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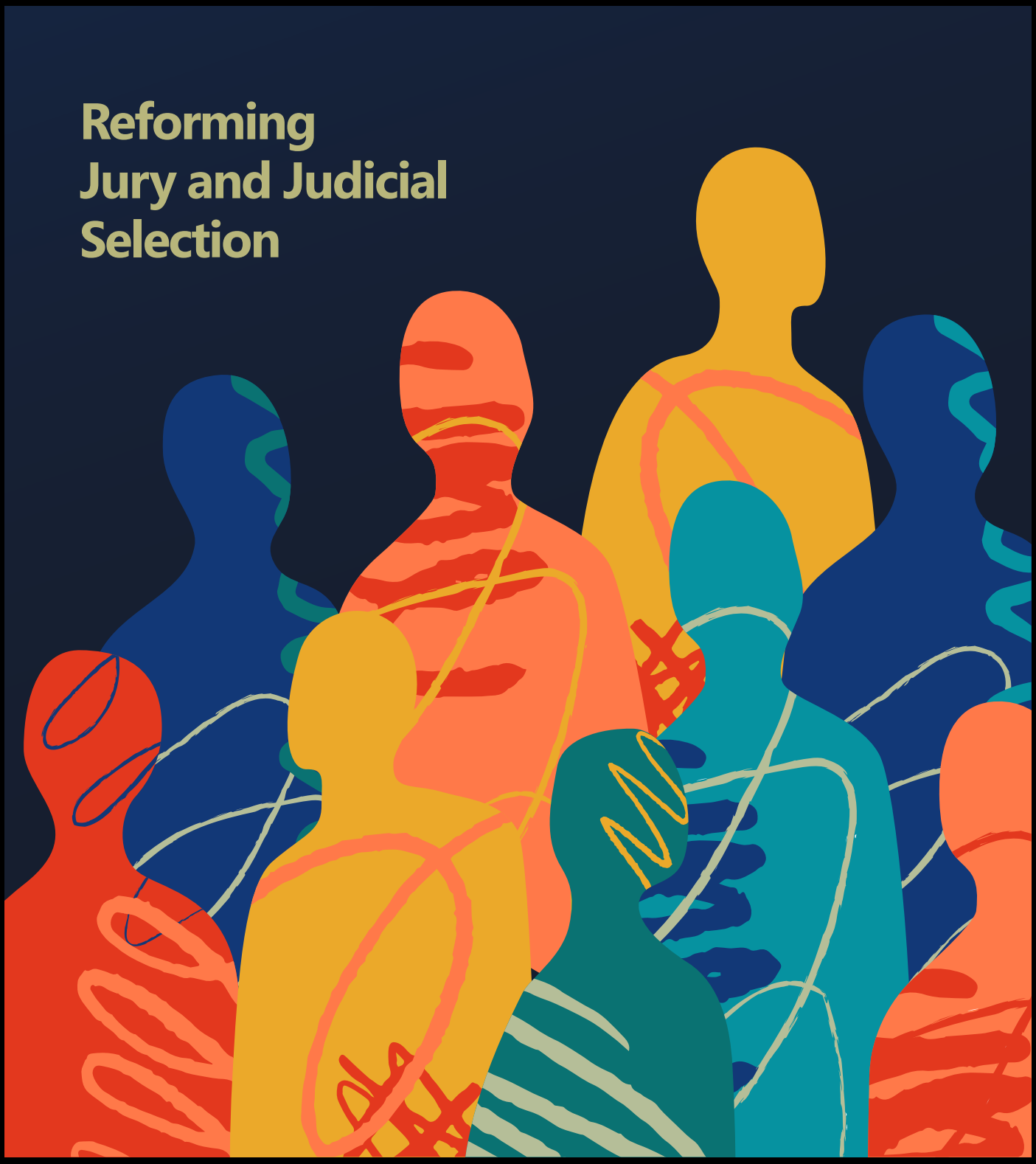
Voir Dire

A publication of the American Board of Trial Advocates

Reforming Jury and Judicial Selection



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National ABOTA Annual Meeting & Leadership Conference
JW Marriott Los Cabos, Los Cabos, Mexico

International Trip
March 21 – 27 Pre-Trip: Sydney & Port Douglas, Australia
March 27 – April 7: New Zealand
April 7 – 12 Post-Trip: Tahiti & Bora Bora, French Polynesia

March 6 – 9
SEABOTA Conference
The Joseph Hotel, Nashville, TN

June 12 – 15
National ABOTA Women's Leadership Summit
Ritz-Carlton, Bachelor Gulch, Avon, CO

June 19 – 22
TEX-ABOTA Santa Fe CLE Roundup
El Dorado Hotel, Santa Fe, NM

July 10 – 13
National ABOTA Summer Conference & National Board Meeting
Fairmont Banff Springs, Banff, Alberta, Canada

July 24 – 27
FLABOTA Annual Conference
The Breakers, Palm Beach, FL

October 1 – 5
National ABOTA Fall Conference/NextGen Jury Summit & National Board Meeting
Four Seasons Hotel, Austin, TX

November 3 – 9
CAL-ABOTA Annual Conference
Mauna Lani, Waimea, HI

Voir Dire Editorial Policy and Information

Voir Dire is the flagship publication of the American Board of Trial Advocates. **Voir Dire** is sent to all members of the organization, as well as to state and federal judges and law schools across the country. ABOTA is committed to producing a publication that is topical, professional and consistent with the organization's mission and programs.

Editorial independence is to a professional editor what professionalism is to a lawyer. Editorial independence allows the freedom to make judgments informed by training and experience, by an awareness of the volume of material that is available for publication, and by the reality of space limitations. Not every worthwhile submission can be assured publication. Editorial independence is entrusted to those who volunteer professional time to journalistic endeavors and are therefore better positioned to make editorial judgments than those who do not.

With these principles in mind, the Editorial Board has adopted the following guidelines in identifying the types of new stories and articles that are appropriate for publication in **Voir Dire**. In deciding which issues to cover in **Voir Dire**, as well as what articles to publish, the editorial board will consider the submission's importance, relevance and interest to **Voir Dire's** readerships. The following general categories are considered potentially important, relevant or interesting to ABOTA members and others to whom **Voir Dire** is distributed:

- The history and value of the right to trial by jury;
- Civility and standards of legal professionalism;
- The judiciary;
- The public's understanding of the civil justice system and ideas to improve it;
- Issues or events that have a direct effect on lawyers as practitioners;
- Practical articles for trial lawyers;
- Issues that have a broad reach across the profession; and
- Legal issues that are part of the national agenda.

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We welcome your ideas and article submissions. To have an article considered for publication, submit your manuscript or idea to the editor. All submissions are subject to review by the Editorial Board.

Letters to the editor

Letters must concern articles published in **Voir Dire**, and they may be edited for clarity or space.

Send letters, press releases and reprint permission requests to briant@abota.org.

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Voir Dire

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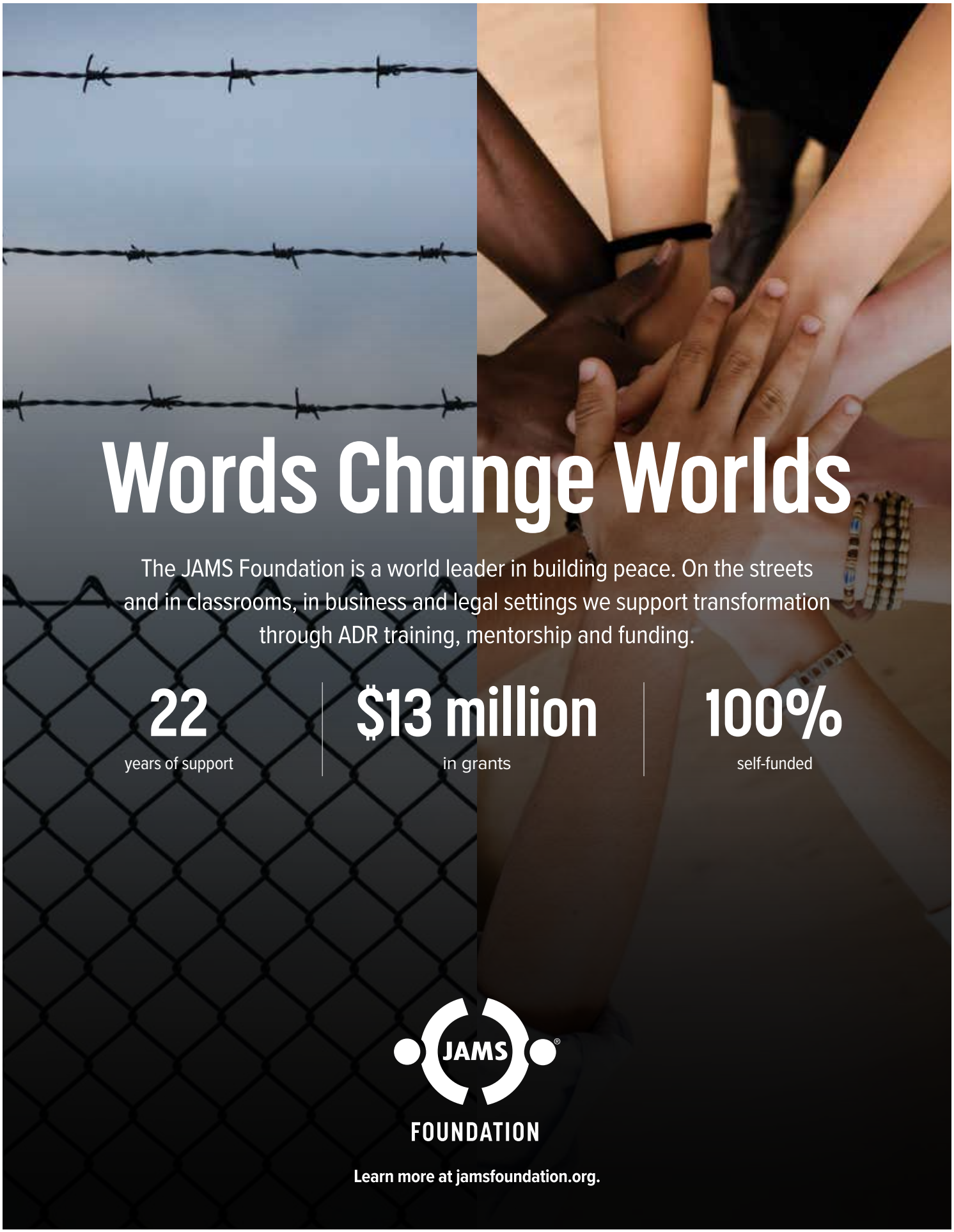

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REFORMING

Jury and Judicial Selection:

A Preliminary Report

Introduction

The ABOTA Foundation journeyed with us on this leap of faith—from a fledging idea to two conferences later, this paper represents the earliest outgrowth of the Foundation's commitment. Aided with the help of lawyers, academics, judges, jury consultants, and social scientists, hard questions were asked. These early ideas are less answers and more the seeds of exploration. Like many ideas, these are in their infancy. We assume they will grow and change.

Ultimately, the Foundation provided a forum for allowing students to ask, "What if?" and we applaud their bravery for granting them the space to think outside the box. "What if?" can lead to "Why not?" and "How can we make that better?" or even "That won't work, but this might." On behalf of all students who participated and were given the opportunity to ask these questions unconstrained by having "always done it that way," thank you to the ABOTA Foundation—from the future of our profession!

—Scott Dodson, Tracy W. McCormack and Craig Peters, Co-Chairs of the More Perfect Jury Symposium Series

Executive Summary

The Preliminary Report strives to improve the civil-trial system by considering reforms for jury selection, the use of jury consultants, and judicial selection. It proposes, for further consideration, the following reforms:

Jury Selection

1. Increase use of written questionnaires.
2. Limit peremptory challenges.
3. Augment juror compensation.
4. Strengthen efforts to achieve diverse representation.

Jury Consultants

1. Expand the use of jury consultants as neutrals to advise the court.
2. Augment techniques for identifying juror bias, negative traits for group decisionmaking, and predilections toward extreme views.

Judicial Selection

1. Universally require disclosures of ethics violations and conflicts of interest.
2. Require qualifications appropriate for the court, such as trial experience for trial judges.

Introduction

In 2022, the American Board of Trial Advocates Foundation, concerned about the diminishing importance of civil juries, began planning a multiyear project focused on raising awareness of the importance of civil juries by considering current jury practices and procedures, along with potential reform measures to enhance jury efficacy and efficiency. Because of the importance of judicial involvement in jury selection, the project expanded to include judicial selection and training.

The first in a series of conferences was held at the University of Texas Law School in 2023. Conversations at that conference hit upon a range of questions and topics related to civil juries and judicial selection. Those conversations generated more concrete topics for focus at the second conference, held at UC Law in San Francisco in March 2024. A third conference to discuss details and final recommendations has been contemplated to be held at Northwestern University Law School.

The UC Law conference, which was cosponsored and co-organized by its Center for Litigation and Courts, brought a diverse group together to continue the work begun at Texas Law School. Participants included California Superior Court judges, federal judges from the Northern District of California, prominent attorneys with civil-trial practices, jury consultants, law professors from UC Law and Texas Law School, and law students from UC Law, Texas, and Northwestern.

The UC Law conference considered three primary topics: jury selection, jury consultants, and judicial selection and training. This paper memorializes the conference discussions and preliminary recommendations. It creates a framework for thinking about how to improve the selection and function of the key decisionmakers in the civil-justice system: juries and judges. The ideas in this resulting report are necessarily preliminary to serve as a foundation for additional discussion and consideration, including at a contemplated third conference at Northwestern.

Part I begins with jury selection. It sets out the historical background on jury selection in American courts, its continued importance to the American system of civil justice, and both positive attributes and problem

areas of jury selection today. Improving jury selection requires articulation of the ideal jury, so the Part also envisions the ideal civil jury as comprising jurors who are (a) representative of the community's views on the issues relevant to the litigation, (b) willing and able to be open in considering and discussing the trial evidence fairly, and (c) saddled with as little jury-service burden as possible. Turning to reform, the Part offers potential measures geared toward improving different facets of jury selection. It also discusses a feasible path for implementing those reforms.

Part II turns to the role and use of jury consultants. It first details their qualifications and the adversarial role that jury consultants currently fill. But the unique expertise of jury consultants shows promise for enhancing system benefits, too. Accordingly, this Part proposes an expanded use of jury consultants, as a service to the court and in furtherance of civil justice, for identifying juror bias, susceptibility to group polarization and groupthink, and propensity for extreme views.

Part III expands the reformist perspective to include the other trial decisionmaker—the judge. Judicial qualifications vary from state to state, but some desirable traits are universal: knowledge of the law, appropriate judicial temperament, and similar characteristics. In addition, this Part proposes other universal requirements, namely the disclosure of any prior ethics violations and the disclosure of any potential conflicts of interest. These disclosures need not be disqualifying, but they should inform, provide transparency, and set a foundation for future recusal needs. In addition, this Part proposes that qualifications adapt to the particular court. For example, candidates for trial court should have some trial experience, while candidates for courts whose dockets exhibit an overrepresentation of certain classes of cases should have some experience in those practice areas.

I. Jury Selection

Juries are one of the most important features of the traditional American justice system,[1] but they have long been maligned as injecting unpredictability into adjudication, and jury service is seen not as a bastion of democratic participation but as a burden to be avoided. This Part reflects on the role, problems, and potential reforms of jury selection.

A. Background

Jury selection has long been a crucial feature for obtaining an impartial and effective jury. The history of jury selection in the United States began in the buildup to the American Revolution. In 1760, England enacted the Massachusetts Jury Selection Law of 1760, prohibiting the questioning of jurors once the sheriff had chosen them for duty.[2] American colonists, including Thomas Jefferson, were outraged by the Crown's attempt to deny them their right to an impartial jury of their peers.[3] England's meddling was important enough to be cited as justification for the Declaration of Independence, which charged the Crown with "depriv[ing] us, in many Cases, of the Benefits of Trial by Jury."[4] The new nation quickly enshrined the right to an impartial jury trial in the Sixth and Seventh Amendments to the United States Constitution.[5] Implicit in the constitutional protection is the right of parties to question jurors about their partiality regarding a case.[6]

The Court has held that the Fourteenth Amendment incorporates the Sixth Amendment's requirements for criminal juries but has not held similarly for the Seventh Amendment's requirements for civil juries.[7] Even for criminal juries, the Sixth Amendment sets a constitutional floor that permits some variation and experimentation, and neither amendment requires the availability of peremptory challenges.[8] States thus have some latitude in regulating voir dire, and this latitude creates differences between federal and state courts. Indeed, these differences begin with juries themselves. In a federal trial, the initial jury pool (the "venire") is drawn from the federal district where the court sits.[9] In contrast, most states choose their juries from the county where the trial will occur.[10] Additionally, many states have statutorily prescribed requirements for certain demographics to qualify for jury service.[11] The size of the jury itself also varies, with federal civil cases having between six to 12 jurors (depending on the complexity of the case), and 12 for criminal cases.[12] States have discretion to size both civil and criminal juries to as few as six jurors.[13] These differences, in theory, tend to lead to juries in federal court that are more diverse than those in state court.[14]

Judges maintain substantial control over the voir dire process, often deciding who may pose questions, the form and content of such questions, and the length of jury selection.[15] They also control whether jurors are questioned collectively in open court or individually in private, and how jurors should respond to questions (by raising hands, by speaking individually in response to questions, or in written answers to a voir dire questionnaire).[16] This broad discretion has led to wide differences in voir dire across courtrooms.

In federal courts, the judge conducts most of the voir dire questioning, which gives attorneys a very limited amount of time.[17] Most judges question jurors by themselves, with fewer allowing attorneys to ask supplemental questions, and much fewer allowing attorneys to ask all of the questions.[18] Judges take the lead on voir dire because they are confident that they know enough about the case and courtroom[19] and because they are concerned that attorney-led voir dire risks inappropriate questions and takes too much time.[20]

But state courts show growing support for attorney-conducted voir dire.[21] They believe that the attorneys know

their case best, and they worry that jurors may say what they think the judge wants to hear instead of reporting truthfully about how they feel about an issue.[22] There is a social desirability to be fair, honest, and impartial, but there is also pressure to conform when the judge is looming over the jury box from up on the bench. In state court, as in federal court, the judge has the final say on whether a juror can or cannot serve impartially.[23]

Despite more than two centuries' worth of efforts to improve juries and their essential function, juries remain in need of protection. Citizens called for jury service often do not view jury service as a civic duty essential to democratic governance.[24] In their defense, jury selection can be tedious, time consuming, and without sufficient compensation. Jury selection also has a long and sordid history of discrimination,[25] leading to a commonly held belief that defendants are not really being tried by a jury of their peers.[26] These issues directly implicate the process of voir dire itself.

Accordingly, the time is ripe to consider the status of jury selection today. Although the jury has its issues, its inherent importance gives improving selection an utmost significance. As Thomas Jefferson once said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[27]

B. Aspiring to a More Perfect Jury

This part sets out and provides commentary on three essential features of a perfect jury. A perfect jury:

- Represents community views on the issues relevant to the litigation;
- Is open to considering and discussing the evidence fairly; and
- Is efficient, in that jury service entails as little burden as possible.

Each essential feature is discussed below.

A perfect jury represents community views on the issues relevant to the litigation. Representativeness is a key value.[28] The Supreme Court has recognized that the Constitution demands that the jury be chosen from a fair cross-section of the community.[29] This recognition stems from an "established tradition" in our judicial system that is rooted in "public justice that the jury be a body truly representative of the community."[30] Indeed, it is a natural outgrowth from the animating purpose of the Constitution that provides a check on arbitrary abuse of power by "mak[ing] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[31] Crucially, representativeness establishes fairness in line with our democratic roots and, in so doing, provides confidence to the public that trial by jury results in impartiality.[32]

Jury representativeness is qualified in two ways. First, representativeness is of the local community, rather than of the nation or humankind as a whole. Local community is at the forefront because it comports "with our basic concepts of a democratic society and a representative government."[33] This framing ensures that a party is judged impartially by a representative pool of their peers without the exclusion of distinctive local characteristics.[34] Second, representativeness is on the issues relevant to the litigation. A jury representative of community views on obscenity, for example, may look different from a jury representative of community views on police misconduct.

Representativeness is achieved through both selection of the venire from among the local community and selection of the jury from the venire. Representativeness of the venire is enhanced by ensuring that venire selection is comprehensive, fair, and randomized, with minimal blanket exclusions and minimal individualized exceptions. To a large extent, most courts' venire selection strives for these goals, with some problematic exceptions. For example, incarcerated persons generally are not summoned for jury service,[35] yet the lack of incarcerated persons means that a jury called to evaluate case-relevant conditions of incarceration is less likely to be representative of the community.[36]

That the original venire represents a fair cross-section of the community does not necessarily guarantee that the final jury will still be a fair-cross section of the community. The panel is whittled down by opposing parties to the final jury members through the use of challenges, which may diminish a jury's representativeness.

Cause challenges are based on specific biases that jurors may have that could prevent them from being impartial or based on personal burdens, such as health, family, or financial burdens, that would not enable a person to serve effectively.[37] Cause challenges, because they are relatively light, deployed by a neutral judge, and based on public reasons, tend to have little impact on representativeness, but some counterexamples exist. For example, a tort case seeking compensation for trauma causing a severe mental disability impairing cognitive function is unlikely to contain a jury with someone with the same mental disability because that person, if called, would likely be excused for cause as unable to perform the function of a juror. Even the benevolent goal of reducing bias can be in tension with representativeness. A juror opposed to the death penalty may be excused for cause in a capital case on grounds that the person cannot fairly consider whether the death penalty is appropriate,[38] but those cause challenges, and the voir dire process itself, then tend to create a jury skewed toward

favoring the death penalty in ways that do not represent the community.[39]

Peremptory challenges, which are used by each party to strike jurors from the venire for nearly any reason,[40] are more problematic. When used effectively, peremptories can target jurors whose views, while insufficiently extreme to justify a cause challenge, do not fairly represent the community.[41] In addition, because peremptory challenges are made by attorneys who know the facts of the case best, peremptory challenges can be used to strike jurors who ought to be excused for cause but whose views are not clear enough to the judge. But when used strategically, peremptory challenges can be used to strike representative jurors whose views fall within the community mainstream but also happen to be opposed to a particular litigant's case strategy.[42] In addition, peremptory challenges can be rooted in attorney bias, such that an attorney makes an assumption about a prospective juror's views that is, in fact, mistaken. [43]

A perfect jury is open to considering and discussing the evidence fairly. The jury's core function is to review the evidence presented at trial and make unbiased findings of fact, after discussion and deliberation among the jury members. That function has both internal and external implications. Internally, each juror must be able to perform this function. Externally, the system must create an environment conducive to performing that function by encouraging honesty and avoiding silencing a particular juror's voice in deliberations.

Ensuring that each juror is open to considering the trial evidence fairly begins with voir dire, which presents an opportunity to remind jurors about the solemn importance of their role and the need to set aside biases. During voir dire, both the judge and the parties should aim to mostly speak candidly about the role that notions of credibility and believability play in a trial.

Voir dire also is designed to ferret out individual juror biases that could hinder open consideration of the facts. But too much disclosure of the specific facts of the case in voir dire, especially if the facts are presented in a slanted light not representative of the whole factual circumstances, can induce bias and reduce openness in deliberation. Accordingly, voir dire should be curated to elicit inherent impartiality about generally relevant facts instead of more specific information relevant to the case at hand.[44] Parties should focus on teasing out how each potential juror feels about their ability to think about the issues neutrally, in a more abstract sense, to elicit potential inherent biases.

The environment of jury deliberations must ensure that each juror feels comfortable voicing their views on the evidence, as informed by their diverse and lived experiences. Jury-room confidentiality, for example, is a crucial aspect of deliberations to enhance juror honesty and discussion.[45] In addition, the deliberation environment should be crafted to encourage a juror with a minority, but still representative, view to speak up to voice that view. Finally, although most courts ask the jury to elect a foreperson to perform the useful tasks of guiding the deliberations and communicating on behalf of a jury, an overbearing foreperson can also stifle discussion and chill valuable contributions from other jurors. In addition, the very title of foreperson can imbue that juror's views with more weight than they should carry.[46] Court instructions can exacerbate that perception. In federal courts, jurors are commonly instructed that the foreperson will "preside over your deliberations" and "speak for you here in court."[47] The foreperson thus can either foster an inclusive environment or create a less comfortable space for others to share their lived experiences.

A perfect jury is efficient, in that jury service entails as little burden as possible. Efficiency is important both on individual and systemic levels. On an individual level, jurors must take time away from jobs, families, and other life enjoyments to serve on a jury. Jurors must also make an effort to pay close attention to the facts; those facts may exact an emotional toll. In short, jury service can be burdensome financially, socially, and emotionally.[48] Minimizing those burdens can make jurors more willing and able to serve effectively. Minimizing those burdens can also improve the perception of jury service as a civic duty and important component of democracy.

Jury trials also exact costs on the parties and court. Jury trials take longer than bench trials, both because of the need to build in time for voir dire and deliberation and because the presentation of the facts may need to go more slowly for jurors.[49] Attorneys may feel compelled to hire consultants to assist with optimal jury selection.[50] And problems in jury selection and conduct can unsettle the finality of the verdict.[51] All else equal, minimizing these costs will benefit the parties and the court.

C. Achieving a More Perfect Jury

With these goals in mind, the paper next proposes consideration of reform measures for voir dire.[52] These proposals are necessarily preliminary. They are offered as warranting further research and discussion. Such research and discussion may reveal that the proposals either have or lack merit.

1. Increase use of written questionnaires.

Questionnaires improve the efficiency of voir dire.[53] It is unclear whether jurors generally are more or less honest on questionnaires, but questionnaires likely encourage

honesty when questions involve sensitive topics, such as sexual assault, domestic violence, or cancer, that jurors may be reluctant to answer orally in a crowded room. To be effective, questionnaires must be drafted carefully, but, when drafted carefully, and when accompanied by a judge's admonition that answers are under oath and must be truthful, questionnaires appear to hold great promise.

2. Limit peremptory challenges.

In contrast to cause challenges, it is difficult to measure what, if any, benefit peremptory challenges confer on the representativeness of a jury. The empirical studies tend to show that peremptories, rather than contributing positively to the perfect jury, instead reflect inappropriate strategic manipulation and bias.[54] Various ways of deemphasizing or limiting peremptory challenges exist, including the following: (a) impose more stringent limits on the time or number of peremptories, limits that might vary depending upon the size of the venire, the profile of the case, or the litigant as prosecutor or criminal defendant; (b) require justification for peremptory strikes; and (c) require parties to exercise their peremptory challenges prior to any cause challenges.[55]

Deemphasizing or limiting peremptory challenges may require a concomitant reinvigoration of cause challenges.[56] Reform of one, in other words, may require reform of the other. One way cause challenges could be enhanced is by employing an expert neutral, such as a jury consultant, to advise the court on cause challenges. Jury consultants are widely employed by the parties to assist with peremptory challenges.[57] If jury consultants add value in attaining a perfect jury, why should that value be confined to an adversarial, party-focused role? A court-advising jury consultant could improve the efficiency of court-led voir dire and the accuracy of cause challenges, thereby diminishing the need for peremptory challenges.

3. Augment juror compensation.

Another way to ensure the original jury panel is truly representative of the surrounding community is to pay jurors a living wage. Jurors currently are paid less than 60 dollars per day, with no reimbursement for parking, transportation, or lunch.[58] Individuals from lower socio-economic classes simply cannot afford jury service, despite their willingness to serve.

Increasing wages for jury service would ensure the participation and signify the importance of all economic classes in the justice system.[59] Fair wages would also likely deter potential jurors from making up excuses to avoid jury duty or answering untruthfully to convey a false bias during voir dire. Evidence suggests that raising compensation increases the likelihood of obtaining a jury with more racial diversity, in addition to socio-economic diversity.[60]

4. Strengthen efforts to achieve diverse representation.

Meaningful engagement in the administration of justice through jury service remains particularly difficult for persons with disabilities.[61] Peremptory strikes based on disability remain constitutional.[62] But courts and legislatures can prohibit such discrimination by statute or rule.[63] In order to ensure the equal participation of all individuals called to service, courts must go beyond the antidiscrimination provisions of the Americans With Disabilities Act[64] by affirmatively welcoming and proactively accommodating those with disabilities. When issues involving disabilities are highly relevant to the case, for which jury representation of disabled persons is important, the court should consider holding remote proceedings or other tailored accommodations to more easily enable disabled persons to serve. Disability rights must be given greater accommodation to promote the inclusion of disabled and immunocompromised individuals in the legal system to ensure that jury panels truly represent the cross sections of a community.

Racial disparities in the administration of justice exist before jury selection even begins. The exclusion of individuals from source lists, such as voter rolls, in which potential jurors are selected contributes to the lack of racial diversity in jury panels during trial proceedings.[65] In an effort to increase diversity, some states supplement voter registration lists with driver's license registries, but even these lists tend to disproportionately exclude citizens of color or lower-income residents.[66] Some states disable felons from jury service, an exclusion that also disproportionately affects persons of color.[67] To improve the representational quality of initial venire calls, lists should be compiled from all available sources, including state tax filings, with limited exclusions.[68]

D. Implementation

Because the reforms sketched above require implementation, this part turns to some preliminary ideas for how to turn the reform ideas into practical reality. The implementation of new initiatives aimed at developing a more perfect jury in the judicial system, a conservative institution, may be challenging. Legal actors might offer resistance and innovative ideas may struggle to gain traction. However, the noble goal of a more perfect jury is not a Sisyphean task. There are practical ways in which these goals may see life in the United States' jury system.

Fundamentally, structural jury reform requires broad

cooperation and serious commitment from legislatures, judges, attorneys, and academics. Once implemented formally, public outreach must be made to educate the public about the changes so that the public is aware of how the reforms affect them. Thus, any project of jury reform will require a centralizing reform body, perhaps even an appointed commission, to address the complicated matters of implementation. Where appropriate, pilot programs can be used to minimize disruption while providing a proof of concept that generates hard evidence for more widespread reform.

With respect to specific reform measures proposed above, the increased use of questionnaires can be implemented on a judge-specific, and even a case-specific, level. Educating judges and attorneys through CLEs, white papers, and other outreach may be all that is needed to induce greater reliance on questionnaires.

The other three reforms identified above require more intrusive, directive, and structural implementation efforts. Reforming peremptory challenges has long been a topic of consideration, with limited change. Because federal reform has stalled, states have taken it upon themselves through legislation and judicial rulemaking to implement peremptory challenge reforms.[69] Indeed, the latest trend has been for state courts to appoint committees or working groups to study and recommend reforms to be promulgated by relevant authorities.[70]

Increasing juror pay requires education of its benefits, alleviation of concerns of disruption to the existing system and state budgets, and political will. Fortunately, the effort in San Francisco provides an illustrative blueprint for success. In 2022, the San Francisco Superior Court, San Francisco Public Defender's Office, San Francisco District Attorney's Office, and the San Francisco Bar Association piloted a program called "Be the Jury" to address the financial concerns of low- to moderate-income jurors.[71] The California legislature played its own part, authorizing the program through AB 1452.[72] The initiative increased the compensation for program-eligible jurors from $15 to $100 a day and raised the daily mileage reimbursement from $.034 to $.067 per mile.[73] Funding primarily came from philanthropic sources.[74] A one-year preliminary evaluation revealed that the program resulted in more economically and racially diverse panels overall.[75]

Expanding the program throughout California or in other states will require some consideration of state funding, but initial pilots in other localities or states can be funded through philanthropic donations.[76] In addition, widespread adoption may result in substantial cost savings in court budgets because increased pay incentivizes juror participation rates, resulting in fewer repeat calls for jury service. The Be the Jury successes, coupled with lobbying efforts, education outreach, and financial/budgetary feasibility studies, should provide powerful support for program expansion.

Similarly, to increase the participation of disabled jurors, widespread cooperation among legal actors is necessary. Federal law already prohibits juror exclusion because of race, color, religion, sex, national origin, or economic status,[77] and the ADA's extension of antidiscrimination protections to disabled persons would seem to support an application of those antidiscrimination principles to jury service, too. Indeed, more than 25 states have laws that prohibit discrimination from jury service on account of disability.[78] And accommodations necessary to welcome disabled persons to jury service are not unworkable; in response to the COVID-19 pandemic, courts routinely conducted proceedings remotely.[79] Fully embracing disabled persons within the civic community by facilitating jury service will require a combination of legislative action, court adoption, and attorney education, but state-level successes already demonstrate that such jury reform is possible.

To increase racial diversity of juries, in addition to the other reform measures articulated above, using tax filing lists to create source lists for juries appears like a practical and moderate proposal to increase jury diversity. In 2020, Governor Newsom signed SB 592 into law, which made state tax filing lists an appropriate source list for juror selection. The law requires the Franchise Tax Board to provide county jury commissioners with a list of resident tax filers. The primary obstacle to similar measures in other jurisdictions is likely logistical in nature. Enacting an equivalent proposal on the federal level, for example, might overburden the Internal Revenue Service, though electronic and automated systems that can transmit the data to district courts would seem within the range of technological feasibility.

II. Jury Consultants

Jury consultants play a pivotal role in modern litigation, particularly in high-stakes or complex cases. Their expertise in psychology, sociology, and human behavior assists attorneys in crafting strategies to select favorable juries and present cases effectively. This Part explores the roles and qualifications of jury consultants and the dynamic between jury consultants, attorneys, and judges. It seeks to reveal how jury consultants affect the trial process and proposes reforms for improving the use of jury consultants.

A. Qualifications of Jury Consultants

A jury consultant's expertise in human behavior stems from various fields and degrees. Nearly half of all jury consultants hold a master's degree, Ph.D., or JD. More than half hold a bachelor's degree in psychology,

social sciences, communication, linguistics, or trial law.[80] Although no licensing certification is required, many jury consultants adhere to the standards of practice in guidelines established by the American Society of Trial Consultants and develop early-career experience at a consulting firm.[81] Some consultants can conduct multi-modal quantitative and qualitative research and synthesize research data.[82]

B. The Adversarial Role of Jury Consultants

Jury consultants enhance attorneys' effectiveness at trial by providing services pertaining to jury selection, trial strategy, and post-trial analysis. Services that consultants may provide to attorneys include the following:

- *Case analysis and theme development*. Jury consultants help analyze the facts and issues from case materials and discuss their analysis of central jury issues and key themes relevant to each party's arguments.[83]
- *Jury research and analysis*. Through focus groups, mock trials, and community attitude surveys (known as qualitative research), consultants gauge public perception and potential juror biases.[84]
- *Voir dire*. Jury consultants evaluate the risks that can affect jury selection and winning over jurors, assess the effects of venue, develop jury questions and juror questionnaires, arrange mock trials with mock jurors similar to the potential jury pool,[85] and advise on in-court jury selection strategies.[86]
- *Witness preparation*. Jury consultants help witnesses, especially experts, present their testimony in a clear, compelling manner that resonates with jurors.[87]
- *Post-trial juror interviews*. After a trial, jury consultants conduct interviews with jurors to understand their deliberation process, which provide useful information for appeal, remand, and future cases.[88]

The professional relationship between attorneys and jury consultants is collaborative. Attorneys share strategies and information about the case, while jury consultants provide insights into jury behavior imperceptible to attorneys. Recently, trial attorneys have come to rely routinely and heavily on jury consultants.[89] In the early 2000s, trial attorneys tended to rely on their own trial experience instead of jury consultants,[90] but, now, senior partners routinely hire them. Orin Snyder, a top trial lawyer at Gibson Dunn said, "I have not gone to trial in 15 years without a jury consultant. Trying cases is a team sport, and even if there's a captain or quarterback, an integral part of the team in modern jury practice is a highly skilled and effective jury consultant."[91]

C. The System Benefits of Jury Consultants

The obvious benefits of jury consultants to adversarial tactics have led some to conclude that jury consultants are bad for the system's goal of obtaining an impartial and a representative jury. Critics label jury science as "high-tech jury tampering"[92] because, they argue, jury consultants "choose favorably biased jurors, not impartial jurors."[93] Additionally, other critics believe that "jury science and its high cost runs afoul of the United States Constitution's impartiality mandate when only one side can afford access to consultant services."[94]

Yet despite these criticisms, jury consultants can benefit jury selection in ways that improve the civil-justice system. The prevalence of jury consultants may be the start of the answer. Nearly 75% of voir dire in state court, and around 30% of voir dire in federal court, is conducted in whole or in part by the attorneys.[95] Jury consultants hired by attorneys can help shape and improve attorney-led voir dire in ways that produce a better jury for effective adjudication. Jury consultants can "preserve[] impartiality by ensuring that hidden biases and prejudices are exposed so that they will not dictate the outcome of trial proceedings."[96] In other words, jury consultants increase the likelihood of ferreting out prospective jurors who could *not* be fair or who might harbor extreme or unrepresentative views.

Jury consultants do so by relying on their backgrounds in psychology, sociology, or law. Jury consultants study prospective jurors for notable body language—crossed arms, nervous shifting, and other signs—that reveal hidden messages beyond verbal communication.[97] These cues may be more reliable than a prospective juror's own self-reporting about their biases.[98] Jury consultants also use social media and other publicly-accessible online information to determine whether jurors would exhibit biases during trial.[99]

Although jury consultants are, like all humans, fallible, they are almost certainly better at identifying juror biases and predilections than the attorneys who would have to oversee jury selection without them. Studies have shown that, consciously or subconsciously, attorneys use impermissible heuristics.[100] For example, a defense attorney in a civil case once justified a peremptory strike against a Black female juror based on the suspicion that she would be "an unduly liberal juror."[101] In short, jury consultants reduce the likelihood of bias among jurors because attorneys would otherwise rely on their own stereotypes and inherent biases to select jurors.[102]

Jury consultants might also improve the quality of jury service. Evidence suggests jurors are often influenced by

matters outside of the trial record—such as style of dress, presence of family members at the trial, and the like[103]—and harbor implicit biases based on gender and race.[104] Jury consultants can help identify jurors most susceptible to those detractors and instead select jurors who will focus on the trial evidence, who will listen to trial with open minds, and who will attempt to put aside their own biases.

Finally, jury consultants may improve jury deliberation by selecting jurors resistant to group polarization and groupthink. Group polarization—when opinions and attitudes of individuals in a group become more extreme after group discussion—has been documented in hundreds of studies across the world. Once people hear what others believe, they sometimes adjust their positions more favorably to the dominant group position. And as people voice like-minded opinions, their views often become more extreme as they believe that the validity of their view has been corroborated by the group discussion. Groupthink is a related phenomenon that prioritizes the pursuit of consensus over sound judgements. Group polarization and groupthink have been documented during jury deliberations. Jurors may want to feel loyal, and they may feel pressured to conform in order to avoid intense conflict or being seen as an outsider. This can lead to a rushed verdict without sufficient consideration of all evidence or vocalization of important minority positions. By way of example, juries have rendered punitive-damages awards that are higher than those of the median juror before deliberation even begins, and studies have shown a reluctance of some jurors to voice (and have shown the diminished influence of) minority opinions in jury deliberations. Jury consultants may be able to minimize some of these sociological effects by identifying jurors more resistant to group polarization and groupthink.

D. Proposals for Enhancing the Value of Jury Consultants

All jury consultants—either privately hired or appointed by the court—can emphasize techniques for identifying implicit and explicit bias, negative traits for group decisionmaking, and predilections toward extreme views. Jury consultants who use these techniques can help to form a group that is balanced, representative, and less likely to make the psychological errors that groups tend to make.

Potentially, jury consultants could act as court-appointed neutrals and owe a duty to the court to offer advice on jurors in an effort to obtain a jury that is as fair, representative, and functional as possible, by identifying potential jurors who may be prone to dysfunctional or irrational decision making. Today, many cases feature exclusively judge-led voir dire, in which jury consultants could play a crucial role; discussions with state and federal judges during the 2024 conference at UC Law SF revealed some judicial willingness to work with jury consultants more directly, perhaps as court-appointed adjuncts. The details of implementing such a proposal should be considered at the contemplated Northwestern conference, but a starting point may be to model Rule 706 of the Federal Rules of Evidence for court-appointed experts and Rule 53 of the Federal Rules of Civil Procedure for court-appointed masters. Due attention should be paid to cost, fairness, and logistical simplicity.

Absent a single, court-appointed jury consultant, all parties should have greater access to jury consultants so that a well-heeled party does not have a significant advantage in jury selection, both to the detriment of the poorer party and to the impoverishment of the jury system generally. Again, the participants at the contemplated Northwestern conference should consider various options for increasing access, such as encouraging academic study of, conferences with, and CLEs featuring jury consultants and their best practices.

Instead of one side reaping the benefits of jury consultants to hand pick jurors, both parties and the judge could work together to form a jury that could be more just and work together cohesively to avoid psychological errors. Improving jury consultants' efficacy, neutrality, and accessibility could be important steps toward a more perfect jury and a more just legal system.

III. Judicial Quality

This Part turns from the jury to the judge. Judicial screening and selection are essential to maintaining a functioning civil-justice system. This Part offers potential solutions for improving the quality of judicial personnel by setting relevant qualifications.

All judges should have certain qualities: organized, intelligent, exceptional communicators, ethical, and impartial to the sways of the masses. Yet each state sets various qualifications for judicial candidates. California and Texas offer contrasting illustrations.

In California, an appointment-based selection system, the essential requirements for the superior court include, "Attentively receiving, analyzing and concentrating on information for a total of eight or more hours within a work day of reasonable duration" and "[a]bsorbing, analyzing and weighing complex issues quickly and accurately" and "[r]esponding to situations with discretion, judgment, emotional and mental discipline, and restraint while under pressure."[105] To probe a candidate's qualifications, 15 questions of California's screening process inquire into candidates' academic and professional history.[106] Other questions listed under a section titled "Qualification/ Suitability for Judicial Appointment" are more personal.

One asks the applicant to describe qualities they believe make them qualified to serve in a judicial appointment. Another asks: "How would you describe your personality?" Yet another asks to describe the role an attorney or judge can play to better society and identify efforts applicants have made in this regard.[107]

In Texas, by contrast, most state-court judges are elected in partisan contests. Candidates must meet certain qualifications to be placed on the ballot. Judges of municipal courts, for example, are required to be attorneys. All appellate court judges must have been licensed to practice law in the state for at least 10 years, be citizens of the United States and of Texas, and be at least 35 years old. Judges in Texas' county courts must be "well informed in the law of the State" but are not required to have a bar license. According to some sources, most of these county judges are not licensed to practice law.[108]

Regardless of the method of selection, some judicial qualifications should be universal, while others should be tailored to either the type of work a particular judge is likely to experience on the bench or to the specific needs of the community that that particular judge serves.

In addition to commonsense universal qualifications like knowledge of the law, appropriate judicial temperament, and the like, two universal disclosure requirements are proposed here: ethics violations and conflicts of interest. Attorneys with Bar complaints, violations, or other morally questionable acts should bear the burden of demonstrating that their prior mistakes do not reflect their present character. Those attorneys should also demonstrate that their prior mistakes will not translate to future misconduct from the bench. Ethics violations need not be per se disqualifying if appropriate remedial measures have been taken, but disclosure of them should be essential. Similarly, candidates should disclose conflicts of interest. Candidates should disclose if a partner or close family member holds a position likely to have an interest in cases appearing before the court or if the candidate, their partner, or close family member has a financial interest likely to be affected by cases before that court. Judges with significant exposure should not be disqualified, but the exercise and formality of disclosure will both inform the selection entities and provide a foundation for appropriate recusals if the candidate is selected.

Three context-specific qualifications should be imposed. First, candidates for trial courts should have some trial experience. Requisite experience will vary in each jurisdiction and depend on a multitude of factors. However, candidates with extensive litigation experience, whether criminal or civil, should be preferred. Second, candidates for courts with an overrepresentation of certain kinds of cases should have experience in that area of practice. California judges in Silicon Valley, for example, should have adequate knowledge and understanding of intellectual property to serve that area effectively. Judges in New York should have an adequate understanding of financial regulations and markets. Third, candidates should have some past involvement in the communities they seek to serve. Community involvement can range from extensive pro bono work to the Rotary Club. No rigid criteria for community involvement are necessary, but judges with a legitimate connection to or care for their community will do better to protect it.

Conclusion

Day after day, in jurisdiction after jurisdiction, the civil-justice system provides a central value to injured parties. Yet room for improvement exists. Jury selection is not as representative, open, or efficient as it could be. The expertise of jury consultants can be harnessed more effectively. And judges overseeing civil trials need to have the qualifications and skills to make the system work optimally. This paper sets out some preliminary reform measures and implementation pathways to improve civil courts. ■

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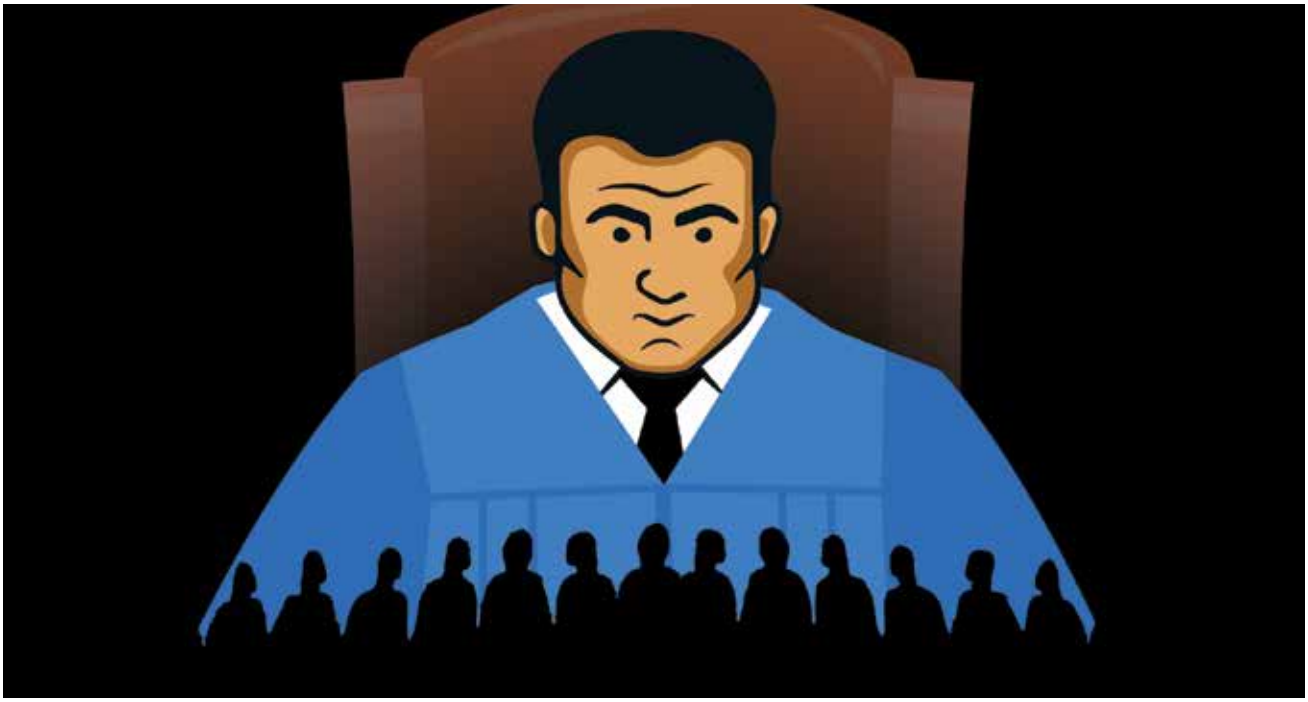
The Arizona Experiment: View from the Bench

Q&A with the Honorable Christopher Whitten, Superior Court Judge, Maricopa County, Arizona



By David Grant Halpern

1. With 15 years of private practice prior to taking the bench in 2006, what was your experience in the use of peremptory challenges (PC) as a practitioner?

As a prosecutor, civil defense lawyer and civil plaintiff's lawyer, I used PCs all the time. I thought they were incredibly valuable for two reasons.

I believe that there are potential jurors who harbor a bias, maybe even an unconscious one, but who do not utter the "magic words" which would cause them to be stricken for cause. Given the time limitations sometimes imposed by the court, or my limitations as an attorney, there was sometimes no fair opportunity to have jurors with such a bias identify themselves in a way that demonstrated an inability to be fair and impartial.

Earlier in my career as a trial lawyer, I also thought I had a good gut instinct for identifying potential jurors who might be unfriendly to my client. I thought I was good at judging things like body language and facial expressions. As I got more experience selecting jurors (and talking to them after trial), I realized I was about as accurate as throwing darts at a board … and I am not a good dart player.

2. Since 2006, you've presided over at least four different speciality courts, criminal, family, tax, juvenile, and civil. In your current role presiding over a civil docket, what types of cases are you assigned?

Luck has been on my side as a judge. I have had a civil or commercial assignment for 10 of my 18 years. Those assignments include all kinds of civil cases including auto accidents, professional malpractice, insurance bad faith, construction defect, breach of contract and complex commercial cases. As a result, I've seen some of Arizona's best lawyers in action.

3. The topic for our interview is your view of what we're calling the Az. Experiment, i.e. eliminating PC (EPC) which began in 2022. First, what—if any—differences did you observe in the use of PC among the various courts over which you presided? Criminal would seem to be the most likely area in which PC were used and adjudicated differently. Has that been your experience?

As a trial lawyer or judge, I have been involved in selecting a few hundred juries. In that time I have only seen one successful challenge to the improper use of a PC under *Batson v. Kentucky* or *Edmonson v. Leesville Concrete*. The reality is that many lawyers are hesitant to make allegations that opposing counsel used a PC to strike a potential juror because they were part of a protected class. In the rare instances where such a challenge was made, the striking lawyer could usually find some proper reason for striking the potential juror, even if it was questionable. In my opinion the protections imagined by *Batson v. Kentucky* or *Edmonson v. Leesville Concrete* have very little teeth.

As a result, in most jurisdictions, the makeup of our juries does not closely enough match the demographics of the community in which they serve. Underrepresented community members rightly question whether they can get a "jury of their peers." That erodes confidence in our system.

4. How about across the different civil dockets? Any notable differences in the use, misuse or abuse of PC in tax/business as compared to family or juvenile court?

Tax trials were almost exclusively to the bench and there is not a right to juries in juvenile or family cases. I do not perceive a big difference between the way PCs are used in civil and criminal cases, except that criminal practitioners are in trial more often, so are often more prepared to deal with *Batson* challenges.

5. Arizona apparently did not jump into this experiment without a good deal of thought and reflection on how other states were addressing the EPC question. Did you have the opportunity to participate in one of the three studies, two of the Az. Supreme Court (i.e. the Committee to Study More Effective Use or the Ad. Hoc. Studying Jury Practices and Procedures), or the third, the Task Force on Jury Data Collection, Policies and Procedures? Either way, how much attention did these various efforts receive from the bench and bar?

I was not part of the AZ Supreme Court Committee that studied and recommended the change or the other two, but talked frequently with those who were – mostly voicing disagreement. The changes were considered for a long time by the Committee (in meetings open to the public) before a set of recommendations was made to the AZ Supreme Court. The Court then invited comment for a long period before adopting the recommendations as a pilot program. After a year, they invited more comment. Only after all of that were the changes adopted. Of note, ABOTA and the ACTL objected to the changes and I supported those objections at the time.

6. It has been reported that COVID may have helped your bench and bar reevaluate the efficacy and value of PC. If so, how?

The changes were well on the way when COVID hit us. I'm not sure what effect it had on the adoption of the changes.

7. What other benefits have you and your peers observed since EPC?

There are at least five important changes we have seen.

First, jury panels and members of sitting juries both have become more diverse. They represent the makeup of the community more accurately. We're still studying the results to get our best data, but all early indications are that the rule change is doing a better job than *Batson/Edmonson* did at achieving this goal.

Second, trial lawyers have more and better information in jury selection. The rule changes came with a recommendation to administer questionnaires and instruction to trial judges not to try to "rehabilitate" potential jurors who indicate they might have a problem being fair and impartial. The comments to the rule suggest trial judges only use open ended questions in exploring potential juror answers, and avoid the "yeah, but you will follow the instructions I give you" type of rhetoric.

We now use jury questionnaires in almost every case (I used one to select a jury this morning). All potential jurors get a QR Code with their jury summons which links to a case-specific questionnaire. About a week before they are to report for service, the questionnaire "goes live" and the potential jurors can complete it on their computer or even their cell phone. If we pick a jury on Monday, the trial attorneys get the responses on the preceding Friday midmorning.

Unquestionably, jurors are more complete and candid in their responses to the questionnaires. If there are interesting answers, the attorneys can focus on following up on those during live voir dire.

Third, our Court saves a lot of money, and creates a lot of goodwill, by not requiring jurors who can't serve to show up and say so. Those jurors now explain why they can't serve in their questionnaire response. If excused, they don't take a day off work and we don't compensate them for a day of jury service. While that might seem insignificant it has saved our county millions of dollars.

In my example above, the trial attorneys who got the questionnaire responses on Friday would meet and confer and, before the end of the day, give me a list of potential jurors who they agree can be excused for cause. The jury office then contacts those people and tells them they do not need to report.

Fourth, the EPC changes allow better, more focused live voir dire by the lawyers because the jury panels reporting for live voir dire are much, much smaller.

By reducing the size of the panel subject to live voir dire, first by screening out the easy strikes from the questionnaire response and then by not having to include extras to account for those who will be subject to PC strikes, trial lawyers can focus their efforts on a jury panel of 20-25 (for an eight person jury with two alternates) instead of 40 or 50. That leaves more time to talk to each individual juror.

Finally, empaneling a jury has become faster and less invasive. Oral voir dire is shorter because the lawyers already have a ton of information and the number of potential jurors involved is much smaller. Think about how much time is wasted in more traditional voir dire asking 50 people if they have schedule conflicts or if they know any of the witnesses.

There is far less chance that a potential juror will have to answer questions on subjects that are private or intrusive, as that information can be included in their questionnaire responses (and followed up with one-on-one if appropriate).

8. A little more than two years into the EPC, what has been your experience overseeing a civil docket? What have you heard from your colleagues on the bench? ….and trial bar?

I opposed these changes when they were first proposed. I believed that peremptory challenges were a necessary tool for empaneling fair juries. That PCs could be misused, while reprehensible, did not justify elimination of the tool, I felt. I knew that *Batson/Edmonson* were not completely effective in eliminating the abusive use of PCs, but thought it was the best we could do.

I think many members of the bar, and many of my friends in ABOTA, still hold this opinion.

My experience has changed my initial opinion about the EPC. Over the last couple of years I have seen how the combined use of questionnaires and better judicial involvement in *voir dire* have resulted in the effective removal of jurors who have bias (explicit or unconscious) for cause, even without peremptory strikes.

In fact, I think good lawyers might be better able to select a fair jury under this new set of rules, given the extra time they have to focus their efforts on a fewer number of potential jurors.

9. Is there any single impact of EPC that stands out, good or not so good? Anything unexpected in how the past two years of EPC have impacted trial process in your court?

The most significant change is that our juries better reflect the demographics of our community. In a time where public confidence in all branches of government—including the judicial system—needs to be earned on a consistent basis, this is crucial.

The cost for this benefit—eliminating peremptory strikes—is much less than I expected. In fact, we might even have increased our ability to weed out biased jurors using the changes to the system that were part of the rule change.

10. Is there any indication that EPC has impacted how jury consultants are used in Arizona? How frequently?

Juror consultants have become even more valuable than before the EPC. They are especially valuable in crafting questions for the questionnaires that result in long narrative answers, full of valuable information. Even before our rule changes, it was difficult for trial lawyers to refrain from advocating their client's position. Doing so in *voir dire* does nothing to help them identify jurors who might be biased against their client. I think trial lawyers understand this intellectually but have a hard time walking the walk. Jury consultants don't seem to give in to the urge to advocate in jury selection nearly as much as we do.

Because the post-questionnaire panels are smaller, and questioning tends to be more focused and individual, jury consultants can be valuable in advising trial lawyer on oral *voir dire*.

11. To date, little has been published about the Az. Experiment. Among the writings is a Princeton University student's Senior Thesis. Kareena Bhakta's 107-page thesis made a few observations that might be worth comment. First, Bhakta describes a seminal case which prompted Chief Judge Peter Swann and Appeals Court colleague Paul McMurdie to draft a petition endorsing EPC. Did the case become controversial at the time of trial? What happened at trial?

Peter is now retired. Paul and he spearheaded the changes. I don't really know much about their motivation, or the case Ms. Bhakta cites. I'm happy to put you in touch with Peter or Paul (but not Mary, LOL).

12. It would seem that EPC imposes a heavier burden on trial judges now that litigants must rely on challenges for cause. Is that your experience? If so, is that a burden you and your colleagues have welcomed?

I don't perceive the changes as resulting in more burden on trial judges. If there is any additional burden, it happens in the weeks before jury selection.

The crafting of the questionnaire takes some time and effort. Trial judges lift some of that load, but it is born mostly by the attorneys. The trial judge doesn't necessarily review the responsive information in detail, absent a request from counsel.

The resulting information results in a drastic reduction in the size of the jury panel which reports for live *voir dire*. The judge presides over a more focused live *voir dire* and does not waste time or effort.

For example, since the EPC changes, I haven't once had to deal with the potential juror who wants out of jury duty so badly that she responds to every question in a manner that she believes most likely to result in being excused; I don't spend the first hour of jury selection weeding out jurors who are never going to be able to serve; but I have seen some excellent lawyers having unhurried discussions with jurors and uncovering bias that would have stayed hidden under the old system.

13. Now that you're a little more than two years into the Arizona experiment, are there aspects about EPC that remain open to evaluation or debate?

There is currently a bill in the Arizona legislature to undo all the changes made in the rule changes. I don't think it will go anywhere, but you can never tell.

As lawyers get more experience under the current rules, I think they become converts, like me. The more converts, the less chance the changes will be re-evaluated or changed. ■

David Grant Halpern is a longtime member of the American Board of Trial Advocates and serves as a co-chair of the Editorial Board.

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There's really nothing like being a trial lawyer

Going to trial is the hardest work we do. But trial lawyers are prone to burnout despite total dedication. A New Zealand barrister shares life lessons about balancing life amidst conflict and issues of real importance.

Chen

By Mai Chen

The following is the transcript of a speech delivered to the National Board of American Board of Trial Advocates at its 2025 International Meeting in Millbrook, Queenstown, New Zealand, April 3, 2025.

I do not know any of you, but the fact that you are trial advocates means that I know all of you! And the most astonishing fact about the 150 members of the American Board of Trial Advocates (ABOTA) at the dinner tonight is that you have come to New Zealand for two weeks (with a pre-trip extension to Sydney and Port Douglas Australia and a post-trip extension to Tahiti and Bora Bora in French Polynesia) to get some work-life balance! I know this is also good networking for your practice, but still…

I have **seen** your itinerary. I now live in Auckland, and prior to that for a long time lived in windy Wellington. And I had my honeymoon sometime last century here in Queenstown, and I am happy to say when I turned up to my Harvard Law School reunion 30 years later, my classmates said, "Wow you are still married to the same guy, Dr John Sinclair."

Despite justice being traditionally depicted by a woman holding a set of scales, no one I met when I was at Harvard Law School studying for my Master of Laws, and certainly no trial lawyer I have met instructing me or on the other side of me in court, has ever been balanced! And I have appeared in the Supreme Court, the Court of Appeal (in New Zealand and the Cook Islands), the High Court, the District Court, and in a range of tribunals and commissions of inquiry.

I have been reading a book called: *Great Lives: A Century in Obituaries*. I don't think anyone profiled in that book could be called "balanced." My former co-founding law partner at Chen Palmer, the Rt Hon Sir Geoffrey Palmer KC—former Prime Minister of New Zealand and Chicago Law School alumnus—was certainly not balanced.

It is the ability to handle intensity, even be comfortable with it, that makes you a great trial lawyer. And if you did not have that intensity of going to court in your life, you would need to recreate it in your life.

New Zealander Dame Barbara Kendall—Olympic Gold medalist Boardsailor in 1992 at the Barcelona Olympics, silver at the 1996 Olympics and bronze at the 2000 Sydney Olympics—psych tested me. She laughed at the result—I am in the uppermost right-hand quadrant—those driven to get results and change. Dame Barbara told me that Olympians end up in that top right-hand quadrant —always wanting to know how fast they can go, internally driven. If they psych tested the ABOTA members here tonight, I know we would get the same result.

I found the immigrant experience is also intense—I was part of the first Taiwanese family who had immigrated to the South Island of New Zealand. A new country, new language, new culture, and no family to help you. I shall not comment on U.S. immigration policies which I am not as well versed on as you.

Litigation is the ultimate intensity sport! Going to trial is the hardest work I do. For that reason, litigators are prone to burnout. Total dedication, total burnout.

Justice O'Meara KC, of the Supreme Court of Victoria, gave a speech at the Victoria Bar Readers Dinner on 18 May 2023 about his own journey into burnout, depression and his recovery. Along the way, he told some great stories about trial lawyering. He spoke of a great litigation colleague he had who was "the barristerial equivalent of the sniper who

can open his case, assemble his rifle and shoot a bullet through the head of his target; all within 3.9 seconds." He concludes by saying:

No one rational wants to be a litigant. It's stressful, unpleasant and uncertain. But you—the barrister—are the shepherd in your client's hour of need. You are also their advisor and their avatar. It's a calling of true nobility within a system that exists for the just determination of conflict and issues of real importance.

Within that system—if you look—you will see every part of life: the elegant, the ugly, the just, the unjust; and the hilariously funny. In one moment, you see the sobbing and grateful client, yet another is your own tears and moment of reckoning. And all of that happens because what you're doing really matters.

There's really nothing like it.

To each of you I say:

a) When you've won the unwinnable and lost the unlosable;

b) When you've sat with a lump in your throat awaiting the verdict of a jury;

c) When you've felt the bitter and real sting of a loss;

d) When you've prepared so assiduously that your argument transcends the mere notes that you prepared to guide it; and

e) When you've seen the gratitude in the eyes of your client and the admiration in the eyes of your opponents – then in those and other such moments you'll really know that you're alive.

And you'll also know—and really feel—an appreciation for life and the human condition.

The philosopher Seneca, who lived around 5 BC – AD 65 said in *On the Shortness of Life: Life is Long if You Know How to Use It*,[1]

Most human beings … complain about the meanness of nature, because we were born for a brief span of life, and because the spell of time that has been given to use rushes by so swiftly and rapidly that with very few exceptions life ceases for the rest of us just when we are getting ready for it. …It is not that we have a short time to live, but that we waste a lot of it. Life is long enough, and a sufficiently generous amount has been given to use for the highest achievements if it were all well invested. But when it is wasted in heedless luxury and spent on no good activity, we are forced at last by death's final constraint to realize that it has passed away before we knew it was passing. So it is: we are not given a short life, but we make it short and we are not ill supplied but wasteful of it. Just as when ample and princely wealth falls to a bad owner it is squandered in a moment, but wealth however modest, if entrusted to a good custodian, increases with use, so our lifetime extends amply if you manage it properly. … It is a small part of life we really live. Indeed, all the rest is not life but merely time.

Seneca really doesn't have good things to say about being a trial lawyer.

How many are left no freedom by the crowd of clients surrounding them!... Indeed, you will hear many of those to whom great prosperity is a burden sometimes crying out amidst their hordes of clients or their pleadings in law courts or their other honorable miseries "It's impossible to live." Of course, it's impossible. All those who call you to themselves draw away from yourself. How many days has that defendant stolen from you? … That advocate is grabbed on every side throughout the Forum, and fills the whole place with a huge crowd extending further than he can be heard: But he says, "When will vacation come?" Everyone hustles his life along, and is troubled by a longing for the future and weariness of the present.

He talks about preoccupation:

The mind when distracted absorbs nothing deeply, but rejects everything which is, so to speak, crammed into it. Living is the least important activity of a preoccupied man.

People are frugal in guarding their personal property; but as soon as it comes to squandering time they are most wasteful of the one thing in which it is right to be stingy. … hold an audit of your life. [By that, Seneca meant a time audit.]

You act like mortals in all that you fear and like immortals in all that you desire. … How late it is to begin to really live just when life must end! How stupid to forget our mortality and put off sensible plans to our fiftieth and sixtieth years, aiming to begin life from a point at which few have arrived.

Learning how to live takes a whole life and, what may surprise you more is that, it takes a whole life to learn how to die.

I once asked a Chief Judge I sat next to at a bar dinner to tell me something he knew now that he didn't know at my age. He said, "There is no such thing as work-life balance but those who love you come to forgive you." I wasn't expecting that!

New Zealander Daniel Kalderimis, KC, has just written a book called *Zest: Climbing from Depression to Philosophy*,[2] where he speaks about the perils of always climbing that slippery ladder of success, working harder and harder on cases, to get promotions, respect and accolades – but there is never enough respect and "making it" is always elusive. This causes us to live a shallow life while we climb that ladder. So, he exhorts us to live a deep life – a life of connection – which may or may not lead to success. If it does, great. If not, then at least you have **lived** your life. And living a deep life is a lifetime's work.

So, I raise a glass to ABOTA and its members present in Queenstown tonight. Well done for choosing to live your life by being here. This is a disruptive time. We have a trade war, some say we are on the verge of another world war, the world is arming, the climate is also heating up to become an existential threat as the Doomsday clock ticks down.

Separation of powers and constitutional issues are keeping us constitutional lawyers busy in New Zealand, and it appears also in the U.S. We also have a superdiverse population in New Zealand, which is causing unique issues and challenges in the court with cases not settling as quickly as they should or at all, the time needed for translation and self-representation, and the lack of documentary evidence. There may be lessons to be learned from the United States as New Zealand moves toward having nearly 50% of the population who are (and in these proportions) Asian, Māori and Pacifica.

My junior tells me that as soon as I attempt to leave the country, something always goes wrong requiring my input. I am sure you are experiencing some of that in your inbox.

Don't spend all your time clearing your inbox please. Remember that the opposite of **preoccupation** is **being present.**

Embrace the chance for a fresh perspective from down under and to reflect on what has been a good use of your time and what has not; **do a time audit.**

If an alien was spying on you from Mars, they would ponder why they see us doing the same thing on repeat—work, home, and then work back to home, with the odd trip to the gym or supermarket or restaurant but otherwise, always the same back and forth.[3] It is always good to surprise the Martians by coming to New Zealand! Soren Kierkegaard says we must wake up and stay awake. We must not sleepwalk through life—and this trip to New Zealand should help you.

I am proud to have been a lawyer of long standing, and I am proud to stand alongside such a gorgeous looking successful group of trial attorneys from the U.S. Law is a tough career—and none more so than being a trial attorney, but the sense of satisfaction from helping people in what we do is enormous, and I hope you get back to the ranch after your break in NZ ready to get back in the saddle and ride hard.

I acknowledge David Teece who founded the Berkeley Research Group (BRG) and the amazing Jennifer Doan and Harriet O'Neill, who briefed me in preparation for tonight's speech. We salute your success, and to Harriet, I have always wanted to be a **former** judge of the Supreme Court. The hard work is over!

I close with this Māori proverb or whakatauki:

"Whāia te iti kahurangi ki te tūohu koe me he maunga teitei," which means:

"Seek the treasure you value most dearly: if you bow your head, let it be to a lofty mountain." ■

Mai Chen is one of New Zealand's top constitutional and administrative law experts. She is a barrister with over 30 years of experience in public and administrative law, regulatory, judicial review, inquiries and reviews and employment law issues. She has also worked extensively in law and policy reform. She is formerly Managing Partner, Chen Palmer, Bank of New Zealand Board, New Zealand Securities Commission, Adjunct Professor at the University of Auckland School of Law and School of Business, and currently President of New Zealand Asian Lawyers and Chair of the Superdiversity Institute.

[1]Marcus Aurelius, Great Ideas Meditations (Penguin Books, United Kingdom, 2005).
[2]Ugly Hill Press, 2024.
[3]Robert Ferguson, Life Lessons From Kierkegaard (Macmillan Publishers, London, 2013).

Artificial Intelligence and Ethics:

Bar Associations tackle the ethical implications of technology

Fraley

By Professor Elizabeth M. Fraley

Prominent bar associations including Florida, Washington D.C., Texas, and New York City have each issued recent opinions on the ethical implications of lawyers using generative AI in legal practice. The need for guidance that led to these statements highlights the markedly increased use of AI in the legal field and concerns about its application to the profession but also points to the need to address lawyers' reluctance to use AI, potentially to vthe detriment of clients. While the opinions share common themes such as competence, confidentiality, supervision, and billing practices, they differ in their specific recommendations and emphasis. This article provides an analysis and comparison of these recent ethics opinions and some thoughts for the future.

Similarities Across the Opinions

1. Competence & Supervision

- The opinions all stress that lawyers must maintain technological competence when using AI and verify AI-generated content to ensure accuracy. Citing ABA Model Rule 1.1, comment 8, they recognize that the ethical requirement of technological competence includes understanding not only the risks of technology but also the benefits of its use. Adding to Chief Justice Roberts' year-end report, all suggest that the judicious use of artificial intelligence can be a boon to the legal profession and to those whom the profession serves. For those attorneys who have been reluctant to use AI, the opinions are a cautionary reminder that ignoring technological advances, such as AI, has ethical ramifications. The opinions suggest a balance, providing for adoption of time- and resource-saving uses while proceeding cautiously where sensitive or confidential information is involved.
- The opinions agree that AI cannot replace a lawyer's professional judgment. This suggests that firms should consider having an acceptable use policy for AI, and that those using AI should verify the results of its use. While the opinions do not specifically refer to Shadow IT issues, they recognize that many younger attorneys feel a high degree of comfort using AI tools, and that partners and firms must understand this fact and monitor use of AI. The opinions tie this monitoring of AI use back to the fundamental duty owed by more senior attorneys and firms to supervise those working for them.
- The opinions cite the *Mata v. Avianca* case as an example of AI misuse leading to professional sanctions.

2. Confidentiality & Data Security

- The opinions highlight concerns about AI systems storing or sharing confidential client data. Because AI large language models (LLM) use data to learn, use of an AI tool inherently risks the privacy and security of that data. For example, AI is particularly efficient at sorting and categorizing large quantities of documents, making it a good option for document production.

Users must understand, however, that the contents of those documents could become part of the LLM and thus compromise the security and privacy of the information. Reading and understanding the terms of use of any AI tool is vital.

- Lawyers must research AI platforms to ensure they do not disclose sensitive client information. Enterprise versions of AI platforms and other security measures can assist in protecting confidential information.
- D.C. and Texas explicitly caution against using self-learning AI that retains user inputs.

3. Candor to the Tribunal & Accuracy

- The opinions warn against AI hallucinations, emphasizing that lawyers are responsible for errors in AI-generated work. As IBM defines this, AI hallucination is a phenomenon wherein an LLM—often a generative AI chatbot or computer vision tool—perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate. In the legal world, this can mean AI creates a case or statute that simply doesn't exist. Again, this ethical requirement that lawyers be responsible for the statements made to the Court is not a new obligation. Lawyers have always had the obligation to verify the representations made to the court, including that a given case stands for the proposition cited. Just as a more senior attorney would not file an appellate brief by a young lawyer without reviewing it, no attorney should rely on AI-generated work without verifying the contents, including any cases cited. There are legal AI tools that use a database approach to cases, statutes and regulations (such as VLex's Vincent tool); this removes the potential for a hallucination, since the tool searches within a database of actual cases.
- Florida and D.C. cite Rule 3.3 on candor to the tribunal, requiring verification of AI-generated citations and legal arguments. Although not specifically cited by Texas, the same ethical rule applies. Texas emphasizes that AI should be a tool assisting in legal research, not a replacement for legal research.

4. Ethical Billing Practices

- The opinions address the issue of billable hours and the tension between AI's efficiency and what constitutes a reasonable fee. Because AI tools can handle tasks quickly, lawyers may be tempted to bill for more hours than the lawyer actually expended on the task. All the opinions agree that AI cannot be used to inflate billable hours artificially. None of the opinions, however, fully address how to capture the benefit of AI-assisted work beyond the traditional billable hour model. This leaves open a key question for lawyers who would use AI to provide alternative fee arrangements such as flat rate billing. Presumably, the opinions would not bar such options.
- Lawyers may charge for AI-related expenses only if explicitly agreed upon with the client.
- D.C. and Texas specify that efficiency gains from AI should benefit the client, not justify higher fees.
- The use of AI affects legal billing models; the New York City Bar Association (NYCBA) emphasizes that lawyers must disclose AI-related costs to clients.

5. NYCBA: a philosophically different approach

The NYCBA's opinion is a progressive approach to AI. The NYC legal market includes some of the largest law firms in the world, many of which already use AI in client services, document review, and legal research. Several factors identified in the report influenced the NYCBA's decision to issue this opinion, including a New York State Bar Association (NYSBA) Task Force Report on AI in 2024, suggesting new AI regulations. The NYCBA, however, believed rulemaking was premature, favoring a principles-based approach rather than immediate regulatory changes. While echoing many of the same ethics approaches as the other bar association, NYCBA examined the role of bias and discrimination in AI Models. Based on the results of those studies, the NYCBA now warns that AI trained on historical legal data could perpetuate discrimination, an issue that is especially relevant in employment law, criminal defense, and legal aid services. This recognition of bias in the LLMs is unique amongst the four ethics opinions but is well known in the world of LLM developers.

The NYCBA opinion also uniquely addresses conflicts of interest in AI usage, noting that if an AI system stores client data, that information could inadvertently be accessible to opposing counsel using the same AI tool. It suggests that law firms must ensure that ethical walls extend to AI tools to prevent conflict-of-interest violations. The NYCBA raises two additional ethical considerations not addressed in the other opinions.

1. Duty to Consult Clients About AI Use

- **Lawyers should inform clients if AI is used in their representation—especially if it affects legal strategy, fees, or confidentiality.**

2. Regulating AI in Lawyer Advertising

- **AI cannot be used to mislead clients or engage in deceptive advertising.**
- **AI-powered marketing tools must comply with New York's strict rules on lawyer advertising and solicitation.**

Ethical Issue	Florida Bar (24-1)	D.C. Bar (388)	Texas Bar (705)	NYC Bar (2024-5)
Competence & Supervision	AI must be monitored like nonlawyer assistants. Lawyers must verify AI work before relying on it.	Lawyers must have a "reasonable and current understanding" of AI's risks before use.	Lawyers are not required to use AI but should understand its risks if they do.	AI cannot replace professional judgment. Lawyers must train staff and supervise AI usage.
Confidentiality & Data Security	Lawyers must obtain client consent before using AI tools that share data with third parties.	AI tools that store user data could violate confidentiality—lawyers must ensure security.	Self-learning AI tools pose risks to client data—lawyers must be cautious.	Lawyers must review Terms of Use and should consult cybersecurity experts.
AI & Candor to Tribunal	Submitting fake AI-generated citations can violate Rule 3.3 (candor to the court).	Courts may require disclosure of AI-generated legal content.	Some courts ban AI-generated filings or require verification.	Lawyers must check for court rules requiring disclosure of AI use.
AI "Hallucinations" & Accuracy	Lawyers must verify all AI-generated legal research.	AI is not a legal research tool—it creates content rather than retrieving law.	Blind reliance on AI is ethically dangerous.	AI can fabricate case law ("hallucinate") and create deepfakes. Lawyers must critically review AI outputs.
Billing & AI Fees	AI cannot be used to inflate billable hours.	Lawyers must not bill for time "saved" by AI. AI costs must be disclosed to clients.	Lawyers may pass AI usage costs to clients if agreed upon.	AI fees must be fully disclosed. AI can reduce costs, but lawyers must not bill for AI-generated work they did not review.
AI in Lawyer Advertising	AI-powered chatbots must identify themselves and comply with advertising rules.	AI tools cannot mislead clients or generate deceptive content.	AI-generated marketing must comply with professional conduct rules.	AI cannot pose as a real lawyer or engage in unauthorized solicitation.
Bias & Discrimination Risks	No explicit mention.	No explicit mention.	No explicit mention.	AI can reinforce discrimination—lawyers must be aware of AI bias risks in legal work.
Conflicts of Interest	No explicit mention.	No explicit mention.	No explicit mention.	AI must not compromise ethical screens—law firms must ensure AI does not improperly share information.

Final Takeaways: What Lawyers Should Know

With four major bar associations now issuing formal ethics guidance on AI, clear patterns have emerged:

1. **AI Can Assist but Not Replace Lawyers**
   - Lawyers must fact-check AI-generated work—AI is not a substitute for legal research or drafting.
2. **Confidentiality is a Top Concern**
   - AI tools that store or share input data can violate Rule 1.6 (confidentiality).
   - Lawyers should use closed AI systems and obtain client consent before inputting confidential data.
3. **Increased Judicial Scrutiny of AI Use**
   - Lawyers must check for court-specific AI rules before using AI-generated legal filings.
   - AI hallucinations (fake citations) can result in sanctions if not caught.
4. **Impact on Legal Fees**
   - Efficiency gains from AI must benefit the client—lawyers cannot bill for "time saved" by AI.
   - AI costs should be clearly disclosed in billing agreements.
5. **AI Could Exacerbate Bias in Legal Decision-Making**
   - Lawyers using AI should be aware of potential bias in AI-generated content.

As AI continues to evolve, bar associations will likely update their guidance. However, the ethical responsibilities remain the same: competence, diligence, confidentiality, honesty, and fairness. Despite the ethical issues raised about the use of AI, it remains a powerful tool that can help attorneys provide better service for clients and a better quality of life for attorneys. ■

Professor Elizabeth M. Fraley is the Gerald Reading Powell Chair in Advocacy at Baylor Law and a member of the Waco Chapter of the American Board of Trial Advocates.

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ABOTA, IATL, ISOB, NBA, AND NBTA ISSUE JOINT STATEMENT DEFENDING THE RULE OF LAW AMID RISING ATTACKS ON THE JUDICIARY AND LEGAL PROFESSION

DALLAS (April 1, 2025) – For over two centuries, the United States has been a beacon of democracy and justice, grounded in the unwavering principle that no individual is above the law. Today, that foundational principle faces a direct assault—not from foreign adversaries but from within. The current administration has engaged in an unprecedented campaign to undermine the rule of law, attack the judiciary, violate court orders, and punish lawyers and law firms for doing their jobs.

Throughout history, authoritarian regimes have understood that the first step in dismantling democracy is silencing those who uphold the rule of law. When the legal system is weakened—when judges are threatened, when lawyers are punished for representing their clients, when court rulings are ignored—tyranny is not far behind. Today, we are witnessing such a moment in America.

The current administration and other officials have not only attacked individual judges for their rulings but have actively encouraged efforts to impeach them. These threats represent more than partisan rhetoric—they are a dangerous attempt to intimidate the judiciary and erode its independence. When the administration signals that court rulings can be ignored or that judges should be removed for doing their jobs, the very foundation of our legal system is at risk.

The attacks have now escalated beyond the courts to the legal profession itself. The administration has singled out law firms by revoking security clearances, directing agencies to terminate contracts, and prohibiting federal employees from engaging with them. These measures are political retribution, plain and simple—an attempt to punish lawyers and firms for representing clients and causes the administration disfavors.

This moment demands action. Regardless of practice area, political affiliation, or position, lawyers must unite in defense of the rule of law. The legal profession exists to serve justice—not political interests. We cannot and will not capitulate in the face of bullying, intimidation, and outright attacks on the institutions that ensure democracy endures.

This is a defining moment—not just for our profession but for our country. History will remember where we stood at this moment.

We stand as unwavering defenders of the rule of law, democracy, and moral integrity. We reject the idea that the justice system is corrupt simply because it holds the powerful accountable. We reject the rhetoric that seeks to delegitimize the courts, the legal profession, and the rule of law itself.

Now is the time for every lawyer—whether in private practice, public service, academia, or corporate counsel—to step forward. The law does not protect itself; it survives because those sworn to uphold it have the courage to do so.

We must volunteer, agitate, use our legal training, and raise our voices to fight against the dismantling of our justice system. We must uphold the principles of fairness and accountability, even when it is difficult, unpopular, or dangerous. We must be relentless in this fight, doing whatever it takes. This is not just a fight for our profession—it is a fight for our country. **We will not yield. We will not be silent. We will not stop.**

These organizations pledge to continue fighting to safeguard our Constitution and the Rule of Law. We call on all legal organizations to stand strong with us and support our position.

Standing at a Rubicon on the Rule of Law

By Quentin D. Brogdon

In January of 49 BC, over 700 years after the founding of Rome, Julius Caesar and his legions stand at the Rubicon, a narrow stream separating Italy from the Roman province of Gaul. At Caesar's back is the province of Gaul where Caesar has been fighting barbarians for years in bloody campaign after bloody campaign. Facing Caesar is Italy and the road that leads to the free city of Rome, heart of the Roman Republic. The sternest laws of the Roman Republic proscribe bringing legions into Italy proper. Doing so in effect amounts to a declaration of civil war. At the Rubicon, Caesar hesitates, staring into the waters of the stream and saying nothing as his legions wait for the order to advance. The Romans have a word for such a moment—*discrimen*—a moment of perilous and excruciating tension when everything hangs in the balance—a dividing line. Saying "the die is cast," Caesar then orders his legions across the Rubicon and into Italy, thereby beginning a chain of events that leads to the death of the Roman Republic. When Caesar crosses the Rubicon, one thousand years of Roman self-government come to an end, and self-government will not appear again until another thousand years later. So fateful is Caesar's crossing of the Rubicon in 49 B.C. that it has become synonymous with fateful steps ever since.

Our American republic is a relatively young 250 years old in comparison to the Roman Republic that was lost when Caesar crossed the Rubicon. But our republic faces an existential crisis every bit as dire as the crisis faced by the Roman Republic when Caesar made his fateful decision. We are standing at a Rubicon on the Rule of Law, and it threatens the very existence of our republic because the Rule of Law is the cornerstone of the foundation of our republic. If lawyers with the knowledge and the duty to speak out about the crossing of this Rubicon do not call it out with one unified, full-throated voice, we risk losing our precious republic, just as the Romans lost theirs.

The Rule of Law means everything, or it means nothing. In 1801, when our republic was still in swaddling clothes, outgoing Federalist president John Adams appointed several dozen Federalist party members to new circuit judge and justice of the peace positions. Incoming Democratic-Republican party president Thomas Jefferson, a bitter foe of Adams, attempted to deny judgeships to appointees whose commissions had not been delivered before Adams left office. Jefferson instructed Secretary of State James Madison not to deliver commissions to appointees who had not yet received their commissions when Adams left office. Maryland businessman William Marbury, an appointee whose commission was withheld, sued Madison. In *Marbury v. Madison*, a landmark United States Supreme Court decision in 1803, Justice John Marshall established and affirmed the bedrock principles that our Constitution is actual law, not merely a statement of principles and ideals, and that American courts have both the power and the duty to strike down laws that violate the Constitution.

The *Marbury* court wrestled with constitutional issues that are as timely today as they were in 1803. The court asked the question to which the self-evident answer established the primacy of the Constitution over all else:

> *To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.*

The *Marbury* court then determined courts have the final say on the constitutionality of laws:

> *It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule … So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution,*

disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

More than 200 years after *Marbury*, much of the recent assault on the rule of law arises from a purported concern about judges exceeding their authority in exercising exactly what the *Marbury* court referred to as "the very essence of judicial duty." Judges who have ruled contrary to the present administration have been threatened with impeachment and with the withholding of judicial funds for their courts, among other dire consequences. This is nothing more than a transparent attempt to discourage judges from making adverse rulings. The attempted intimidation of sitting judges has reached such a level that Chief Justice John Roberts took the rare step of commenting in a recent report that "attempts to intimidate judges for their rulings in cases are inappropriate and should be vigorously opposed." The American Board of Trial Advocates issued a statement that "our courts stand as the primary sentinels, guardians, and protectors of our liberty from excesses of power by the other branches of government," and that "in performing their jobs, judges deserve the respect of all in our society, most of all by those who have been placed in positions of power." The American College of Trial Lawyers issued a statement that "threats of impeachment for such judicial acts have no constitutional grounding and are patently inconsistent with the rule of law upon which our nation was founded," and that "such threats are dangerous because they undermine the public's trust in the rule of law and may provoke violence against judges."

Those in the present administration who decry the purported overreach of judges seem to have short memories. Well over 100 lawsuits alleging executive or administrative overreach were filed against the previous administration. Many of those lawsuits resulted in court-ordered limitations on the previous administration's actions. The lawsuits and the rulings against the previous administration were celebrated then by some who now oppose "tyrannical" judicial overreach as "good news," "brilliant," and "amazing" during the previous administration. Are we obligated to follow a court's rulings only when we agree with the court? And if so, where does that leave the Rule of Law? The answer of course is "in tatters."

The Rule of Law depends not only on the ability of judges to play their roles without fear and intimidation, but also on the ability of lawyers to play their roles without fear and intimidation. Founding father John Adams was a revolutionary who was an architect of the American colonies' break from Britain. But in 1770, he famously defended eight British soldiers accused of murder in the Boston Massacre, arguing for their right to a fair trial and self-defense. Our adversarial system depends upon zealous advocates litigating each side of a dispute with equal vigor, and we cannot allow retaliatory actions by any executive branch, regardless of party, to put that bedrock principle in jeopardy. This is not a new idea. It's at least 250 years old.

The assault on the Rule of Law by the current administration is not limited to criticism and attempted intimidation of judges. Lawyers are also the recipients of criticism and attempted intimidation. Our president has signed no fewer than five executive orders targeting major corporate law firms. Among other orders, he signed an executive order retaliating against Covington and Burling, a firm that did pro bono legal work for Jack Smith, the special counsel who pursued indictments against the president. The order sought to strip clearances and contracts from Covington. The president signed another executive order seeking to severely punish the law firm Perkins Coie for its legal work for Democrats during the 2016 presidential campaign. The order stripped Perkins' lawyers of security clearances and access to government buildings and officials. The president then signed an order targeting Susman Godfrey, the law firm that sued Fox News for misrepresentations related to the 2020 election. Judges, in the exercise of *Marbury's* "very essence of judicial duty," have put these executive orders on hold. When a federal judge put the administration's attempts to intimidate Susman on hold, the judge observed the president's order was "a shocking abuse of power" that likely violates the First Amendment, and that "the government cannot hold lawyers hostage to force them to agree with it."

As lawyers, we have a duty to speak out against this bullying—bullying that mortally threatens the Rule of Law and our republic. If we do not sound the alarm, who will? In *Henry VI, Part II*, Shakespeare has evil henchman Dick the Butcher exclaim, "The first thing we do is, let's kill all the lawyers." Dick is a murderer who is the right-hand man of Jack Cade, who is leading a rebellion against King Henry. Dick and Cade know they will be able to co-opt an ignorant population easier than co-opting a population that understands its rights with the assistance of lawyers, the staunch guardians of rights and freedoms. Over 400 years ago, Shakespeare understood something we now risk forgetting. In a dissenting opinion in *Walters v. National Association of Radiation Survivors* in 1985, Supreme Court Justice John Paul Stevens explained it: "Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."

The American Bar Association and a who's who of prestigious lawyer associations, including the American Board of Trial Advocates,

the American College of Trial lawyers, the International Academy of Trial Lawyers, the International Society of Barristers, and others have courageously spoken out against the assault on the rule of law, and many lawyers and firms have signed amicus briefs in support of the firms that have been targeted. But sadly, most AM Law 100 firms have remained conspicuously silent, and a flurry of prestigious firms rushed to strike extortionary "deals" with the current administration that require the firms to provide a billion dollars in free legal services for causes supported by the current administration.

The collective silence and willing disarmament on the part of many in our legal profession calls to mind a poem often attributed to German pastor Martin Niemoller:

First they came for the socialists, and I did not speak out— Because I was not a socialist. Then they came for the trade unionists, and I did not speak out— Because I was not a trade unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me.

This is a defining moment—a discrimen—for our republic and for our law profession. History will remember what we choose to do, and what we choose not to do. Failing to confront the current assault on the Rule of Law effectively condones it. We are standing at a Rubicon on the Rule of Law, not merely standing near it. Will we summon the moral courage to preserve our republic—the courage that the ancient Romans failed to summon at their critical moment? The answer remains to be seen. ■

Quentin D. Brogdon is a partner in Crain Brogdon in Dallas. He has been president of the Texas Trial Lawyers Association, the Dallas Chapter of the American Board of Trial Advocates, and the Association of Plaintiff Interstate Trucking Lawyers of America. He is a fellow of the International Academy of Trial Lawyers, the American College of Trial Lawyers, and the International Sociaety of Barristers.

2026 Calendar of Events

January 15 – 18
National ABOTA Annual Meeting & Leadership Conference
The Pendry Hotel, Newport Beach, CA

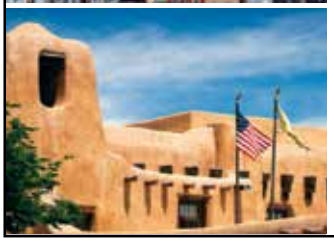
July 10 – 12
National ABOTA Summer Conference & National Board Meeting
The Westin Book Cadillac Detroit, Detroit, MI

International Trip
Main Trip: March 14 – 25
Post-Trip: March 25 – 30

July 23 – 26
FLABOTA Annual Convention
Details to follow

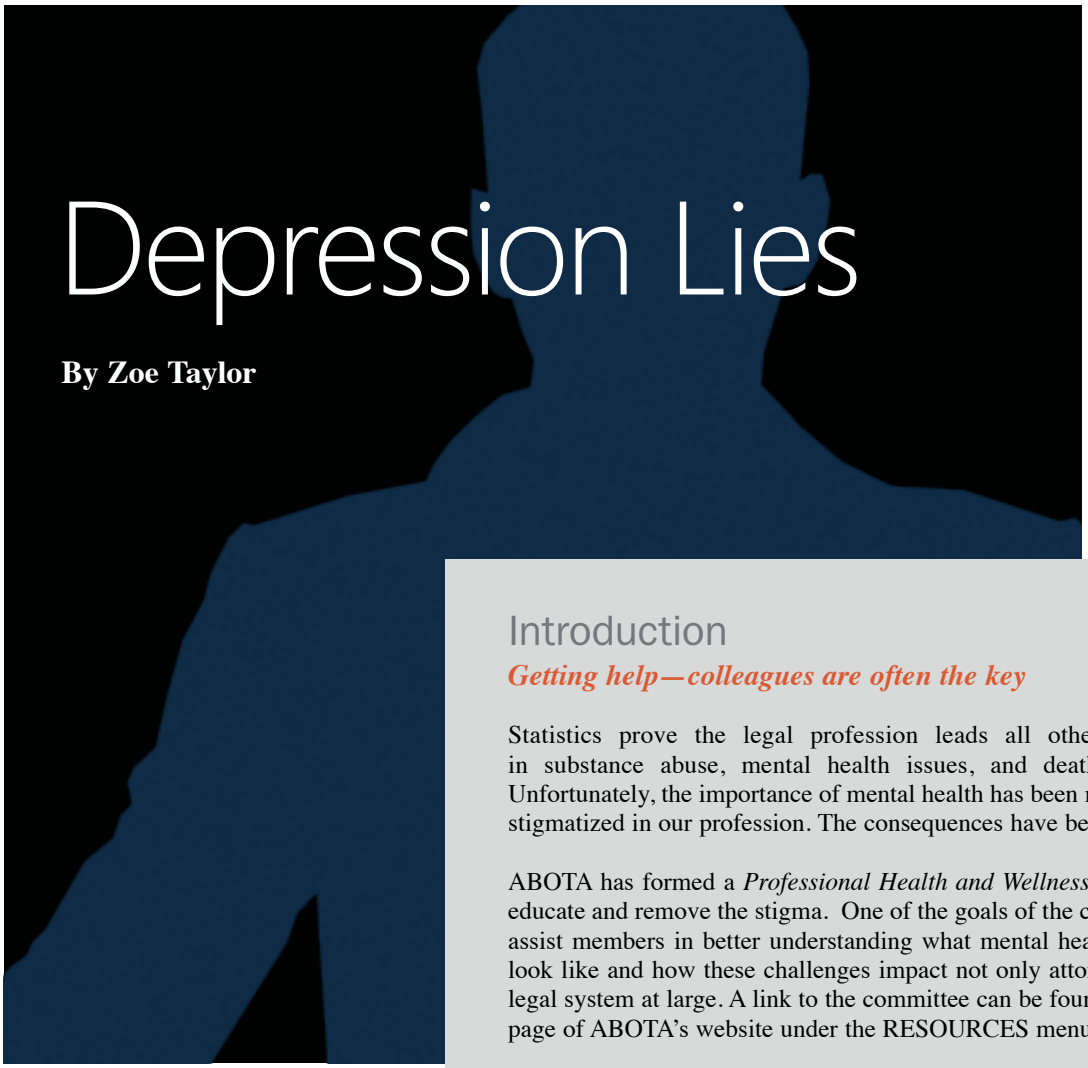
April 23 – 26
SEABOTA Conference
Charleston Place, Charleston, SC

October 15 – 18
National ABOTA Fall Conference & National Board Meeting
The Four Seasons, Philadelphia, PA



June 18 – 21
TEX-ABOTA Santa Fe CLE Roundup
El Dorado Hotel & Spa, Santa Fe, NM

November 2 – 7
CAL-ABOTA Conference
Wailea, Maui, Hawaii



Depression Lies

By Zoe Taylor

Introduction

Getting help—colleagues are often the key

Statistics prove the legal profession leads all other professions in substance abuse, mental health issues, and death by suicide. Unfortunately, the importance of mental health has been minimized and stigmatized in our profession. The consequences have been tragic.

ABOTA has formed a *Professional Health and Wellness Committee* to educate and remove the stigma. One of the goals of the committee is to assist members in better understanding what mental health challenges look like and how these challenges impact not only attorneys, but the legal system at large. A link to the committee can be found on the main page of ABOTA's website under the RESOURCES menu.

The charge of the Professional Health & Wellness Committee is to raise awareness of issues within the legal profession related to physical, mental, and spiritual health issues, including issues relating to substance abuse, to enable lawyers to get help when needed. ABOTA seeks to consider taking steps to educate our members on these issues in the hopes of saving careers, families, and lives.

Zoe Taylor's article, *Depression Lies*, spotlights the tragic consequences of death by suicide. Zoe's husband, Trevor, was a beloved member of our Austin Chapter. Our chapter was stunned by Trevor's death and his loss is still deeply felt by all of us who knew him. It takes a lot of courage for Zoe to allow ABOTA to publish her story. She has done so to save lives.

Addiction specialists confirm that colleagues are often the key to convincing lawyers to get help. I know this to be true because I am an alcoholic. I have been sober for over 40 years. I was able to get sober and stay sober largely because of the intervention and continued support of fellow lawyers. I can honestly say without the assistance of fellow lawyers who cared about me, I would no longer have my legal career, my family, and most likely would be dead.

By Dicky Grigg

Dicky Grigg is a longtime member of the Austin Chapter of the American Board of Trial Advocates. He serves as the Co-Chair of the Professional Health & Wellness Committee.

This is what I know: Depression lies. Depression will tell you that you aren't successful, that you don't deserve what you have. That you aren't a good partner, parent, child, or friend.

Depression holds you hostage. It isolates you and warps your reality. It distances you from those who love you and whispers words of shame, doubt, and derision. It wrecks your self-confidence, your self-worth, and your relationships.

I say all this as a person lucky enough to have never suffered from the disease. But I loved someone who did. And it killed him.

Trevor was 47 years old when he died. He had a successful law practice, two wonderful children and a loving family, and many friends and interests. He was smart, funny, and kind. He loved being a trial lawyer, was passionate about his cases and his clients, and was really good at it.

But depression told him he wasn't any of these things. That he was a failure. That he wasn't successful. That his family would be better off without him. These were all lies. But the incessant internal chatter of depression, of shame, doubt, and derision, drowned out the love and accolades. It made him deaf to the love and life around him.

Trevor had been through major depressive episodes before. He had been successful with therapy and medication. He knew the tools to manage his disease and had done so several times. He even reached out to other lawyers who were in crisis to offer support. But he never talked about wanting to die. When depression hit him hard again toward the end of 2016, I thought he had time to start treatment again. I had no idea that this time the lie that depression was whispering to him was that death was the only way out.

Trevor died by suicide on January 23, 2017. It started out like any other day–letting the dog out, taking the trash and recycling to the curb, making breakfast and lunches for the kids, and getting off to school and the office. It ended in tragedy.

You know the statistics. You have read them in this very journal. Depression and suicidal ideation is unfortunately all too common to the legal profession. According to a Psychology Today article this summer, the number of lawyers suffering from mental health issues comes close to or exceeds a quarter of our profession: 28 percent reported depression, 19 percent reported anxiety and 23 percent reported stress. The number of lawyers who have contemplated suicide is more than double the general population. And that's just the numbers reported. From lawyers willing to talk about their issues and their weaknesses.

It's not easy writing or talking about this. But I believe in the mission the Austin Bar has adopted this year to stop the stigma, and I'm so impressed with the others who have already stepped forward to share their stories. I was so touched that the ABA chose to walk in honor of Trevor and Aspen Dunaway in the Out of the Darkness Walk hosted by the American Foundation for Suicide Prevention. I miss Trevor every day and am grateful for the remembrance.

The legal profession does not honor vulnerability. Because it's a sign of weakness and of failure. And, for whatever reason, mental illnesses are viewed differently than other diseases. They're still often seen as a weakness, instead of a genuine disease, a condition brought on by any number of factors including environment and genetics. But the strength that it requires to live with depression or anxiety is immense. The mental energy required to just get through a day can be exhausting. But if we can chip away at the stigma and allow our fellow lawyers to be vulnerable without judgment, I hope others can open up and reach out for help. Because it's not a weakness. It's just a disease like any other, and there is treatment and hope.

Depression robbed Trevor of hope. Please don't let it rob you or someone you love. Reach out. Have a safety plan–someone who can just be with you to keep you safe. Until you can start treatment again. Because there is always hope. ■

Zoe Taylor is a graduate of the University of Texas Law School and currently serves as the director of legislative affairs for the Texas Trial Lawyers Association.

Understanding the Rule of Law

By Grace Weatherly

An independent judiciary is the cornerstone of the rule of law in the United States. Publicly promulgated laws must be equally enforced and fairly and consistently applied to all individuals, institutions, and entities, including the government itself. To uphold the rule of law, protect individual rights, and ensure that the government operates within constitutional limits, our judicial system must be free from undue influence and capable of impartially interpreting and applying the law uniformly.

The United States' Supreme Court's power of judicial review, established in *Marbury v. Madison* (1803), recognized that the separation of powers among the three branches of government created in our Constitution could only be protected by an independent judiciary's authority to interpret the Constitution and declare laws unconstitutional. The principle of judicial review is so ingrained in our legal system that it has not been subject to serious debate over the past 222 years.

Among ABOTA's stated missions are the protection of an independent judiciary and the rule of law. Our system cannot function without reliably steadfast judicial review. Those seeking to dishonor and ignore the established power of an independent judiciary have not offered any viable alternative system – only support for unfettered power of the executive branch. This is inconsistent with the Founding Father's vision and Constitutional interpretation since at least 1803. Alexander Hamilton noted in Federalist No. 78, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." As lawyers, it is our duty to engage our communities and educate our fellow citizens of the value and fragility of our judicial system. As described by Patrick Henry in 1788, "[t]he Judiciary are the sole protection against a tyrannical execution of laws." Each generation must be engaged in protecting this precious right.

Grace Weatherly served as the 2021 National President of ABOTA and is a member of the Dallas Chapter.

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