong*, 654 F.2d 1328, 1333 (9th Cir. 1981); *Kanahele*, 951 F. Supp. at 947.

D. Forms of Special Verdicts

1. *Civil*

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

Before closing arguments, the form of the verdict should be decided so that counsel can effectively structure their final arguments. This also enables the court to tailor its instructions. *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1374 (9th Cir. 1987); *accord Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) (approving of logic in *Landes*); *see also* MANUAL FOR COMPLEX LITIGATION § 11.633 (Fed. Jud. Center, 4th ed. 2004) (discussing benefits of having counsel draft and submit proposed verdict forms at pretrial conference).

2. *Criminal*

"Although there is no per se prohibition '[a]s a rule, special verdicts in criminal trials are not favored.'" *United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008) (quoting *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998)).

"Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances." *Reed*, 147 F.3d at 1180 (citing numerous cases in which special verdicts have been upheld). Special verdict forms are often necessary to satisfy the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

E. Coerced Verdict

Coerced verdicts require a new trial. *Rinehart v. Wedge*, 943 F.2d 1158, 1160 (9th Cir. 1991) (affirming grant of new trial when court recalculated general verdict, and polled jury to ratify recalculated verdict, thereby intruding on jury's deliberative process and coercing verdict); *cf. United States v. Evanston*, 651 F.3d 1080, 1085 (9th Cir. 2011) (discussing *Jenkins v. United* States, 380 U.S. 445 (1965)). *See also* § 5.4.

F. Recalling "Discharged" Jury

As a general rule, once a jury has been discharged, it may not be recalled. Factors to be considered in deciding whether a recall is permissible include whether the jurors have in fact dispersed or mingled with others and the passage of time. *See Rojas*, 617 F.3d at 677 (holding that district court did not err in recalling jury that had been "discharged" but had not dispersed, to re-read verdict form when courtroom deputy's initial reading did not conform to written verdict).

Notes

Chapter Six: Post-Verdict Considerations

Description:

This chapter contains materials dealing with post-trial matters.

Topics:

6.1 Post-Verdict Interview of Jurors

A. Court Interviews

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

Depending on the circumstances of the case and/or the personal preference of the judge, conferences between the court and the jurors can be a valuable resource both in expanding the judiciary's understanding of juror attitudes and needs and in addressing juror concerns. However, judges should exercise caution.

Communications between the court and jurors must occur after the verdict and/or dismissal of the jury panel for that particular case. While judges may express appreciation to the jurors for their services, no expression of approval or disapproval concerning the verdict is appropriate. The court should not initiate discussion of matters that could be implicated in post-trial motions, such as the merits of the case, facts, or evidence on which the jury deliberated. Conferences should, in general, be viewed by the court as an opportunity for jurors to express their concerns and offer their suggestions in the area of jury care and comfort.

It may be helpful to inform the jury on their discharge as follows:

Ladies and gentlemen:

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

understanding they were being expressed in confidence. Please respect the privacy of the views of the other jurors.

B. Attorney Interviews

Attorneys are discouraged from conducting post-trial interviews about the jury's internal deliberations or the manner in which the jury arrived at a verdict. *See Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980); *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972); *N. Pac. Ry. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) (improper for attorney to interview jurors to discover course of deliberations). Some judges permit attorneys to interview jurors. A verdict cannot be impeached on the basis of the deliberations or the manner in which the jury reached its verdict. *See* § 6.2.E.

C. Interviews by Media

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

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

A. In General

When extraneous information has been brought to the jury's attention improperly, the moving party is entitled to a new trial if there is "a reasonable possibility that the extrinsic information *could* have affected the verdict." *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (quoting *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979)) (emphasis in original). The same standard applies to both civil and criminal cases. *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000). The inquiry is objective; that is, the court "need not ascertain whether the extrinsic evidence actually influenced any specific juror." *United States v. Montes,* 628 F.3d 1183, 1187 (9th Cir. 2011) (quoting *United States v. Keating*, 147 F.3d 895, 901-02 (9th Cir. 1998)).

In determining whether evidence is extraneous, a court should carefully distinguish between ["t]he type of after-acquired information that potentially taints a jury verdict" and "the general knowledge, opinions, feelings, and bias that every juror carries into the jury room." *Fields v. Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (en banc) (quoting *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989)). For example, a juror's sharing of a list of Bible verses with other jurors during deliberations was found to have had "no substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 781.

Evidence that is "part of a trial" and that does not "enter the jury room through an external, prohibited route" is not extraneous. *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005) (holding that speculation by deliberating jurors about whether defendant's husband, who had been codefendant, had pled guilty, when in fact he had died while jury was deliberating, was not extraneous evidence because alleged source of speculation–supplemental jury instruction stating that codefendant's case had "been disposed of"–was part of trial).

Some factors to be considered by a court in determining whether extraneous evidence could have affected the verdict are: (1) whether the extrinsic information was actually received, and if so, how; (2) the length of time the information was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the

extrinsic information was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other factors that may bear on the issue of the reasonable possibility that the introduction of extrinsic material substantially and injuriously affected the verdict. *Cook v. LaMarque,* 593 F.3d 810, 827 (9th Cir. 2010).

When deciding the significance of extrinsic evidence, the court may consider the following: (1) whether the prejudicial statement was ambiguously phrased; (2) whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial; (3) whether a curative instruction was given or some other step taken to ameliorate the prejudice; (4) the trial context; and (5) whether the statement was insufficiently prejudicial given the issues and evidence in the case. *Sassounian v. Roe,* 230 F.3d 1097, 1109 (9th Cir. 2000).

The introduction of extrinsic information assumes particular importance in criminal cases. When jurors learn of extrinsic facts regarding the defendant or the alleged crime, whether from another juror or otherwise, the speaker "becomes an unsworn witness within the meaning of the Confrontation Clause" of the Sixth Amendment. *See Jeffries v. Wood,* 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc). *See also Estrada v. Scribner*, 512 F.3d 1227, 1238 (9th Cir. 2008).

B. Burden of Proof

1. Generally

Once it is has been established that extraneous information reached one or more jurors, the party opposing a new trial generally has the burden of demonstrating the absence of prejudice. *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006).

2. Jury Tampering

In criminal cases, allegations of "jury tampering" are treated "very differently" from "prosaic kinds of jury misconduct." *United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999). "Jury tampering" is "normally understood" to refer to "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." *Id.* at 895. However, jury tampering may occur in other

ways. *United States v. Rutherford*, 371 F.3d 634, 642 n.6 (9th Cir. 2004).

Jury tampering creates a presumption of prejudice. *United States v. Stinson*, 647 F.3d 1196, 1216 (9th Cir. 2011). The government carries the heavy burden of rebutting that presumption by establishing that the contact with the juror was harmless to the defendant. *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001) (citing *Remmer v. United States*, 347 U.S. 227 (1954), and 350 U.S. 377 (1956)). A defendant must make only a *prima facie* showing of prejudice by establishing that "the intrusion had an adverse effect on the deliberations." *Rutherford*, 371 F.3d at 642. An "adverse effect" may be found when "the intervention interfered with the jury's deliberations by distracting one or more of the jurors, or by introducing some other extraneous factor into the deliberative process." *Id.* at 642 (quoting *Dutkel*, 192 F.3d at 897). *See also Henley,* 238 F.3d at 1115-19 (examples of less serious intrusions of extraneous information, to which lesser standard may apply).

C. *Ex Parte* Contacts Other Than Jury Tampering

See § 5.2.B(1).

D. Whether Evidentiary Hearing is Required

The court must consider whether to conduct an evidentiary hearing before ruling on a motion for new trial based on allegations of juror misconduct, or the imparting of extraneous information. *See Montes,* 628 F.3d at 1187. However, an evidentiary hearing is not required every time there is an allegation of juror misconduct or bias. *Id*. The court must consider "the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *Id.* at 1188 (quoting *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981)). An evidentiary hearing is not necessary if the court knows the exact scope and nature of the extraneous information, *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001), or if it is clear that the alleged misconduct or bias could not have affected the verdict or the allegations are not credible. *United States v. Angulo,* 4 F.3d 843, 848 n.7 (9th Cir. 1993); *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). An evidentiary hearing must be held if a new trial is sought based on alleged jury tampering. *See Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003).

E. What Evidence May be Considered

Fed. R. Evid. 606(b) governs the scope of a juror's testimony upon an inquiry into the validity of a verdict or indictment. A juror may not testify about how the jurors reached their conclusions. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir. 1999) (juror's statements to press regarding impact of evidence did not warrant new trial).

Rule 606(b) does permit a juror to testify regarding extraneous prejudicial information improperly brought to the jury's attention. However, it is essential to distinguish between testimony regarding the fact that extrinsic information was brought to the jury's attention (*e.g.,* the substance of the communication, who knew about it and when, and the extent it was discussed) versus the subjective effect of that extraneous information upon the mental processes of a particular juror in reaching a verdict (*e.g.,* "I changed my vote as a result of that new information"). Testimony regarding the former is permissible. *See Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983); *Henley,* 238 F.3d at 1118; *Sassounian*, 230 F.3d at 1108-09. Thus, a juror may testify that he conducted an independent investigation or observed a matter and may reveal the substance of what he communicated to his fellow jurors concerning that investigation or matter. *See Rhoden v. Rowland,* 10 F.3d 1457, 1459-60 (9th Cir. 1993) (jurors could be asked whether they saw defendant shackled during trial and whether they discussed it with other jurors). It is less clear that a juror may be questioned about the subjective impact of that information on jurors' deliberations. Although the Ninth Circuit held in *Bagnariol* that questioning about the subjective impact was impermissible and that such information could not be considered by a trial court, 665 F.2d at 884-85, it later "weakened the precedential value" of that holding. *See United States v. Mills,* 280 F.3d 915, 922 (9th Cir. 2002) (citing *Jeffries,* 114 F.3d at 1491, which noted that jurors' opinions that extrinsic evidence had not been harmful were not controlling and that other circuits allowed a trial judge to interview jurors to determine effect of extrinsic evidence).

Testimony regarding a juror's "general fear and anxiety following a tampering incident" is admissible to determine whether there is a reasonable possibility that the extraneous contact affected the verdict. *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001). Testimony regarding racial bias during deliberations may also be permissible on the ground that it is unrelated to any issue that a juror

in a criminal case might legitimately be called on to determine. *See Henley*, 238 F.3d at 1119-21 (discussing, but ultimately not deciding, that question). *Cf. Rushen*, 464 U.S. at 121 n.5 (juror may testify on any mental bias in matters unrelated to specific issues that juror was called on to decide). *See also Estrada,* 512 F.3d at 1241 n.14 (declining to decide "whether evidence of actual or implied bias disclosed during deliberations is admissible despite the prohibition of subjective evidence by [Rule] 606(b)"); *United States v. Decoud,* 456 F.3d 996, 1018-19 (9th Cir. 2006) (noting that *Henley* implied in dictum that evidence of racial prejudice might be exempt from Rule 606(b)'s restriction on post-trial evidence).

Under Fed. R. Evid. 606(b), jurors may not testify about other jurors' use of alcohol or drugs during trial. *Tanner v. United States*, 483 U.S. 107, 125 (1987).

See also §§ 3.14.B and 5.2.C.

6.3 New Trial Motion Premised on False Answer During Jury Selection

A new trial may be ordered if the moving party demonstrates "that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). *See also Fields v. Brown*, 503 F.3d 755, 772-73 (9th Cir. 2007) (en banc) ("when the issue of bias arises after trial . . . or, as here, on collateral review of a conviction in state court, dishonesty in voir dire is the critical factor"). Whether a juror is dishonest is a question of fact. *Id.* at 767. A mistaken, though honest, response to a question does not meet the *McDonough* test. *Pope v. Man-Data, Inc,* 209 F.3d 1161, 1163 (9th Cir. 2000). A new trial is warranted based on a false voir dire response "only if the district court finds that the juror's voir dire responses were dishonest, rather than merely mistaken, and that her reasons for making the dishonest response call her impartiality into question." *Id.* at 1164. An evidentiary hearing is usually necessary to establish a record upon which the court can make the requisite findings. *Id*.

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

TABLE OF AUTHORITIES

FEDERAL RULES OF EVIDENCE

CASES

TABLE OF AUTHORITIES

I N D E X

References are to section numbers.

A—

B—

C—

D—

E—

J—

JURORS

N—

O—

P—

Q—

R—

S—

T—

W—

X—

Y—

Z—