

THE NATIONAL  JUDICIAL COLLEGE

# Judge's Resource Guide: **Managing Jury Trials**

INTERNATIONAL ACADEMY  
OF TRIAL LAWYERS



*The NJC Experience.*



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# Introduction

The National Judicial College (NJC) conducted a symposium on **The Jury Trial in the 21st Century**, as part of its 50th Anniversary celebration. Since then, NJC has been actively engaged in furthering the recommendations of the national experts who gathered for the symposium in Chicago at the American Bar Association. Many allied organizations are also addressing the issue on a national level. However the unique role that NJC plays is equipping judges with the knowledge and skills they need to manage jury trials. It is helping judges fulfill the leadership position they occupy in their courts and communities within the ethical constraints of their state.

This Resource Guide is designed to be a practical resource that judges can use to develop a “trial notebook” and/or checklist for a simple to a complex

trial. It is based on the symposium participants’ unanimous belief that: a) jurors are the heart or cornerstone of a jury trial; b) each section of the Resource Guide should address the impact on the role & responsibility of the jurors; c) while conducting a trial must be a collaborative effort of judge and counsel, the judge has the responsibility to manage the trial proceedings utilizing available technology and incorporating proven techniques; and d) even though a trial is adversarial in nature, it shall be conducted with civility.

Throughout this Resource Guide, there are active links which will take you to additional publications and resources. In addition, you can find these resources at [www.judges.org/jury](http://www.judges.org/jury).

***“Judges need to fall in love with the jury system. The judge can’t inspire citizens to love the jury trial until they are comfortable with it.”***

*~ Judge David Hardy, 2nd Judicial District Court, Reno, NV*



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# Case Management Toward Trial

You can't talk about jury trial management without first talking about case management. Judicial case management provides a critical foundation for jury trial management. The two are inextricably linked.

The concept of effective case management (ECM) is based upon the premise that it is the responsibility of the judge to manage cases. ECM has evolved over the last 50 years. Initially, addressing or defeating delay was the justification for judicial case management. Today ECM is viewed as integral to how a court is organized, how it operates, and is the foundation upon which access to justice is built. It is a core function, and not simply a delay reduction tool.

Whether new to the bench or a veteran judge, it is always helpful to refresh one's knowledge about the elements of ECM. For a refresher, NJC's pamphlet FAIR, TIMELY, ECONOMICAL JUSTICE - Achieving Justice Through Effective Caseflow Management is a quick read. It defines ECM:

"Effective caseflow management is the process through which courts move all cases from filing to disposition.... This process includes all pre-trial phases, trials and all events that follow disposition...."

Differentiated Case Management (DCM) simply recognizes that cases differ substantially in the time and the degree of court involvement required for disposition. Not all cases impose the same demands upon judicial system resources thus cases need not be subject to the same processing requirements. Some cases can be disposed of expeditiously with little or no discovery and few intermediate events. Other cases require extensive court supervision over pre-trial motions/events, determining admissibility of evidence, especially expert witnesses, settlement negotiations or trial preparation. The early case screening that a DCM system promotes enables a

***"Judges must take the lead to ensure effective case management. ECM is the foundation of effective jury trial management."***

~ Judge William F. Dressel (ret.), President Emeritus,  
The National Judicial College, Reno, NV

## KEY CONCEPTS OF AN ECM PLAN INCLUDE:

"Intake" or early case evaluation based on differentiated case management;

Differentiated case management utilizing meaningful and monitorable case events at appropriate intervals;

Continuous court supervision of case progress from filing to resolution.

court to prioritize cases for disposition based upon relevant factors. In a criminal case, relevant factors could include prosecutorial discretion; nature of offense, age or physical condition of the parties, victims, witnesses, etc. Inherent in the concept of DCM is the recognition that many cases can proceed through the court system at a faster pace than others if appropriate procedures are available. Under a DCM system, cases do not wait for disposition simply on the basis of when a case was filed.

It is commonly accepted that judges, at every “case event” should ask questions of the parties regarding the status of settlement and inquire about what the court can do to facilitate resolution. In a similar vein, it is also very appropriate for the court to ask counsel if the case is likely heading for a jury trial to determine what can be done to prepare the case for trial, including reinforce the concept of a “jury focused trial.”

***“Speed does not equate  
with efficiency, nor does it  
guarantee reduction in cost.  
Preparation does.”***

~ Robert L. Parks, Esq., Law Offices of Robert L. Parks, Miami, FL

Judges should not miss out on the opportunity presented at the setting of the trial to clarify the status of the case. This critical step is often overlooked or treated as perfunctory. It can be an opportunity to do more than assign dates. Would it not be appropriate

to require counsel either jointly or separately to file a trial-setting memorandum outlining issues to be tried, proposed evidence, relief sought, etc.? This memorandum would allow the judge and trial counsel to begin a discussion about critical trial elements including the role of the jury. The memorandum contents and format could be based upon subjects to be reviewed at the Trial Management Conference and included in a Trial Management Order. A trial-setting memorandum would provide a guide going forward leading up to the [Trial Management Conference](#) and eventual trial. More importantly, it would allow a judge to set realistic trial dates.

The degree of detail that a court might require in such a memorandum will vary depending on when cases are set for trial. It is recognized that courts set trials at different stages of the case depending upon their local culture. While setting an “early and firm trial date” is a laudable goal, it is realistically difficult to do early in the case before many cases are settled and significant discovery has occurred. Many courts are now waiting until after most, if not all, discovery has occurred and settlement efforts completed to set trial. There are of course exceptions to this procedure for complex or “unusual issue” cases that require more time from setting to the actual trial. It is important however that there be meaningful exchange between counsel and court demonstrating understanding of what the trial will entail before putting it on the court’s and counsel’s calendars blocking out valuable time.

The trial setting is also a good time to review with counsel the expectations of the judge who will be conducting the trial especially the concept of the jury being the focus.

# B Judicial Trial Management

In the early stages of the development of judicial case management, the prevailing view was that conducting a trial was to be left to trial counsel. In the 1980's and 1990's, that attitude began to mirror the philosophy discussed in the previous section about case management. Judges began to assume more and more responsibility for how a trial was being

conducted. The National Center for State Courts initiated a study in the late 1980's in three states on how trials were conducted and in 1998 published [On Trial: The Length of Civil and Criminal Trials](#) which states in the preface: "The major conclusion is that trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial."

The following are excerpts discussing whether trials can or should be controlled by judges:

***"Setting the trial date is not just a perfunctory step. It's an opportunity to manage the case!"***

~ Judge Chad Schmucker, (Ret.), President, The National Judicial College, Reno, NV

If there is a dominant theme from our findings it is diversity. No two courts try the same types of cases, use the exact same jury selection methods, or evidence a uniform philosophy about trial time. There are, however, a number of policies and techniques that appear to be used in courts with shorter trial

times, including identifying and dispensing with matters not truly in dispute, preventing repetitive testimony, imposing time limits on the time allowed for certain segments of trial, and enhancing the continuity of trials in progress. In general, attorneys appear to welcome a court's efforts to expedite trials, as long as such efforts are consistent, predictable, and sufficiently flexible to allow for exceptional circumstances.

The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand, more judicial control of the trial process. The following statement is in our judgement a fair reflection of current citizen expectation:

***Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able – and want to – keep things moving. Why is that too much to ask for? It ought to be taken for granted.*** (Edwin Newman, "The Law's Delay," San Francisco Chronicle, June 3, 1987)



Based on the findings of *On Trial*, the National Center for State Courts' Institute for Court Management and The National Judicial College convened a group of lawyers, judges and educators to develop a course for judges called Managing Trials Effectively. Through funding from the State Justice Institute the course was conducted in numerous states. Based upon materials developed for the course and the responses of judges, the American Bar Association adopted [Trial Management Standards in 1992](#). These standards were premised on the belief that an effective and efficient presentation of admissible evidence and applicable law is the responsibility of both bench and bar. The general principle of the standards states: "The trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to a conclusion without unnecessary interruption." This principle is similar to and mirrors the language of the American Bar Association, Standards Relating to Court Delay Reduction adopted in 1985.

In 1991 the Federal Judicial Center published [The Elements of Case Management: A Pocket Guide for Judges](#). The second edition issued in 2006 notes

that it is the responsibility of judges to manage the litigation process and while there is no single correct method, such management involves judges using tools at their disposal with fairness and common sense. In discussing the judges' responsibility at trial, it states:

At trial, the court's management power transcends the authority specifically conferred by rules, statutes and decisions. The judge has broad inherent power over the management of the cases, attorneys, and parties. That inherent power, employed judicially, enables the court to do what is necessary to produce just, speedy and economical trials....the judge should be careful not to take the case away from the lawyers.... The judge's task is to bring about a reasonable accommodation by formulating a framework within which the adversary process will function constructively.

As stated in this publication, conducting a trial must be a collaborative effort by the judge and counsel working together to prepare to present the case to jurors in a manner that enhances their ability to perform their duty.

***"Think about the 21st century juror pool. We have four or five generations available to us as jurors. They have different perspectives, different ways of learning, different attention spans. We need to accommodate all of them."***

~ Judge Jim Holderman, (Ret.), U.S. District Court, Chicago, IL

# The Trial Management Conference

The Trial Management Conference (TMC) is the opportunity for the court to review what has occurred during the case to date, walk through the upcoming trial and identify remaining issues to be addressed. It is a critical event that allows the court to assess whether counsel are prepared to proceed as well as to prepare the judge to preside.

There is no consensus on when to conduct the TMC but a good rule is 10 to 20 days before trial. The most appropriate time for holding the TMC depends on how the court sets its trial dates and the complexity of the trial. If the court is setting a trial in three to six months then at the time of trial scheduling, it is appropriate to set a date for the TMC. If the trial is being set more than six months out, then an intermediate status conference should be held three months before trial and the TMC should be set at the intermediate status conference.

***“If a judge is able to allow a jury to submit questions in an orderly way, and vet the questions quickly, it is a smooth process and the jurors are euphoric. It helps them with their process of getting it right – which is what they want to do.”***

~ Professor Shari Seidman Diamond,  
Northwestern University, Chicago, IL

Whenever the TMC is set, the court should attach to the order setting the TMC an outline setting forth the purpose and describing what will occur during the TMC emphasizing the jury focused trial concept.

Additionally the order setting the TMC should provide that counsel confer prior to the TMC to review matters to be covered at the conference as well as determine how the trial can be simplified so as to assist the jury in its role.

Often the TMC can be conducted in a short period of time with basic cases often reviewed upon a stipulated trial management order prepared by counsel. The great bulk of cases can easily be addressed in 30 minutes if counsel have done their work and submitted the appropriate documents as discussed herein. A more complex case can require more than just a single conference between the judge and trial counsel. It may require a series of meetings to address the various complexities anticipated to be addressed. The TMC needs to be scheduled to allow enough time before the trial so that court and counsel can address any problems not resolved as well as to fashion appropriate remedies to allow the trial to proceed as scheduled. Jurisdictions currently have their own form of documents litigants file prior to a trial to disclose issues, witnesses, exhibits, etc. (often referred to as pretrial statements, trial readiness certificates or trial disclosure statements). A court can incorporate these types of documents into a TMC as they will provide the framework for the conference. The following are examples of areas included in an order setting the TMC as well as covered during the conference:

**TRIAL SCHEDULE** – this provides an opportunity for court and counsel to review the time currently set aside for the trial and determine when witnesses will be called. Counsel will estimate the amount of time for witness testimony (direct and cross) as well as address any other events which might impact the time allocated for the trial. Each segment of the trial is reviewed. The judge should consult with counsel to determine whether time limits should be set for specific events.

**JUROR FOCUSED TRIAL** – refer to the subsequent section which addresses the concept of a **Focus on Jurors** and describes the types of issues which will need to be discussed for this purpose. Issues such as instructions in plain English; when jurors will be instructed; jurors taking notes; jurors asking questions; jury notebooks; jurors being allowed to discuss the case under admonition from the court, etc. This is also a good time to cover how potential jurors will be educated as to the trial process and address subjects ranging from what procedures the court uses to address a jury pool, use of jury questionnaires, handouts given to jurors, etc.

**ISSUES** – the purpose of this section is to clarify what issues of law or fact are really in dispute and those which can be admitted pursuant to offer of proof, stipulation, etc.

**WITNESSES** – this should go beyond what was discussed earlier as to the scheduling of witnesses and the time anticipated for each witnesses testimony. The TMC should be used to determine any legal problems, qualifications, ability to testify or conflict that might arise regarding the testimony of a witness. It is also helpful to explore and address duplication of witnesses and issues such as how to present qualification of experts.

**EXHIBITS** – court and counsel should review exhibit sheets and confirm that all exhibits have been disclosed and appropriately marked for submission at trial pursuant to the court's procedure. It is also a time to review that each counsel has seen the exhibits and determined what stipulations as to authenticity or admissibility might be appropriate as well as discuss how exhibits are best presented for the jurors to review, etc.

**SPECIAL TRIAL NEEDS** – this is the opportunity to determine issues such as: i) will interpreters be needed, ii) what technology will be utilized including who will supply equipment that the court does not have, or iii) whether witnesses will be appearing pursuant to written deposition, video or by other electronic presentation. If evidence is going to be submitted

through offer of proof or stipulations, judge should confirm that the "offer/stipulations" have been reduced to writing. Additionally, determine whether there will be any witnesses testimony that needs to be addressed in an in camera proceeding during trial including why it can't be addressed prior to trial.

**VOIR DIRE** – this is an opportunity to review how the court usually handles *voir dire* during trial and make any adjustments that may be appropriate for the case. Review the questions that the court usually asks and confer with counsel to determine if there are additional questions appropriate for the court to ask. Explore special areas that counsel intends to review to allow the court to either address such questions during this conference or do so prior to trial commencing.

**JURY INSTRUCTIONS AND VERDICT FORMS** – the vast majority of instructions are standard and not subject to debate. Court and counsel can determine which instructions are appropriate to be given to the jury prior to commencement of opening statements, which instructions need to be repeated during the trial and which instructions will have to be ruled upon depending on evidence received. Judges who instruct the jury prior to the beginning of the case have found that the majority of the instructions can be agreed upon during the TMC and identify other instructions that may be needed depending on evidence but reserve decision until later in the case. Similarly, in most cases a verdict form can be determined at the TMC so that the jury can be advised as to what type of issues they will be required to address at the end of the case with the caveat that the verdict form is subject to modification and what they are being given is to introduce them to the anticipated issues.

**OTHER PROCEDURES** – this is the opportunity to review issues such as the use of alternate jurors, the use of jury questionnaires, instructing or admonishing a jury especially on use of electronic devices or other anticipated matters, how challenges for cause/peremptory challenges will be exercised including in a criminal case how the court addresses Batson challenges or similar issues, the procedure for submitting the case to the jury, how a verdict is received, etc.

**MISCELLANEOUS** – this is the time to cover issues such as any peculiar procedures the court utilizes in conducting trials, counsel's concerns or expectations regarding potential trial problems, technology, etc.

# Focus on Jurors

The concept of a trial being “focused” on jurors and conducted in a manner to maximize jurors’ ability to comprehend evidence, applicable law, and procedure but also to enhance the quality of jury decision making is not new. The National Judicial College Symposium participants strongly supported this as the single most important concept to be included in this resource guide. Judges for many years have experimented with procedures which are often referred to as [Jury Trial Innovations](#) (such as early and continuous juror education, juror note taking, jurors being allowed to ask questions, etc.). Fortunately, there are numerous publications addressing research done in this area which support these judicial efforts to assist jurors.

Judges, lawyers, educators, and academics all agree on one concept: submissions and presentations to juries need to be done in plain and understandable English.

In exploring what the court and counsel can do to focus on jurors, there are three research efforts and publications that offer wisdom and guidance:

The American Bar Association Criminal Justice Section offers a resource, [“Achieving an Impartial Jury \(AIJ\): Addressing Bias in Voir Dire and Deliberations.”](#) The project created an [AIJ Toolbox](#) of user-friendly options for education and debiasing techniques. The tools range from a review of recommended juror orientation materials, a checklist which “focuses on courtroom dynamics”, suggested jury instructions, suggested voir dire, etc.

***“Can we un-couple the concepts of impartiality and connectivity. Just because a juror has gone online or tweeted, does that necessarily mean that the juror can’t serve?”***

~ Paula Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts

The 1997 National Center for State Courts publication [Jury Trial Innovations](#) was a joint effort by the ABA Section of Litigation Jury Initiatives Task Force and the National Center for State Courts. This publication is divided into seven chapters with appendixes setting forth samples as well as a bibliography. Chapter I addresses how jurors make decisions: the value of trial innovations; Chapter II addresses jury administration and management; Chapter III addresses voir dire (or, in plain English, jury selection); Chapter IV is about pretrial management; Chapter V is on trial procedures; Chapter VI is on jury instructions and deliberations; and Chapter VIII is post-verdict considerations.

The 2005 ABA [Principles For Juries & Jury Trial](#) is a product of the ABA American Jury Project. The preamble to the principles states: “The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years.” It contains a set of 19 Principles that “define our fundamental aspirations for the management of the jury system.”



**JURY ORIENTATION** – The three resources discussed herein have sections addressing jury orientation (See ABA Principle No. 6 and Section on “Assembling a Jury” (No. 9, 10 & 11); National Center Chapter I and II and AIJ Toolbox Section IV beginning on Page 4.) The education of jurors begins with a jury summons that, besides stating the date, time and place, sets forth other information to inform jurors about their impending duty. Courts maintain web sites which are referred to in the summons and can contain a rich variety of information educating jurors about their upcoming service. When jurors arrive at the courthouse and are gathered in the jury assembly room there are myriad approaches to continue the education. Judges and/or court administrators can address the assembled jury pool, videos are shown and publications are made available to further increase the understanding and knowledge of jurors. Once jurors are assigned to a specific trial and taken to the courtroom, many courts provide material for jurors to read with admonition to not discuss the material among themselves, describing the type of trial (criminal vs. civil), as well as some of the introductory basic instructions about the role of jurors. There are other educational methods discussed in the 3 publications and elsewhere. Each judge should review the variety of approaches available and work with court administration and the local bar to come up with a cohesive process to educate prospective jurors.

**TRIAL PROCEDURES** – [Jury Trial Innovations](#) reviews a number of approaches in Chapters III and V. The ABA Principle discusses how court and counsel “should rigorously promote juror understanding of the facts and the law”. During the NJC Symposium and in [Jury Trial Innovations](#) there was discussion to the effect that when “problems arise with juries, it is often the quality of the presentations that are implicated rather than inherent deficiencies in jurors’ ability to process the information provided”.

All agreed that jury performance improvement can be achieved through improving the quality of communications addressing jurors in a manner that enhances comprehension through quality of presentation and continuous communication with the jury. The challenge to be met is that today’s jurors come from various generations and a variety of backgrounds. Individual jurors bring different “modes of learning” or preferred ways of absorbing information. Thus, whether it is the court or counsel addressing the jury, it is important that they incorporate a variety of delivery methods to accommodate the various ways that jurors take in information whether it be by listening, reading, watching, or examples. For example, judges during an

oral introduction on the nature of the case can list key points on a PowerPoint or set forth the key points on a chart. Counsel in addressing jurors should likewise use aids and be mindful of using plain language in their presentation.

To assist jurors in providing information to court and counsel prior to voir dire, many courts have jurors fill out information questionnaires (See [Jury Trial Innovations](#) Chapter III Section III-3). The questionnaire can inform jurors that sensitive issues can be individually addressed.

Once a jury has been selected, the judge can review the anticipated trial schedule and standard instructions addressing issues such as what is evidence, burden of proof, etc. Many courts prior to beginning evidence are reviewing what type of verdict form jurors will be required to fill out at the end of the case.

It is also important before the presentation of evidence begins that the court review with jurors their rights and tools available to them such as note-taking, asking questions, ability to discuss evidence under strict limitations, etc. Then as the trial moves through each stage, the judge should discuss the purpose of each stage such as opening statements, presentation of evidence, closing statements, etc. ABA Principle 13 and [Jury Trial Innovations](#) Chapter V have suggestions for this area.

**VERDICT/POST TRIAL.** All three publications have rich material addressing this portion of the trial and specifically how to assist jurors. They suggest a variety of approaches from jury instructions before closing arguments, plain English instructions, suggestions to jurors on conducting deliberations, providing written or recorded instructions to jurors for their use, and concluding with a discussion of post-verdict considerations. These range from the judge meeting with jurors informally, debriefing sessions, instructions on post-verdict interviewer contact with counsel or others, jury exit questionnaires, as well as appropriate response to allegations of juror misconduct. Lastly, there is agreement that jurors should be appropriately thanked for their service and given an opportunity to debrief whether through an informal discussion with the court or resources provided in trials that have dealt with sensitive or horrific matters. The challenge presented is for each judge to review current procedures, take into consideration the concepts discussed herein and in the three resources (and other material) and come up with ways to enhance the role of the jury in their own jurisdictions.

# Technology

Technology is changing rapidly. Specific applications of technology that could be described in this Trial Management Guide would be partially or wholly obsolete as soon as the Guide is published. Please refer to NJC's supplemental online resources for current

examples and information ([www.judges.org/jury](http://www.judges.org/jury)). Technology presents opportunities and challenges and the court system must adapt and respond in order to continue to effectively and efficiently conduct all trial phases.

**COMMUNICATION WITH JURORS** - Technology can be used to communicate with potential jurors before the trial. When jurors are first summoned for jury duty, technology can be used to communicate about the law as it pertains to jury service, about their responsibility to determine the facts, about relevant court procedure, and to explain their duties. Some courts send out instructions directing potential jurors to go online and fill out a brief questionnaire. Technology can be used to keep potential jurors informed of the status of their need to report for jury duty. When jurors arrive at the courthouse, there are a variety of ways technology can be used to provide them with information about their upcoming responsibility as a juror. For example, they can be shown videos, engage in PowerPoint presentations, provided information on iPad/tablets to review, or fill out additional questionnaires to make the jury selection process more efficient and effective.

**PRESENTATION OF EVIDENCE** - Technology can be used to present evidence in many different ways. While oral testimony is the main way evidence is presented, juror retention and understanding can be maximized by offering alternative delivery methods. For example, visual aids and demonstrative tools such as diagrams, videos, models, photographs, and other audio and video supplements can enhance oral testimony and increase jurors' comprehension of the facts of a case.

**READILY ACCESSIBLE RECORD OF THE TRIAL** - Whether it be a Computer Assisted Transcript or the digital recording of evidence and exhibits, such technology allows almost immediate "play back" access to evidence. This technology can allow the judge to immediately review evidence for trial management purposes or to respond quickly to jurors' requests to review evidence during deliberations. It allows counsel to review and plan for subsequent presentations including citing important testimony during closing statements. Technology can also be used to enhance the judge's note-taking ability and speed the judge's ability to rule on objections, issues and motions. Because the judge has immediate access to previous testimony and presentations, the judge can either address issue from the bench or take a short break to clarify the issues and consult prior submissions as contained within a trial notebook to appropriately address the issue.

**ADDRESS "SPECIAL NEEDS" WITNESSES, PARTIES, JURORS OR OTHERS** - Technology provides solutions to address a variety of disabilities or impairments (i.e.: hearing, sight, etc.), and language challenges in a manner that not only allows a person with a disability or impairment to serve on a jury, but to fully participate and clearly understand what is taking place during the trial.

In addition to the benefits listed above, technology can also present challenges. These challenges range from addressing jurors' use of and access to technology during the trial to a judge having to address the admissibility or use of technology-created evidence. There are numerous articles which are available at NJC's supplemental online resources ([www.judges.org/jury](http://www.judges.org/jury)) discussing the "challenges" presented by jurors texting, tweeting, sending email or conducting web searches for information. Judge Herbert Dixon of the D.C. Superior Court has created an advisement which is given to jurors at various times throughout the trial especially prior to taking a break. Also, there are extensive articles and presentations addressing how best to engage jurors on this sensitive issue whether it be use of cell phones, iPads, computers, tablets or other devices for communication or information seeking purposes. Additionally, technology is often used by counsel to create reconstructions of events or otherwise create demonstrative evidence requiring the judge to determine its admissibility or whether instruction should be given as to use of such evidence by the jury.

Judge and counsel must discuss these issues and agree on what will be done to address the challenges

presented by ever evolving technology. These discussions should occur well before trial and probably most effectively at the trial management conference. While the usual response is to draft an instruction admonishing jurors, witnesses, parties, etc., there may be other solutions to appropriately address each situation as it arises.

Another issue which often arises is the question of who will be providing the technology to present evidence in trial. Once again the answer will vary depending on what is available in the jurisdiction but oftentimes the responsibility will fall to counsel. When this happens the issue then may arise as to the responsibility to provide opposing side(s) with access to the technology which will enable them to participate in the utilization of the tools. Presentation technology is evolving rapidly. It will only be a matter of time before the cost of such systems will make them more readily available in both state and federal courts.

There is much to be learned from judges who are using technology to enhance their ability to appropriately manage trial proceedings and this growing area will continue to lend itself to both judicial and lawyer education initiatives.

# Creating a Judicial Trial Notebook

The trial notebook is an essential judicial tool in managing a trial. It is a resource that brings together in one location relevant trial material. The scope and detail of a notebook will vary with the type and complexity of the case. The notebook can be an

electronic or paper folder but a three-ring binder works best with tabs labeled for each section. The following are suggested tab headings in a notebook for a typical trial:

- **TRIAL MANAGEMENT ORDER**
- **TRIAL CHECKLISTS** - Trial checklists as discussed in detail below or other checklists you have developed to address specific trial situations.
- **KEY PLEADING** - Normally, the complaint and answer in a civil case or the criminal indictment / information.
- **TIME SCHEDULE** - The proposed time schedule developed for the trial and any scheduling orders.
- **MOTION LOGS** - A list of motions previously addressed including a note as to whether the motion was granted or denied with one log for the plaintiff/prosecution and a second log for each defendant. This eliminates having to place all motions in the notebook. Some judges do find it handy to create a separate folder with the actual motions and courts ruling for easy access if an issue arises.
- **COURT ORDER LOG** - This is a list of significant court orders relevant to the trial.
- **JURY SELECTION** -
  - An introduction describing the jury selection process;
  - The judge's standard voir dire questions (which of course will vary between a civil and criminal case);
  - special voir dire questions determined appropriate for the court to ask during the trial management conference;
  - any court order or list of special areas upon which counsel will be allowed to inquire;
  - a juror seating chart;
  - statute, court rules and judge's protocol on challenges for cause;
- material on issues determined to be potentially relevant depending on the case, such as Batson challenge;
- any other general admonitions given to jurors, etc.
- **JUDGE TRIAL DIRECTIVE/ADMONITIONS** - These admonitions may include:
  - what the court advises a jury prior to taking a recess,
  - jurors' rights to take notes or ask questions,
  - procedure for reviewing exhibits received into evidence
  - availability and use of a juror notebook provided by the court
- **JUDGE'S REMARKS** prior to opening statements.
- **WITNESS LISTS** for both plaintiff/prosecution and each defendant.
- **EXHIBIT LIST** for plaintiff/prosecution and each defendant.
- **OTHER TRIAL RESPONSIBILITIES AIDS** such as oath given to jurors and witnesses and special instructions to jurors.
- **JUDGE'S REMARKS** prior to closing statement.
- The anticipated **JURY INSTRUCTIONS**.
- **THE PROPOSED VERDICT FORM** - outline of the procedure for taking a verdict (which often varies from jurisdiction to jurisdiction), procedure for polling of jurors, instructions to jurors about conduct post-trial and judge's remarks thanking jurors for service.



Tab 2 referred to trial checklists. While the notebook itself acts as a checklist giving the judge ready access to action and responses during each phase of the trial, trial checklists allows the court to ensure that

required activity has occurred during various trial stages. Subjects that could be included in jury trial checklists include:

- ☐ Witness lists have been exchanged and each party signed off.
- ☐ Exhibit lists have been exchanged and each party has signed off.
- ☐ All exhibits have been marked per court protocol.
- ☐ Judge has reviewed the trial schedule with counsel on the record.
- ☐ Witness issues have been identified such as who is allowed to be in courtroom, and how to keep certain witnesses separate, etc.
- ☐ During the jury selection the following has occurred:
  - Oath has been given to prospective jurors.
  - Court has given initial remarks to jurors.
  - Court has included special questions in its voir dire.
  - Plaintiff/Prosecution voir dire.
  - Defense voir dire.
  - Challenges for cause have been called for by the court and made by counsel.
  - Plaintiff/Prosecution peremptory challenges (number allowed: \_\_\_\_ ) have been exercised.
  - Defense's peremptory challenges (number allowed \_\_\_\_ ) have been exercised.
- ☐ Court's protocol to select and advise alternate jurors completed.
- ☐ Oath to jurors.
- ☐ Admonition given to jurors at each break.
- ☐ Court's remarks to jurors explaining opening statements prior to plaintiff/prosecution and each defendant.
- ☐ Plaintiff's case in chief:
  - Oath to witnesses.
  - Ruling made on Exhibits offered.
  - Statement to jurors when plaintiff/prosecution rests their case.
- ☐ Upon addressing any motions, determine defense ready to proceed and advise jurors as to moving into defense phase of the case.
- ☐ Defendant's case in chief – same list as in Plaintiffs case in chief.
- ☐ Upon defendant resting, advise jurors of opportunity for rebuttal and repeat if any sur-rebuttal.
- ☐ Finalizing instructions out of presence of jury.
- ☐ Instruct the jury pursuant to local protocol.
- ☐ Advise jury as to purpose of closing statements.
- ☐ Plaintiff/ Prosecution closing statement.
- ☐ Defense closing.
- ☐ Plaintiff/Prosecution reply closing.
- ☐ Advisement to jury after conclusion of all evidence as to what will occur next.
- ☐ Review final instructions and verdict form with counsel and address any objections.
- ☐ Court instructs jury and provides copy(s) of instructions per its protocol.
- ☐ Review exhibits to ensure only admitted exhibits are given to jury and provide any "special" items jurors need during deliberation.
- ☐ Address any jury questions per court's protocol and make record of counsel agreement or objection and court's ruling.
- ☐ Follow court's protocol in receiving verdict including polling of jurors whether standard procedure or requested.
- ☐ Dismiss jury with thanks of court and have jurors retire to jury room.
- ☐ Take any motions from counsel and address as appropriate.
- ☐ Enter verdict in record.
- ☐ Meet with jury per court's procedure.
- ☐ Ensure the record is complete including that all exhibits and necessary discovery, etc., have been filed.

# Civility

For several decades, well-meaning authors have published guidance on how judges, lawyers, and court staff should behave as professionals. A key element in defining professional behavior is the concept of civility. Essential elements of justice system civility include integrity, personal dignity, candor, respect, courtesy, and cooperation with others.

A jury trial is one of the most visible justice system events and often the behavior of judges, lawyers, and court staff is critically analyzed by the jury, the litigants, witnesses, and other members of the public. It is therefore important that all involved with a jury trial act with civility to ensure that not only is a fair trial conducted, but that it is perceived to be conducted in a fair and just manner. The adversarial nature of the jury trial may not lend itself easily to civility at all times, but it is critical that all parties engage civilly in order to demonstrate that the American justice system can resolve disputes without the rancor that is often seen elsewhere in society.

***“We need to improve the opportunities for settlement, as well as improve the path to jury trials. They are both goals and not conflicting.”***

~ Judge Herbert B Dixon, Jr. (Ret.), Superior Court, Washington, D.C.

The National Judicial College held a symposium on the topic of civility in the American justice system. What resulted was a document entitled Promoting Trust and Confidence, which more fully described the concept of civility among the various professions in the court system and defined four civility principles. The four principles were intended to foster a level of civility in and out of court and create a standard of conduct exceeding the minimum required under state-issued rules of professional conduct or canons. They may be adapted to the jury trial, specifically, as follows:

**PRIORITIZE COURTESY AND TREAT OTHERS WITH RESPECT AT ALL TIMES** - Courtesy and respect are the hallmarks of civility. Respect within the justice system is executed by exercising patience with people and the trial process. It is also important to respect the rights of parties and non-parties as well as refrain from acting inappropriately, even if someone initiates unprofessional or uncivil conduct. At all times it is essential to model civility by being courteous and respectful toward the rule of law as well as to all coming into contact with the justice system. Remember that courtesy and respect should also be practiced in all forms of communication, both oral and written.

**REMEMBER THAT TIME IS PRECIOUS, FOR EVERYONE** - A high-functioning system of any kind operates at its best when efforts are applied to complete processes in a timely fashion. This includes the jury trial at all phases. A reasonable amount of time is required for pleadings, discovery, and other court events, especially if a case is complex. However, to promote civility, the goal should be the timely resolution of cases. Justice delayed is justice denied is a maxim that is often invoked

by the justice system to fulfill the implicit promise of timely resolution. Another maxim is that time is money. Public confidence in the courts decreases as the costs of court proceedings increase due to unnecessary delay. Civility suffers and often erodes when parties are unable to receive resolution in a timely fashion. Additionally, delay reduces the ability to establish relevant facts as memories fade resulting in uncivil exchanges, to say nothing of lost evidence, and can needlessly heighten anxiety with a direct impact on civility. Communication and actions can become combative. Time, and the proper use of it, is an important element of civility and the administration of justice.

**PRESERVE AND IMPROVE THE LAW, THE LEGAL SYSTEM, AND ASSOCIATED DISPUTE RESOLUTION PROCESSES, INCLUDING THE JURY TRIAL** - Civility has the capacity to preserve the value and importance of the legal system and its associated dispute-resolution processes and improve the administration of justice. All

persons involved in the system profit when the benefits and the burdens of the law are applied equally and with civility. This principle is an effort to express the importance of a collective commitment to fairness, both actual and perceived. While the judge has a responsibility to conduct fair and efficient trial proceedings, likewise, the lawyers and court staff are a part of the solution.

**EFFECTIVELY AND CLEARLY COMMUNICATE YOUR ROLE AND ANY EXPECTATIONS YOU MAY HAVE** - Effective communication is the foundation of a fair, effective, and efficient jury trial. Tied to this principle is the notion that each person comes to a jury trial with his or her own feelings and attitudes (such as implicit bias) about other system players based on a host of characteristics. Civility and effective communication help reduce the impact of these attitudes especially implicit bias and ensure that the trial is conducted efficiently, impartially, and fairly.

# Challenges

This section was created to facilitate an ongoing dialogue to address emerging or ongoing jury trial issues identified by judges and lawyers. The following

are some cases or issues that have been initially identified as presenting unique jury trial challenges.

- **HIGH PROFILE CASES** – See the National Judicial College [online course](#) discussing the challenges these cases present.
- **COMPLEX CIVIL CASES** – See the [NJC publication](#) on handling complex civil cases.
- **DEATH PENALTY CASES** – Death is different, and these challenging cases present a variety of issues which are analyzed in the [NJC course](#) on this subject.
- **HANDLING COMMERCIAL CASES** – See the description of [NJC's course](#) on this topic.
- Remedies available to address motions for mistrial whether arising from misconduct of lawyers, parties, witnesses, judge or other events.
- The challenges of presenting and responding to [electronic evidence](#).
- How to respond to alleged jury tampering or manipulation.
- Resources to assist jurors who sit on trials involving “horrific evidence” or where a personal security risk is posed.